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REN YATSUNAMI*

A DISCUSSION OF DIGITAL INFORMATION RELATING TO CULTURAL HERITAGE WITH REGARD TO AUTHENTICITY MANAGEMENT[1]

1. Introduction

The international conference "The Challenges of World Heritage Recovery", which was held at the Royal Castle in Warsaw on 8 May 2018, adopted the document titled "Warsaw Recommendation on Recovery and Reconstruction of Cultural Heritage" (hereinafter: Warsaw Recommendation).[2] There are countless examples of items of cultural heritage being damaged by natural disasters, armed conflicts, and other factors, leaving no room for doubt as to the significance of the principles provided in the Warsaw Recommendation. From the perspective of this article, it is especially noteworthy that para. 10 of the Warsaw Recommendation highlights the need to be conscious of "the new possibilities offered by evolving technologies, in particular for very high-definition 3D digital recording and reproduction of material attributes of cultural heritage properties, and of the ethical challenges that this poses in relation to their possible reconstruction."[3]

The application of evolving technologies for creating, storing, and utilizing digital information on cultural heritage has recently been promoted. The importance of the consciousness of the evolving technologies manifested by the Warsaw Recommendation is not limited to the context of recovery and reconstruction.

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[2] UNESCO World Heritage Center, Ministry of Culture and National Heritage of the Republic of Poland, "Warsaw Recommendation on Recovery and Reconstruction of Cultural Heritage", 8 May 2018, available at: https://whc.unesco.org/en/documents/168799 (accessed: 25.04.2024).

[3] *Ibidem.*

Members of the Permanent Committee of Emerging Professionals of ICOMOS Japan (hereinafter: EPJP members), including the author, share this concern and have determined to take the themes of authenticity management in the age of digital transformation for academic events. From 2023, EPJP members have organized the "Seminar Series on Authenticity," in which the project's principal investigator is Hiroki Yamada, a senior assistant professor at the Research Institute of Cultural Properties of Teikyo University, Japan.[4] As the fourth seminar in the series events, the principal investigator Yamada, Rumi Okazaki, an associate professor at Shibaura Institute of Technology's School of Architecture, and the author co-organized the webinar titled "Authenticity of Cultural Heritage in the Digital Age" on 18 November 2023. It attracted some attention in the expert networks in the field of cultural heritage,[5] but because of the complexity of the topic, comments expressed in the webinar event showed expectations for follow-up research activities in the medium to long term. In this context, this paper intends to develop a few thoughts on digital information about cultural heritage in relation to the concept of authenticity.

2. Digital information of cultural heritage and authenticity

2.1. Impact on the practices for preserving cultural heritage

Let us suppose there is a historic building, and it has been repaired in the past. As a result of the repair works, the original materials remain in the larger part of the building, but new materials have been installed in a few spots. If sufficient time has passed for aging, it may become difficult for human eyes to distinguish which material has been installed later, in comparison with the original materials. However, documentation of such repair records shall be secured in the conservation practices, as explained in the ICOMOS "Principles for the Recording of Monuments, Groups of Buildings and Sites".[6] Thus, methods for preserving repair records for future

[4] This research project was supported by "Grant for Collaborative Research in Humanities and Social Sciences", a research grant by the Suntory Foundation (Research No.28 of 2023, the principal investigator: Hiroki Yamada).

[5] For example, in the field of cultural tourism, the seminar had an impact on course materials for the capacity building program for tourist site managerial talents that are developed by the Waseda University Academic Solutions Corporation. See: Waseda University Academic Solutions Corporation, *Post Korona Jidai Ni Okeru Kankochi Keiei Jinzai Ikusei Jigyo: Jigyo Jisshi Hokokusho* [Report on the Tourist Site Managerial Talent Development Project in the Post-COVID Era], March 2024, available at: https://www.mlit.go.jp/kankocho/content/001741058.pdf (accessed: 25.04.2024).

[6] ICOMOS, "Principles for the Recording of Monuments, Groups of Buildings and Sites", October 1996, available at: https://www.icomos.org.tr/Dosyalar/ICOMOSTR_en0057762001587380182.pdf (accessed: 25.04.2024).

generations have been developed over the years, including the use of completion photographs, completion drawings, computer-aided design (CAD), and so on.

As technology advances for creating and managing digital records of cultural property, the amount of available information in repair records will increase, and the accuracy of those records will become better secured.[7] Digital records will also open the door to non-specialist communities being involved in creating, interpreting, and using those records in various sectors.[8] The inclusive discussion forum about heritage conservation is important considering that one of the five strategic objectives, the so-called 5Cs, includes "Communities" in the World Heritage Policy Compendium. The development of digital heritage documentation has the potential to promote inclusive dialogues of heritage conservation by providing versatile data on the conditions of authenticity.

2.2. Digital information concerning the attributes of authenticity

The International Charter for the Conservation and Restoration of Monuments and Sites (hereinafter: the Venice Charter) was adopted by ICOMOS in 1964. The preamble of the Venice Charter underlines the duty to hand on the historic monuments "in the full richness of their authenticity." Although the term "authenticity" appears in the phrase, the rest part of the Venice Charter does not provide any clue on the definition of authenticity.

Afterwards, the concept of authenticity gradually developed in the history of adopting and revising the Operational Guidelines for the Implementation of the World Heritage Convention (hereinafter: Operational Guidelines). The Operational Guidelines are revised periodically, and the latest version was adopted in 2023. In the context of the development of the authenticity concept, the versions of 1978, 1980, and 2005 are considered to be the milestones.[9]

With the first adoption of the Operational Guidelines, the concept of authenticity was introduced in the world heritage evaluation framework in 1978, having been influenced by the American National Register of Historic Places in which the

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[7] A. Noguchi, "Korekara No 3D Kokogaku: Kesoku, Bunseki, Katsuyo" [General Remarks Perspective of 3D Archaeology: Measurement, Analysis and Utylization], *Kokogaku Journal* [Archaeological Journal] 2024, no. 791, pp. 3–4.

[8] S. Nakazono, "3D Kokogaku No Shinjidai Ni Omou" [Thoughts on the New Era of 3D Archaeology], *Kokogaku Journal* [Archaeological Journal] 2024, no. 791, p. 1.

[9] H. Yamada, "'Sekaiisan Joyaku Riko No Tameno Sagyoshishin' Ni Okeru Authenticity Ni Kansuru Kijutsu No Hensen Keii: Authenticity No Zokusei To Sono Atsukai Ni Chumoku Shite" [The Evolution of the Description of Authenticity in 'Operational Guidelines for the Implementation of the World Heritage Convention': Focusing on Attributes of Authenticity and its Use], [in:] *Gakujutsu Koen Kogai Shu 2024* [Summaries of Technical Papers of Annual Meeting 2024], Nippon Kenchiku Gakkai [Architectural Institute of Japan], Tokyo 2024.

integrity concept works as a qualifying condition.[10] Paragraph 9 of the Operational Guidelines of 1978 stipulates, "the property should meet the test of authenticity in design, materials, workmanship and setting."

Under the Operational Guidelines of 1980, in order to prove the outstanding universal value, the nominated monument, group of buildings, or site is required to meet one of the criteria listed in para. 18(a) and evaluated through the test of authenticity stipulated by para. 18(b). Then, para. 18(b) adopts the phrase "the test of authenticity in design, materials, workmanship or setting". Compared to the version of 1978 and that of 1980, the role of four attributes changed from accumulative to selective requirements.

In the development of authenticity, the Nara Document on Authenticity, adopted in 1994, played a significant role. Its impact resulted in the adoption of the Operational Guidelines of 2005. Under the Operational Guidelines of 2005, the nominated property, in order to be deemed to have outstanding universal value, must meet at least one of the criteria listed in para. 77, and pursuant to para. 78, it "must also meet the conditions of integrity and/or authenticity." For the conditions of authenticity, its para. 82 states "properties may be understood to meet the conditions of authenticity if their cultural value (as recognized in the nomination criteria proposed) are truthfully and credibly expressed through a variety of attributes". As the attributes to be considered, the same paragraph enumerates "form and design; materials and substance; use and function; traditions, techniques and management systems; location and setting; language, and other forms of intangible heritage; spirit and feeling; and other internal and external factors". However, the challenges for the State Parties to clarify the concept of authenticity for implementation still remain. Herb Stovel states, "[a]lthough the requirements for authenticity and integrity are spelled out in great detail in the 2005 Operational Guidelines, many States Parties have not well grasped what is being requested".[11]

The conditions of authenticity, including the attributes enumerated above, remain under the Operational Guidelines of 2023. Thus, a question may be raised as to how advanced technologies concerning the digital information of cultural heritage affect heritage management works to preserve the conditions of authenticity.

Recent examples in 3D point cloud documentation of historic sites may be worth noting when examining this question.[12] In the field of geography, the Digital Elevation Model (DEM), or the Digital Terrain Model (DTM), has progressed to

10 H. Stovel, "Effective Use of Authenticity and Integrity as World Heritage Qualifying Conditions", *City and Time* 2007, vol. 2, no. 3, p. 23.

11 *Ibidem*, p. 22.

12 Y. Takata, R. Nakamura, A. Noguchi, "Koku LiDAR Ni Yoru Shosai Iseki 3D Tengun Kesoku To Bunkazai Digital Twin" [3D Point Cloud Documentation of Archaeological Site with Airborne LiDAR and Cultural Heritage Digital Twin], *Kokogaku Journal* [Archaeological Journal] 2024, no. 791, pp. 5–9.

meet the need for 3D terrain information. In recent years, the methods of mounting Light Detection and Ranging (LiDAR) scanners on Unmanned Aerial Vehicles (UAV), or so-called drones, have been developed, and such remote sensing methods can be used to measure cultural heritage sites at less cost. Accordingly, even in the event that a historic site is located in forests or mountainous areas with steep terrain, surveys to measure the site and its surrounding environment have become possible by applying the UAV-LiDAR measurement.[13] In relation to authenticity, the digital information accumulated by UAV-LiDAR for the purpose of cultural heritage documentation may affect the assessment of "location and setting" and "form and design."

Attention may also be paid to the advanced application of Building Information Modeling (BIM) for managing cultural heritage archives. In BIM data, information about each part of the building's material, use, condition, and any other aspects can be recorded as attribute information. In this sense, BIM provides not only 3D recording of the forms and structure but also archives for multidisciplinary purposes. Since it is possible to add important information from archaeology or architectural history viewpoints, 3D models suitable for cultural heritage archives can be created and recorded. In the case of a 3D model of a building with a tile roof, each partial data on a set of roof tiles can include digital records about the name of its style, the origin of its materials, the year of its production, and so on.[14] Thus, BIM models demonstrate the clear possibility of providing greater information in relation to authenticity assessments, especially concerning "form and design," "materials and substance," "use and function," "traditions," and "location and setting." In this sense, one of the next challenges for cultural heritage law should be how to develop international standards for digital documentation data, including 3D point cloud, BIM models, and so on.

3. Metaverse and authenticity

3.1. Metaverse projects on cultural heritage

On 10 December 2022, Hiroyuki Kimura, a project professor at Kyoto Institute of Technology, and the author as EPJP members co-organized a webinar for the

[13] *Ibidem.*

[14] Y. Kuwayama, "Shiseki Fukugen BIM To Shiseki Metaverse De Miryoku Aru Machizukuri" [H-BIM and H-Metaverse for Attractive Community Development], *Nara Bunkazai Kenkyusho Kenkyu Hokoku 37: Digital Gijutsu Ni Yoru Bunkazai Joho No Kiroku To Rikatsuyo* [Nara National Research Institute for Cultural Properties Research Reports 37: Recording and Utilization of Cultural Property Information via Digital Technologies] 2023, vol. 5, pp. 182–189.

purpose of discussing the effects that the development of metaverse-related technologies will have on the debate over authenticity in cultural heritage.[15] Nowadays, various metaverse projects have been established in relation to activities on cultural heritages.[16] For example, the project Hoian Metaverse, created and operated by the Institute of International Culture at Showa Women's University under the leadership of Hiromich Tomoda, was introduced during the webinar, and its team gave a demonstration there. As another example, J-heritage, a Japanese NPO operating heritage tourism events, organized an exhibition in July 2021, providing a virtual reality experience relating to Japanese industrial heritages in cooperation with Hacosco and Taiyo Kikaku, companies with expertise in metaverse technologies.

In recent years, there has been an increasing number of cases where cultural heritage digital information on the metaverse is used to support activities in the real world. For instance, collaboration between UNESCO and Google Arts and Culture enriches the range of information and services related to cultural heritage on Google's platforms. The interoperability between Google apps is also constantly being updated, so it may be possible in coming years to immerse ourselves seamlessly in digital museums while taking a walk in Street View.[17] The link between activities in the metaverse and the real world can be further strengthened through the function of "share," "like," and so on, which results in higher immersion in heritage digital galleries or digital twins . Users' immersion in digital galleries actually attracts attention in the context of tourism and education.[18]

As the interrelationship between the metaverse and reality grows stronger, a question may be raised as to whether cultural heritage digital twins should also be required to maintain authenticity from the viewpoint of cultural heritage law. In the medium term, it would be possible to discuss how international standards specific to cultural heritage digital data can be established regarding the accuracy of 3D point cloud data and the management of version history for facilitating the implementation of conventions on cultural heritage. In the long term, if buildings or monuments that exist only in the metaverse increase their historical value in

[15] R. Yatsunami, H. Kimura, Y. Nishimura, "Nippon ICOMOS EP Webinar Series 'Ghost in the Heritage 2045: Metaverse To Bunkaisan' " [ICOMOS Japan EP Webinar Series 'Ghost in the Heritage 2045: Metaverse and Cultural Heritage'], *Japan ICOMOS Information* 2023, vol. 12, no. 5, p. 17.

[16] Y. Kuwayama, "Shiseki Fukugen BIM…", pp. 182–183.

[17] N. Proctor, "The Google Art Project: A New Generation of Museums on the Web?", *Curator: the Museum Journal* 2011, vol. 55, issue 2, pp. 215–221.

[18] Y. Zheng *et al.*, "The Development and Performance Evaluation of Digital Museums toward Second Classroom of Primary and Secondary School Taking Zhejiang Education Technology Digital Museum as an Example", *International Journal of Emerging Technologies in Learning* 2019, vol. 14, no. 2, pp. 69–84.

a future society, experts may possibly face the need to discuss whether they should be legally recognized as cultural heritage.

3.2. Authenticity in a society in which humans, post-humans, and AI co-exist

Rodney Harrison critically describes the process that led to the emergence of cultural landscapes and intangible heritage concepts as "the creative 'friction' between the particular set of Euro-American ideas about heritage embodied in the World Heritage Convention and alternative Indigenous and non-Western concepts of heritage."[19] With such an observation, Harrison points out that Cartesian dualisms remain in the cultural heritage instruments "that hold nature and culture, and matter and mind, to be separate."[20]

Harrison's critiques seem to raise even more serious challenges to cultural heritage law in the era of the metaverse, especially an era when post-humans or cyborgs often appear in society. Post-humans with bio-hacking methods in their brains and body parts may enjoy the objects, including the heritage digital twins in the metaverse as real, feeling the smell of space, a gentle breeze caressing their cheeks, and voices echoing in the heritage site. When the amount of digital information exceeds a certain level, the metaverse experience may create an emotional impact appealing to human sensibilities, allowing users to observe or feel the attributes of authenticity as if the digital twins of heritage are real objects. Then, the dichotomy between natural and cultural heritage, tangible and intangible heritage, and integrity and authenticity may need to be reconsidered in the field of cultural heritage law.

Furthermore, in society some robots with AI may be so sophisticated that they are indistinguishable from humans or post-humans. Accordingly, the actors in the communities that enjoy cultural heritage may become more diverse in the future. From this viewpoint, the comprehensiveness of Harrison's dialogical model, which sees "heritage as emerging from the relationship between a range of human and non-human actors and their environments,"[21] would be even more helpful in order to examine the role of heritage communities in the near future.

Edward Tylor elaborates on the concept of animism, seeing it as an idea closely related to the dualism between human and non-human.[22] Harrison explains Tylor's animism as "an ontology in which the Cartesian dualism of mind and matter does

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[19] R. Harrison, *Heritage: Critical Approaches*, Routledge, London 2013, p. 204.

[20] *Ibidem*.

[21] *Ibidem*.

[22] Edward Tylor explains he borrowed the term from Georg Ernst Stahl's idea that can be seen as "a revival and development in modern scientific shape of the classic theory identifying vital principle and soul". E. Tylor, *Primitive Culture*, vol. 1, Cambridge University Press, Cambridge 1871, p. 385.

not exist, as there is no separation between the spiritual and material world."[23] Discussions of techno-animism consider how humans and non-humans will interact in the near future,[24] and these have implications for discussing the diversification of cultural heritage communities. In this context, it is also possible to recall Gilbert Ryle's phrase the "ghost in the machine" as a criticism of the Cartesian dualism of mind and body.[25] The phrase the "ghost in the machine" was taken as the title of a book by Author Koestler; in it the concept of the holon, which sees everything both as a whole and a part, also appears.[26] While the dichotomy between natural and cultural heritage and the distinction between tangible and intangible concepts are challenged, the question may also arise as to how the tension between authenticity and integrity should be reconceptualized. If it is essential for both integrity and authenticity to measure the ability of heritage to communicate its value to people, their conditions concerning such ability might be captured with an alternative integrated concept derived from a critical view like that of the "ghost in the heritage" in future heritage conservation framework, in line with overcoming remaining dualisms in cultural heritage law.

4. Conclusions

As digital information on cultural heritage becomes more sophisticated, complex challenges that were not anticipated under the current cultural heritage laws will likely arise. Hence, cultural heritage and digital archive experts are expected to work together to contribute toward standard-setting authorities at the national and international levels.

As an example, policy development on digital archives in Japan shows a clear connection with the work of museums and galleries, although it has not resulted in the establishment or revision process of specific rules within heritage law.[27] In this context, the Japan Society for Digital Archive has played an important role in providing forums of discussion through a series of roundtable meetings and symposiums about the issues of digital archives. On 3 August 2022, it held the first meeting of

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[23] R. Harrison, *Heritage…*, p. 204.

[24] T. Okuno, *Ningen, Dobutsu, Kikai: Techno-animism* [Human, Animal, Machine: Techno-animism], Kadokawa, Tokyo 2002, p. 45.

[25] G. Ryle, *The Concept of Mind, 60th Anniversary Edition*, Routledge, London 2009, p. 11.

[26] A. Koestler, *The Ghost in the Machine*, Hutchinson & Co., 1967, reprinted edition by Lightning Source in 1982, pp. 45–58.

[27] K. Oyama, "'Digital Archive Kensho' To Seisaku Teigen" ['Digital Archive Charter' and Policy Recommendations]," *Digital Archive Gakkaishi* [Journal of the Japan Society for Digital Archive] 2024, vol. 8, no. 1, pp. 36–40.

the "Roundtable for Creating Together the Digital Archives Charter".[28] Following that, the Japan Society for Digital Archive continued its efforts by holding a second roundtable meeting on 11 October 2022 and a third one on 26 November 2022.[29] Afterwards, on 6 June 2023, the Japan Society for Digital Archive adopted the "Digital Archive Charter." These efforts by experts on digital archives were recognized by the Japanese government, resulting in the Basic Policy on Economic and Fiscal Management and Reform 2023 (hereinafter: Basic Policy 2023).[30] According to it, the function of the National Archives of Japan is to be strengthened by a "promotion of digital archiving of official documents and materials held by the National Archives of Japan, museums and art galleries, etc." (footnote 154 of the Basic Policy 2023).

Observing the digital archives experts' attention to cultural heritage management, collaboration between their networks and the networks of cultural heritage experts such as ICOMOS and ICCROM could be enhanced through digital documentation of heritage. According to the 2020 survey, 37 percent of the international ICOMOS Emerging Professionals Working Group members are architects or have expertise in architecture.[31] Twenty-six percent have expertise in cultural heritage, in landscape, or in world heritage, and 13 percent are archaeologists.[32] In order to promote the discussion over the application of emerging technologies to the practice of authenticity management of cultural heritages, collaborative research activities and information sharing among experts from further diverse backgrounds would be desirable.

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[28] The records of roundtable meetings and symposiums organized by the Japan Society for Digital Archive are available at: https://digitalarchivejapan.org/advocacy/charter/kenshoentaku/ (accessed: 25.04.2024).

[29] *Ibidem*.

[30] "Basic Policy on Economic and Fiscal Management and Reform 2023", Cabinet Decision on 16 June 2023, English translation available at: https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/honebuto/2023/2023_basicpolicies_en.pdf (accessed: 25.04.2024).

[31] ICOMOS Emerging Professionals Working Group, "ICOMOS EPWG Information Package" 2020, p. 33, available at: https://www.icomos.org/images/DOCUMENTS/Working_Groups/EPWG/EPWG_Information_Pack_2020_English.pdf (accessed: 25.04.2024).

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SUMMARY

Ren Yatsunami

A DISCUSSION OF DIGITAL INFORMATION RELATING TO CULTURAL HERITAGE WITH REGARD TO AUTHENTICITY MANAGEMENT

The "Warsaw Recommendation on Recovery and Reconstruction of Cultural Heritage" in para. 10 highlights the need to be conscious of "the new possibilities offered by evolving technologies, in particular for very high-definition 3D digital recording and reproduction of material attributes of cultural heritage properties". In fact, increased examples of projects for creating and managing digital information on cultural heritage attract attention. This paper intends to develop a few thoughts on digital information about cultural heritage in relation to the concept of authenticity. For this purpose, it discusses how advanced technologies concerning the digital information of cultural heritage affect heritage management works to preserve the conditions of authenticity, elaborated mainly in the instruments on world heritage conservation. Also, the paper examines possible impacts that the development of metaverse technologies may have on the tension between authenticity and integrity and other dualistic concepts.

Keywords: authenticity, cultural heritage, digital information, metaverse

STRESZCZENIE

Ren Yatsunami

DYSKUSJA NAD INFORMACJĄ CYFROWĄ ZWIĄZANĄ Z DZIEDZICTWEM KULTURY W ODNIESIENIU DO ZARZĄDZANIA AUTENTYCZNOŚCIĄ

Rekomendacja warszawska w sprawie odbudowy i rekonstrukcji dziedzictwa kulturowego w punkcie 10 podkreśla potrzebę bycia świadomym „nowych możliwości, jakie stwarzają rozwijające się technologie, w szczególności w zakresie cyfrowego zapisu 3D i odtwarzania w wysokiej jakości materialnych atrybutów dóbr dziedzictwa kulturowego". W rzeczywistości coraz więcej projektów tworzenia i zarządzania cyfrowymi informacjami na temat dziedzictwa kultury przyciąga uwagę. Niniejszy artykuł ma na celu rozwinięcie kilku przemyśleń na temat cyfrowych informacji o dziedzictwie kulturowym w odniesieniu do koncepcji autentyczności. W tym celu omówiono, w jaki sposób zaawansowane technologie dotyczące cyfrowych informacji o dziedzictwie kulturowym wpływają na zarządzanie tym dziedzictwem w celu zachowania warunków autentyczności, opracowanych głównie w instrumentach ochrony światowego dziedzictwa. W artykule przeanalizowano również możliwy wpływ rozwoju technologii metawersji na napięcie między autentycznością a integralnością i innymi dualistycznymi koncepcjami.

Słowa kluczowe: autentyczność, dziedzictwo kultury, informacja cyfrowa, metawersja

DOO-WON CHO[*]

VALUE-BASED STUDIES RELATING TO THE ICOMOS GUIDELINES ON FORTIFICATIONS AND MILITARY HERITAGE

1. Introduction: Research background and purpose

1.1. Research background

Fortifications are an important outcome of a crucial link in the historical development of human settlements, regions, and even nations. From the prehistoric era to modern times, fortifications have been an essential component of the self-defense of any human community. Fortifications were integrated in various ways linked to the setting and geography of each community and settlement. Defensive facilities included buildings, complexes, or territorial defense systems that continued to function defensively or ceased to serve their original purpose. Sometimes conflict of interest between different communities expanded from small-scale local battles to wars. Winning or losing depends on the possession of more potent weapons and the use of effective tactics and strategies. This critically influenced the existence of a community or a united community. Since fortifications are one of the representative results of the history of small-scale and large-scale war, the heritage community has generally recognized the values of those fortifications as military heritage, so that they have let them function within a multidisciplinary research process and appropriate protection measures.

The Convention concerning the Protection of World Cultural and Natural Heritage adopted on 16 November 1972 in Paris (hereafter: 1972 World Heritage Convention) drew input from the international community with regard to the basis and feasibility of protecting various heritages. Relevant charters and conservation

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principles on each heritage sector based on the 1972 World Heritage Convention have been prepared through the efforts of multidisciplinary experts over a considerable period of time.[1] Heritage charters and conservation principles first influence the conservation and management of World Heritage in each sector. Furthermore, they influence each state party and its legal environment for World Heritage protection. In this context, ICOFORT (International Scientific Committee on Fortifications and Military Heritage), one of the international scientific committees under ICOMOS (International Council on Monuments and Sites), an advisory body in the field of the cultural heritage of UNESCO World Heritage, developed a charter on protection, conservation, and interpretation relating to fortifications and military heritage from 2007 to 2021 (table 1). The charter was adopted during the ICOMOS General Assembly in 2021 under the title of "The ICOMOS Guidelines on Fortifications and Military Heritage," which provides orientation on how to identify the essential attributes of fortifications and military heritage and provides direction on how to define their value.

This article focuses on the applicability of the essential attributes of fortifications and military heritage presented in the ICOMOS Guidelines. It clarifies the value of fortifications and military heritage by analyzing and interpreting cultural- and world-heritage cases.

Table 1. The process of preparation for the ICOMOS Guidelines on Fortifications and Military Heritage

2007		Elvas, Portugal, a Draft ICOFORT Charter begun[2]
2017	Jul. 11–14	Siena, Italy, a Draft completed of the ICOFORT Charter Draft ICOFORT Charter on Fortifications and Related Heritage – Guidelines for Protection, Conservation, and Interpretation
	Jul.	Draft ICOFORT Charter translated into English and French, Review by ICOMOS National Committees around the world and convergence of supplementary items (1st review)
	Oct.	Draft ICOFORT Charter Review by ICOMOS National Committees around the world and convergence of supplementary items (secondary review)
	Dec.	The ICOMOS Advisory Committee (ICOMOS International Scientific Committees) approved the Draft ICOFORT Charter 2017/12_6-3-2

[1] ICOMOS, Charter, and other doctrinal texts: https://www.icomos.org/en/resources/charters-and-texts (accessed: 13.01.2024).

[2] ICOFORT, 2021, ICOMOS Guidelines on Fortifications and Military Heritage (posted to ICOMOS with the ICOFORT Charter on Fortifications and Military Heritage (Final) on 15 July 2020, https://www.icofort.org/fortificationsguidelines (accessed: 13.01.2024).

2018	Sep.	Draft ICOFORT Charter ICOMOS International Scientific Committee Review and Convergence of Supplements (3rd review)
	Dec.	The ICOMOS Advisory Committee (ICOMOS International Scientific Committees) approved the Draft ICOFORT Charter 2018/12_7-3
2019	Sep.	Draft ICOFORT Charter Circulation to ICOMOS members around the world, review, and convergence of supplementary items (4th review)
2020	Jul.15	Completion of the final draft of the ICOFORT Charter ICOFORT Charter on Fortifications and Military Heritage (Draft) – Guidelines for Protection, Conservation, and Interpretation
	Dec. 7	2020 ICOMOS General Assembly Decision: Review of the French translation of the draft ICOMOS Guidelines and recommendations for supplementation. Charter in English and French – 2021 ICOMOS International Scientific Committee Advisory Committee (ADCOMSC) – Reexamination & Recommendation
2021	Dec.	ICOMOS Guidelines on Fortifications and Military Heritage, ICOMOS International Scientific Committee Advisory Committee (ADCOMSC) 2021 finally adopted by ICOMOS General Assembly 2021 (hereinafter: ICOMOS Guidelines 2021)

Source: Author's own elaboration.

1.2. Research purpose

Recently, the movement to inscribe fortifications and military heritage on the World Heritage list has been gathering momentum. Although the inscription of fortifications and military heritage as a World Heritage site is not necessarily the goal, efforts to establish clear values, preserve, and manage fortifications and military heritage that reflect a region's historical identity are intensifying, and consequently conservation management issues relating to fortifications and military heritage are constantly under discussion. The ICOMOS Guidelines 2021, which are analyzed and discussed in this paper, are expected to provide a helpful direction for defining the outstanding universal value of fortifications and military heritage for World Heritage. In the World Heritage nomination process, it is necessary to identify the heritage attributes that express these values. These ICOMOS Guidelines 2021 can propose assistance in establishing the value of fortifications and military heritage categories. The ICOMOS Guidelines 2021 refer to eight proposed value classifications: architectural/technical value, territorial/geographical value, cultural landscape value, strategic value, human/anthropological value, memory/identity/educational value, historical value, and social/economic value. These are integrated

with functional attributes such as barriers and protection, command, depth, flanking, and deterrence. As the main attributes that convey the characteristics of value, they are expected to guide stakeholders, mostly site managers, on how to research, protect, utilize, and efficiently interpret fortifications and military heritage.

2. Contents and interpretation of the ICOMOS Guidelines on Fortifications and Military Heritage

2.1. Definition of attributes

The ICOMOS Guidelines 2021 identify the characteristics of fortifications built from prehistoric times to modern times, and recommend proper protection, conservation, and interpretation, taking into account their influence on and relationship to society. In other words, the functional attributes of fortifications and military heritage serve as important elements that express their authenticity and integrity. Therefore, the ICOMOS Guidelines 2021 are very important to those who are from the field of research, conservation, and utilization of fortifications and military heritage. The relevant attributes are identified as follows:

2.1.1. Barrier and protection

The primary attribute [is] to protect human activity and settlement against any external threats with the ability to resist attack (art. 2 of the ICOMOS Guidelines 2021).

When there was a movement from cold weapons such as bows and spears and gunpowder weapons such as matchlocks and cannons were introduced into the battlefield, the height of the observation towers located in fortifications was lowered, and the walls of fortifications were transformed from earthenware to stone walls to withstand artillery attacks effectively. A stone wall in a fortress wall takes two different forms. In the first, only one side facing the enemy camp was composed of stone walls, and its inside consisted of a covered way and an earthen rampart. In the other both sides of fortress walls are piled with stone, the inside and outside being constructed with stone walls. The inside between stone walls was filled with earth, gravel, and lime to strengthen its waterproofing function. When constructing fortifications, overlapping or added defensive elements were sometimes used to block the enemy's approaches as much as possible, and they were sometimes installed to attack the enemy preemptively. A fortification system as an independent stronghold was developed by clearly setting the boundary on both sides and by placing natural or artificial rivers and the use of a coastline, including cliffs and, indeed, an entire island.

2.1.2. Command

The ability to monitor the area surrounding the defended zone as far as possible and prevent the attacker from approaching (art. 2 of the ICOMOS Guidelines 2021).

No matter how well-established fortifications are, a command system is necessary if they are to perform their function correctly. Such a communication system connects the inside and outside of the fortifications. A command system directs communication between each military facility, and it organizes a system of dispatches for communication or it indirectly employs signals, etc. The operation of the command post that oversees the whole military facility is an essential element in fortifications.

2.1.3. Depth

A military strategy that seeks to delay rather than prevent the advance of an attacker by yielding space to buy time; this tactic allows for the creation of successive defensive lines.

Typical shielding facilities such as detached front work, moats, trenches, and foxholes were installed to prevent the enemy from rushing up to the fortress walls and gates, and a drawbridge intermittently connected the inner and outer walls of the castle. A gate tower on the drawbridge and a sentry tower were installed on both sides of the drawbridge, etc. for the function of defense. They are regarded as fundamental elements of a fortification system, regardless of whether the fortifications are in the East or the West.

2.1.4. Flanking

A strategy that aims to delete blind spots, commonly applied with above-ground structures (e.g., rampart, towers, or bastions) (art. 2 of the ICOMOS Guidelines 2021).

An observation tower was installed to observe the enemy's movements. A protruded lookout from the wall was placed to defend the blind spot that was difficult to observe from the top of the fortress wall, and thus a gap in the defensive system was filled. A detached fort or some scattered military facilities can form an efficient defense zone for the main fortress. An auxiliary gate was installed to enable secret entry and exit for ambush and reconnaissance by positioning troops outside the fortress. The auxiliary gate also performs functions such as making possible the secret supply of materials and food when the fortress gate is normally closed.

2.1.5. Deterrence

Deterrence: a defensive strategy used to deter the enemy from attacking by instilling doubt or fear of the consequences. This strategy can include a range of tactics, including constructing a majestic enclosure and its defensive attributes (e.g., multiple openings for shooting, the scale of gates and towers, and decoration of walls and entrances) (art. 2 of the ICOMOS Guidelines 2021).

A wooden palisade installed near the fortress, parapets running inside and outside the top of the fortress wall, anti-tank obstacles permanently installed on the front line, and laying mines and barbed wire on enemy approach routes are crucial deterrents in modern and contemporary warfare, all of which can be observed on battlefields. Moreover, a trap fort is expected to confuse the enemy's lines of movement and disrupt their power while luring the enemy onwards and forcing them into a dead-end space.

Overall, the above attributes reveal essential characteristics of configuring military landscapes (art. 2 of the ICOMOS Guidelines 2021).[3] Now case studies are set out showing on how the functional attributes of fortifications and military heritage presented in the ICOMOS guidelines can be applied.

The installation of 53 *Dondae* (墩臺, Observation post) evenly along the coast of Ganghwa Island in Korea in the eighteenth century can be seen as a case of creating a more densely fortified landscape as well as being an attempt to further strengthen the depth of defense and deterrence in order to completely block enemies trying to approach Hanyang (the former name of Seoul) at the mouth of the Han River, which flows into the Yellow Sea. In particular, the Ganghwa Fortress and *Dondae* distributed to the north and south centered on *the Gapgotdon* (甲串墩) observation post, which was installed in the *Yeomha* (鹽河) Ganghwa Straits, and the Munsusanseong Fortress located in Gimpo, across from Ganghwa Island, make fortified landscapes that constitute a thorough defense network.

Among the fortifications of Vauban[4] in France, Citadel Blaye, Fort Paté, and Fort Médoc form a strategically built defense system at the mouth of the Gironde River, which flows into the Atlantic. Citadel Blaye and Fort Médoc were established on both sides of the mouth of the Gironde River, and Fort Paté was built on Paté Island located in the middle of the river. This is an example of reducing the vulnerable area of the defense network through developing natural and artificial functions. It provides a continuous combination for border defense. This is one of the representative examples of fortified landscapes, showing their development in Europe in the seventeenth century, covering the functional attributes of barrier and protection, command, depth, flanking, and deterrence. Citadel Blaye, Fort Paté,

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[3] Military cultural landscapes include but are not limited to territorial or coastal defense installations and earthworks and have values similar to other heritage buildings and sites, but also possess unique values that need to be carefully studied, analyzed, and preserved.

[4] There are 12 ensembles of fortifications of Vauban along the eastern, western, and northern borders of France. Vauban's fortifications which were inscribed on the World Heritage list as serial properties in 2008, are the most outstanding military facility of Sébastien Le Prestre, Marquis de Vauban (1633–1707), a military engineer trusted by King Louis XIV. They had a great impact on several continents. Vauban thoroughly analyzed previous military strategy theories and analyzed the natural environment of the border area in France. In this way he was able to produce an actual rational fortification system.

and Fort Médoc were organically linked to serve as defenses, boundaries, and gateways. They were the first defense network to block enemy forces approaching the mouth of the Gironde River from the Atlantic. If this defense network collapsed, the city of Bordeaux, which was a central city for the Bourbon dynasty in the seventeenth century, would be in a precarious state. The Gironde River itself and the military system designed for artillery use in the seventeenth and eighteenth centuries made it possible to achieve the functions of barrier and protection, and flanking. A command-and-control system was established centered on Citadel Blaye. The oval-shaped Fort Paté, built on the northwest side of Paté Island, which is located in the middle of the Gironde River, monitored all directions and provided fire support to further strengthen the flank defenses of Fort Médoc and Citadel Blaye, and to prevent access to the land from the sea through the river.[5] It performed the function of effectively suppressing and blocking the enemy's routes. As regards Fort Médoc, located on the far left of this defense system, it served as an outpost of Citadel Blaye to provide defense against enemies approaching by land from the Atlantic.

2.2. Defining value

ICOMOS, the advisory body in the cultural heritage field of the UNESCO World Heritage Committee, prepares charters, principles, guidelines, and declarations for cultural heritage conservation in different categories and disseminates them to the world. In this way, it guides the stakeholders from the World Heritage Site and the cultural heritage site to be inscribed on the World Heritage list to identify values, to systematize their attributes, and to list their values in order to conserve, manage, and sustainably utilize cultural heritage. Among them, the ICOMOS guidelines on fortifications and military heritage present eight directions on how to establish the value of fortifications and military heritage. This chapter provides an interpretation of the value-based definition of fortifications and military heritage. In addition, it is expected that stakeholders understand from it the efforts to identify World Heritage values and to conserve their properties with the help of existing cases such as sites included on the World Heritage list and the World Heritage tentative list, and related fortifications and military heritage in Korea, Asia, and other regions.

2.2.1. Architectural/technical value

The specific typology of the fortifications responds to a specific warfare technology. Assessing the technical value requires a deep understanding of the evolution of weapons and warfare so that

[5] Ch. Corvisier, I. Warmoës, "L'art de fortifier de Vauban, Vauban, architecte de la modernité" [in:] *Vauban, architecte de la modernité?*, eds. T. Martin, M. Virol, series: *Les Cahiers de la MSHE Ledoux* 11, Presses universitaires de Franche-Comté, Besançon 2008, pp. 124–126.

innovative advances in response to changes in military science and engineering can be identified and tested (art. 4 of the ICOMOS Guidelines 2021, *Values*).

Humans have built fortifications of various complex designs over thousands of years. The forms range from the primitive method of setting the boundaries of a settlement by placing fences to setting the boundaries of a settlement according to the hierarchy of power and governance within it. They include *Hwanho chwirak* (環濠聚落) settlements with defensive facilities created by digging ditches around the community area,[6] as well as earthen ramparts, and large-scale stone fortresses that used a range of gunpowder weapons.

While developing these attributes of fortifications, a tactical and strategic system was established, and most of all, factors such as command, troop movement, and weapon operation were essential. In particular, a fortification system was repeatedly improved and developed through direct and indirect experience of weapon operation on the battlefield. Furthermore, the development of a fortifications system, which enabled effective attack and defense by appropriately deploying weapons and troops, went in parallel with the above.

Vietnam's World Heritage Hue Monument Complex is an example of utilizing symbolic elements essential to *feng shui*, such as rivers and mountains. The Hue Monument Complex is an example designed according to ancient Eastern philosophy and Vietnamese tradition. It was the administrative center of Southern Vietnam in the seventeenth and eighteenth centuries. It served as the capital from 1802 to 1945 because of its geographical location in the center of Vietnam and its access to and from the sea. The capital consists of the administrative building protection facility, the imperial palace, the shrine protection facility, the imperial residence protection facility, and the bastions and ramparts built as additional fortifications at the northeast corner of the capital to control the river. The Tran Hai Thanh Fort was built additionally as a shelter for defense against future sea attacks.[7] Also, Hue Fort is well known as an example of integrating Eastern and Western architecture; it was constructed in the style of the Vauban Fortifications, the first representative example of European star-shaped fortifications in Southeast Asia.[8] Such a design is

6 *Hwanhochwirak* (環濠 聚落) means settlements with defensive facilities achieved by digging ditches around the community.

7 S. Ota, "The Characteristics and values of the Asian city walls (Thang Long and other city walls) as World heritage" [in:] *Traditional Urban Planning Principles and City walls in Asian Capital*, eds. S. Kim, Y. Shin, H. Lee, H. Park, J. Seo, *Hanyangdoseong Haksulchongseo i chaek* 한양도성 학술총서 2책 [Seoul City Wall Studies Series 2], *Hanyangdoseong dogam* 한양도성도감 [Seoul City Wall division], *Yemaek* 예맥 [Yemac Design Company], Seoul 2014, pp. 97–101.

8 "Complex of Hué Monuments", UNESCO, https://whc.unesco.org/en/list/678 (accessed: 13.01.2024).

seen as a representative example of using cannon to suit each terrain and maximize defensive functions.

Hikone-Castle bears testimony to the governance system of the Tokugawa period in Japan and has architectural and technical value. It reveals how the technology for the construction of fortifications from the early seventeenth century to the nineteenth century developed and was applied to the *daimyo*,[9] the governance system of Japan. This castle consists of two hierarchically based blocks. This covers the entire form of the castle, including its defensive sections and the lord's residential area. An inner block with a hill faces Lake Biwa at its center and is surrounded by a moat and an outer block that surrounds this inner block. The defensive sections and the lord's residence are built within the inner block, making good use of the natural land formation of the hill. The height of the castle wall and the depth of the moat bear testimony to the civil engineering of that period. Houses of upper-class samurai are found in the outer block. A moat also surrounds this outer block. Beyond this moat is the *joka-machi* consisting of a residential district for ordinary people and a commercial district.[10] To build this castle, water channels were diverted, a special building site was created, and the governance-based hierarchy and double and triple moat structures for effective defense and protection of material supply reflect architectural and technical values.

2.2.2. Territorial/geographical

The value of fortifications as a territorial organization is an essential component of the significance of defense systems. While some fortified structures may be independently standing isolated elements, others may form part of a more extensive system of non-adjacent components that shape the surrounding cultural landscapes and require evaluation in a broader context. In these cases, the system's value is greater than the specific value of each part, all requiring the same protection regardless of how modest they seem. The identification of these values may also take into consideration, among other things, the strategic advantages of location, and how the design responds to the spatial distribution of weaponry, the type of siege or attack intended, the reach of the defensive range, and the topography and ecosystems of the territory to defend (art. 4 of the ICOMOS Guidelines 2021, *Values*).

Inscribed in the UNESCO World Heritage List in 1988, the Old Town of Galle and its Fortifications in Sri Lanka make up a fortified city built by Europeans. It is

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[9] *Daimyo* governments played an important role in the governance system. *Daimyo* were deployed by the shogun's government in local provinces or domains, and their positions were guaranteed as long as they dedicated themselves to the duties of governing their domains. *Daimyo* collected senior vassals to live together within the castle complex, instead of deploying them to separate places throughout the domain territory.

[10] Hikone-Jo (Castle) was enlisted on the World Heritage Tentative list in 1992. See: "Hikone-Jo (Castle)", UNESCO, https://whc.unesco.org/en/tentativelists/374/ (accessed: 20.04.2024).

an outstanding example of the interchange between European architectural styles and South Asian traditions from the sixteenth to the eighteenth centuries. The most striking feature of the Old Town of Galle and its Fortifications is the application of European models to Sri Lanka's geopolitics, climatology, and historical and cultural conditions. In the early sixteenth century, two years before the construction of Colombo, Portuguese navigators settled here. They built fortifications to defend the northern peninsula. In the mid-seventeenth century, when the Dutch occupied it, they surrounded the whole area with fortified walls and made it an impregnable fortress.[11]

There were two major capital defense strategies in the Korean peninsula, which is marked by mountainous terrain and islands. The first was the strategy of clearing land settlements, evacuating them to mountain fortresses,[12] and the second strategy (implemented only in an emergency) involved landing on the island from the sea. This shows that fortresses' functions and construction methods vary according to each location and topography.

In particular, during the Goryeo Dynasty (918–1392 CE)[13] of Korea, in which there was a conflict with Mongolia, a mountain fortress protection officer was sent to build a mountain fortress to evacuate people and implemented the *Haedoipbo*,[14] which was a strategy of relocating the capital to Ganghwa Island.[15] This island is located at the point where the lower part of the Han River of Korea meets the Yellow Sea. It was fortified as a base for the thirteenth-century rebellion against Mongolia and continued to function as a fortress until the eighteenth century. By reclamation of the sterile marine environment, a military farmland *(Doonjeon)* was developed in order to supply food, and the Ganghwa strait *(Yeomha)*[16] area was recognized as an important strategic point and was densely fortified. This Ganghwa maritime fortification site is of unique territorial and geographical value. It is a maritime fortified landscape, and it embodies the climax of a fierce history of

[11] „Old Town of Galle and its Fortifications", UNESCO, https://whc.unesco.org/en/list/451 (accessed: 13.01.2024).

[12] "*Chengyaipbo* (清野入保)" tactics mean "clear the field and fight from the mountain fortress."

[13] The Goryeo Dynasty is also spelled Koryŏ Dynasty. See: "Goryeo dynasty", *Britannica*, 15.05.2024, https://www.britannica.com/topic/Koryo-dynasty (accessed: 18.05.2024).

[14] "*Haedoipbo* (海島入保)" strategy means resettlements on the island often used during the Goryeo dynasty (918–1392) of Korea.

[15] J. Kang, *Daemongjeonjaenggi ganghwacheondoui oigyojeok baegyeonggwa gyeonggido gwonyeokui gunsanjeok daeeung* (대몽전쟁기 강화천도의 외교적 배경과 경기도 권역의 군사적 대응 [Diplomatic Intentions behind the Decision to Relocate the Goryeo Government, to the Gang hwa-do Island during the Mongol invasion, and Military responses staged in the Gyeonggi-do province], *Hangukyeoksayeonguhoi* 한국역사연구회 [Korean History Society], pp. 105–145, https://koreanhistory.jams.or.kr/po/volisse/sjPubsArtiPopView.kci?soceId=INS000001510&artiId=SJ0000001325&sereId=SER000000001&submCnt=1 (accessed: 1.06.2024).

[16] Ganghwa strait · Yeomha (江華海峽・鹽河).

constantly encountering, clashing with, and resisting world powers on the Korean Peninsula.[17]

When establishing a defense strategy, the Koreans built defense facilities using the topography as much as possible because of pressure from the enemy. These facilities took the form of mountain fortresses, coastal fortresses, and fortified islands. Their function ranged from that of an administrative unit to that of a nation, depending on the nature of the emergency.

2.2.3. Cultural landscape value

The value of the cultural landscape allows better understanding of the material and functional context of fortifications, and takes into account, among other elements, respect for its enclave, the role of military construction for defensive purposes, its dominance position, visual and physical in relation to the surrounding territory (art. 4 of the ICOMOS Guidelines 2021, *Values*).

UNESCO World Heritage Namhansanseong is a good example of a fortress using natural topography. It is a military cultural landscape in which various fortress elements were brought together, built, and differentiated in the course of time. For example, the surrounding peaks called Beolbong Peak (505 m) to the east of Namhansanseong and Geomdan Mountain (480 m) to the south can be used to attack the main fortress of Namhansanseong. After the construction of Jujangseong fortress (the old name of the main fortress wall of Namhansanseong) in 672, these surrounding peaks were occupied during the Chinese Invasion of Joseon in 1636,[18] and the Qing troops besieged the entire main fortress because of a lack of fortifications. This experience led to measures to place reinforced external fortresses on Geomdan Mountain to the south and on Beolbong Peak to the east.

In particular, the Bongam extended defensive wall, built to the right of Namhansanseong's main fortress, and the Hanbong extended defensive wall, built along the mountain ridge from the 15th Auxiliary Gate located to the south of Bongam extended defensive wall, experienced occupation by the enemy. As a result, it was judged to be a tactically weak area, so more defensive facilities such as several batteries and bastions were placed in this area. As a similar case, there is the midgate of Bukhansanseong mountain fortress located in the north of Seoul, which is

[17] G. Lee, "Ganghwaeui gojido, nangongbullageui yosaeseomeum damanaeda" 강화의 고지도, 난공불락의 요새섬을 담아내다 [in:] *Gojidoe banyeongdoin ganghwahaeyanggwanbangyujeok* 고지도에 반영된 강화해양관방유적, eds. R. Kim, H. Jeong, H. Ahn, I. Hong, *Ganghwahaeyanggwanbangyujeok Haksulchongseo Je i gip* 강화해양관방유적 학술총서 제2집 [The Series of Scholarship Ganghwa & Goryeo History Foundation vol. 2], Ganghwa goyreo yeoksajaedan 강화고려역사재단 [Ganghwa & Goyreo History Foundation], Jindijain 진디자인, Suwon, 2016, pp. 17–35, https://iharchive.ifac.or.kr/archives/item/view?pageNum=1&searchData=%ED%95%99%EC%88%A0%EC%B4%9D%EC%84%9C&categoryLargeGroupCode=0005&searchType=TITLE&rowCount=8&search=N&iidx=727 (accessed: 6.06.2024).

[18] It broke out in the Byeongja year of 1636. That is why it was named "Byeongja horan (丙子胡亂)."

a more developed example of overcoming the weakness of the Western fortress. A bulwark like a traverse element in European fortifications was placed to prevent the enemy from entering beyond the fortress wall.

An east observation post and a west observation post were included inside the Sinnamseong outer wall at the top of Geomdan Mountain.[19] Furthermore, the Bongamseong extended defensive wall connected to the main fortress of Namhansanseong can be seen as a fortified landscape created through experience drawn from actual conflict. If one analyzes this place more closely, one can see that all weapon operation systems were systematically introduced there, from cold weapons such as bows and spears to gunpowder weapons such as matchlocks and cannons. It is reckoned that the range of the Hongyipao[20] cannon operated during the Chinese invasion of Korea in 1636 stretched up to 1.6–1.9 km from Beolbong Peak in the east and Geomdan Mountain in the south to the center of Namhansanseong. These surrounding peaks could attack a primary element such as the Namhansanseong Haenggung emergency palace, where the king stayed. In order to occupy these surrounding peaks in advance, the Shinnamseong outer wall (East – and West Observation posts) was constructed, which performed the function of detecting enemy invasion from the surrounding area in advance and responding to it immediately. Since the defense zone of Geomdan Mountain in the south of Namhansanseong was very wide, a second line of defense was built behind the Sinnamseong outer wall, and three separate outworks (*Ongseong*)[21] were installed to defend the entire area between Geomdan Mountain and the southern fortress area of Namhansanseong. The first southern outwork defended the right-side slope of Geomdan Mountain; the second southern outwork covered the center, left, and right sides of Geomdan Mountain; and the third southern outwork covered the left ridge of Geomdan Mountain. The distance between the main fortress wall in the south and Geomdan Mountain was covered by the range of the *Cheonja Chongtong*[22]

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19 The top of the mountain has two peaks, like the back of a Bactrian camel, and an observation post is installed on each peak.

20 *Hongyipao* (紅夷炮) was the Chinese name for European-style muzzle-loading culverins introduced to China and Korea from the Portuguese colony of Macau and by the Hendrick Hamel expedition to Joseon in the early seventeenth century.

21 *Ongseong* is an outwork installed at the main gate of the fortresses constructed on the flat land to enhance defensive power. However, in the case of Namhansanseong, Ongseong was on the ridge of the mountain, where there was a crucial zone.

22 The *Cheonja Chongtong* gun is named after the Chinese character "cheon" (天) inscribed on its body. "天" is the first character of *Qianziwen* (Thousand Character Classic) and indicates that this gun was the first produced in the Joseon Period. According to the inscription on the barrel, it was produced in 1555 (the tenth year of King Myeongjong's reign). It is considered an important cultural heritage as it is the largest gun made during the Joseon Period and the oldest one containing a legible inscription. "*Cheonja Chongtong* Gun", National Museum of Korea, https://www.museum.go.kr/site/eng/relic/represent/view?relicId=4635 (accessed: 8.05.2024).

gun.[23] All fortification elements are integrated to reveal the value of a military cultural landscape.

In addition, each outwork built along the main ridge extending from the main fortress is directly monitored and defended from the main fortress to prevent enemy incursion. The range between the battery built at the end of each southern outwork and the main fortress wall at the rear is included within the effective range of the matchlock. The entire system operating these weapons belongs to a property zone that most clearly reflects the characteristics of military heritage, and the natural landscape surrounding this zone belongs to the buffer zone of World Heritage Namhansanseong.[24] For communications inside and outside the fortress, command posts were installed in four places in the east, west, south, and north of the fortress to enable signal transmission without any obstacles along a visual axis. In particular, Dongjangdae (東將臺) east command post directly and uninterruptedly communicated with Oedongjangdae (外東將臺) external east command post. From this, it can be seen that people at that time analyzed the natural topography very carefully and adapted it flawlessly to perform military functions.

2.2.4. Strategic value

Fortification is a symbol of the fusion of multiple types of knowledge. The strategic value of a fortification is more significant than its territorial or geographical value, since it reflects the power of decision and the depth of knowledge, as well as the social cohesion of the ruling group (art. 4 of the ICOMOS Guidelines 2021, *Values*).

In the history of the development of fortification systems in Korea, there are many cases in which the country's capital was built strategically with a mountain fortress located separately behind the capital. There was a tradition of building a mountain fortress behind the capital wall to compensate for the weakness of the flat terrain and to utilize a river for defense. That means constructing a double fortifications system that makes it possible to clear the plains when enemies invade, to evacuate people, and to protect people inside a mountain fortress. In other words, the mountain fortress served as a refuge and base for attack. This military strategy was called the *Cheongya Ipbo*.[25] It was applied to the Janganseong capital wall and Daeseongsanseong mountain fortress in Pyeongyang[26] at the time of the Goguryeo Kingdom (Koguryŏ Kingdom, 37 BCE–669). Other examples include the Naseong capital

[23] The maximum range is estimated to be about 960 m, and the effective casualty radius of the Chongtongryu is estimated to be about 200–500 m when compared to weapons at the time.

[24] UNESCO World Heritage Centre, "Namhansanseong", Documents – 2014 Nomination file, pp. 169–170, https://whc.unesco.org/en/list/1439/documents/ (accessed: 27.05.2024).

[25] This means clearing the field and fighting from the mountain fortress.

[26] Evidence the tactic and this tradition. Pyeongyang is the current capital of North Korea.

wall and Busosanseong mountain fortress of the Baekje Kingdom[27], the Wolseong capital wall and Myeonghwalsanseong mountain fortress of the Silla Kingdom[28], and the Gaegyeong capital fortifications[29] and Daeheungsanseong mountain fortress in the Goryeo Dynasty.[30]

In the Joseon Dynasty, the combination of the capital wall and mountain fortress made a unique fortified landscape that combined the Hanyangdoseong capital city wall, the Tangchundaeseong defense wall, and the Bukhansanseong mountain fortress into a single defense system as the capital fortifications of Hanyang.[31] In peacetime, the Tangchundaeseong defense wall and the Bukhansanseong mountain fortress played an essential role in defense against the northern enemy approaches. Furthermore, the Bukhansanseong mountain fortress was a refuge for the capital in times of emergency or war.[32]

The other example indicating strategic value is that of the Coastal Fortifications along the Konkan coast of Maharashtra in India. The history of these forts along the Konkan coast reveals the shifting balance of regional and international powers and, the changing territories of control between the ninth century to the nineteenth century CE, from the earlier dynasties of the Satvahanas, Rashtrakutas, Chalukyas, Yadavas, Shilaharas to the later period with the Bahamanis and, finally the Portuguese in the north, and the Siddhis, the Dutch, the British, and the Marathas along the southern coast.[33] They are the largest concentration of western coastal fortifications along the Konkan coast in Maharashtra; they stretch up to approximately 740 km on the Indian Ocean side. They are also a testimony to the historical

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[27] The Baekje Kingdom is also spelled Paekche Kingdom (18BCE-660). Naseong capital wall and Busosanseong mountain fortress in Buyeo are major elements of the World Heritage "Baekje Historic areas" of the Republic of Korea. See: "Baekje, ancient kingdom, Korea", *Britannica*, 27.03.2024, https://www.britannica.com/place/Paekche (accessed: 13.04.2024).

[28] Silla Kingdom (57 BCE–668). The Korean Peninsula consists of Gogureo, Baekje, and Silla, unified by Silla in 668. The Unified Silla lasted from 668–935. Wolseong capital wall and Myeonghwalsanseong mountain fortress in Gyeongju are major elements of the World Heritage "Gyeongju historic areas" of the Republic of Korea. See: "Silla, ancient kingdom, Korea", *Britannica*, https://www.britannica.com/place/Silla (accessed: 13.04.2024).

[29] It is an important element of the World Heritage "Historic Monuments and Sites in Kaesong" of the Democratic People's Republic of Korea.

[30] UNESCO World Heritage Centre, "Namhansanseong…", pp. 174–176.

[31] Capital Fortifications of Hanyang: Hangyangdoseong Capital City Wall, Bukhansanseong Mountain Fortress, and Tangchundaeseong Defense Wall, UNESCO," https://whc.unesco.org/en/tentativelists/6652/ (accessed: 20.04.2024).

[32] "Capital Fortifications of Hanyang: Hangyangdoseong Capital City Wall, Bukhansanseong Mountain Fortress and Tangchundaeseong Defense Wall", UNESCO, https://whc.unesco.org/en/tentativelists/6652/ (accessed: 27.05.2024).

[33] "Coastal Fortifications along the Konkan coast of Maharashtra", UNESCO, https://whc.unesco.org/en/tentativelists/6703/ (accessed: 20.04.2024).

development of global maritime trade and commerce. These coastal fortifications shaped military strategy, contemporary military and political affairs, and the cultural landscape of the region.

2.2.5. Human/anthropological values

Fortifications were built to protect one human group from another. Therefore, they can be associated with sites of conflict. Sometimes Fortifications are connected with brutal and devastating battles and wars that resulted in one group being victorious over another defeated group. They can also be associated with their role in the performance of nation-building and can be used to play a role in nation-building. Both fortification structures and cultural landscapes may also contain archaeological information, which is essential to understanding them and can provide information about the past use of these places that is not available from historical sources (art. 4 of the ICOMOS Guidelines 2021, *Values*).

The Great Wall of China has been recognized as a historically and strategically important wall, as well as an outstanding architectural monument, and was inscribed as a UNESCO World Heritage Site in 1987. In 220 BCE, the first emperor of China, Qin Shi Huang (259 BC–210 BCE), decided to build integrated defense fortifications in preparation for an invasion by northern nomadic folks. Construction of the Great Wall continued until the Ming Dynasty (1368–1644 CE). It has become the world's largest military facility. The Great Wall of China is a complex and diachronic cultural heritage and a special example of military heritage maintained solely for strategic purposes for 2,000 years. However, the history of wall construction shows continued development in defense technology and the changing political situation. The hardships of the Chinese people involved in the construction process can be found in important works in Chinese literary history. This is shown in works such as the novels of the Ming Dynasty, which adds a humanist dimension to the fortification.

The Demilitarized Zone (DMZ) on the Korean Peninsula is a system of military facilities that have faced each other for over seventy years following the Korean War armistice, and the natural environment there, including the human environment and an ecosystem that has been free from human exploitation and development for some time, is well preserved, adding to its value as a piece of natural heritage. In terms of international history, it is a result of the Cold War. The Demilitarized Zone (DMZ) on the Korean Peninsula is 4km wide with southern and northern boundaries set at 2km to the north and south of the 248km Military Demarcation Line from the mouth of the Imjin River to Goseong County on the east coast.[34]

[34] Munhwajaecheong·Gyeonggido·Gangwondo 문화재청·경기도·강원도 [Cultural Heritage Administration of Korea, Gyeonggi Province Gangwon Province], *Hanbando Bimujangjidae 2020–2021 Siltaejosa Bogoseo* (한반도 비무장지대 2020–2021 실태조사 보고서, [Actual condition survey report of the demilitarized zone on the Korean Peninsula 2020–2021], Gungnip

The DMZ on the Korean Peninsula is a defense system with forward outposts and general outposts continuously deployed from east to west. The main operational area setting concept is to minimize approach blind spots by deploying multiple lines of barbed wire and various weapons to increase defense capabilities. In other words, it is the product of a military culture that maximizes the efficiency of protection, flanking, and command and control by utilizing the natural terrain to deploy forward outposts at regular intervals between the Military Demarcation Line and the Southern Limit Line and by installing general outposts situated behind the Southern Limit Line (more than twice the number of forward outposts). The concept shapes the fortified landscape. To embody the spirit of peace and reconciliation of the 1972 World Heritage Convention, a dialogue channel between the state parties to the dispute and a bilateral or multilateral interpretation of this military heritage in human history are needed.

2.2.6. Memory/identity/educational value

Fortifications can play an essential role in the memory of society. They illustrate the conflict directly, allowing an intense, often personal, learning experience from events that can be part of the shared history of communities. They belong to the collective memory concerning the cultural landscape they set. Fortifications have educational value because they can provide a stimulating and nurturing environment related to the cultural experience of military heritage (art. 4 of the ICOMOS Guidelines 2021, *Values*).

Belgium and France submitted a World Heritage nomination dossier of Funerary and Memory sites of the First World War (The Western Front) in 2017. The site is a transboundary space with 139 sites spread across northern Belgium and eastern France. This area is where battles with Germany took place between 1914 and 1918, and the proposed heritage site includes very large and very small sites and covers various types of cemeteries.[35]

These sites were placed on the UNESCO World Heritage list in 2023, as they meet criteria iii, iv, and vi; however, in 2018 and 2023, the UNESCO World Heritage Committee identified the property as a serial property and assessed that the integrity, authenticity, and justification criteria needed to be revised.[36]

Munhwayusan yeonguwon 국립문화유산연구원 [National Research Institute of Cultural Heritage], Baehyosang Print square 배효상프린트스케어, Daejeon 2022, pp. 14–15, https://www.heritage.go.kr/heri/cul/linkSelectEbookDetail.do? (accessed: 27.05.2024).

[35] Decision 42 COM 8B.24 Funerary and Memorial sites of the First World War (Western Front) (Belgium, France), adopted during the 42nd session of the World Heritage Committee (Manama, 2018), https://whc.unesco.org/en/decisions/7137 (accessed: 13.01.2024).

[36] UNESCO World Heritage Centre – Decision – 18 EXT.COM 4., https://whc.unesco.org/en/decisions/8046/ (accessed: 27.05.2024). Urbanization, energy, and transport infrastructure (wind power and roads with heavy traffic) were cited as the main risk factors for many components. Due to

Where there are different perceptions of Sites of Memory (where there is a disputed place, where there are different views on its significance or history), the interpretation of the site can present complex problems. However, a careful and inclusive interpretation process can also be an excellent opportunity to unite communities with different perspectives.[37]

The 45th UNESCO World Heritage Committee in 2023 adopted the following Guiding Principles concerning interpretation, education, and information and reconciliation; these will apply to sites of memory associated with recent conflicts. An "Interpretation strategy" is formulated as follows: bearing in mind potential differing views and narratives, the interpretation strategy shall be multi-dimensional to present accurately the full meaning of the site and to support an understanding of its full history. "Education and information programs" will include evidence of educational and information programs meeting the same high ethical and scholarly standards of the UNESCO Global Citizenship Education program, such as the inclusion of multiple narratives based on sound research and comparative analysis using documentary and archival sources, testimonies, and material evidence. A reconciliation process not interrupting the process of dialogue is recommended.[38]

In particular, most war-related sites are probably a heritage of wounds that have scarred a country; they may also derive from a period when a country enjoyed a period of glory in its history. For example, the place where Vasco da Gama started his voyage in Portugal during the Age of Discovery is a symbolic national monument reflecting Portugal's national identity. In addition, Vasco da Gama's pioneering of the Indian Sea route has great significance in opening sea routes between the West and the East. It brought many changes to European society through the spice trade.[39] The major ports used for navigation were elaborately fortified so that future fleets

the inappropriate property boundaries, it is necessary to reset the boundaries of the property zone and the buffer zone, and the legal protection system related to this is also inappropriate for all components, so the need for improvement is recommended. In particular, one of the most critical issues of this property was how to define the Outstanding Universal Value (OUV) of the site, which is linked to the memory of the recent conflict that is nominated under criterion (vi), preferably in conjunction with other criteria and thus can be shared by humanity. In the case of global events, such as World War I and World War II, the principal members of the World Heritage Committee discussed how to reflect the memory of all countries involved.

[37] J. Luxen, "Result of the study on Interpretation of Sites of Memory" [in:] *Materials on the International Seminar on the 30th Anniversary of Korea's Accession to the UNESCO World Heritage Convention*, Korean National Commission for UNESCO, 2018, pp. 168, https://unesco.or.kr/assets/data/report/dk6JjIJPXGTrQJShGpGzg3ltafJTWI_1525237321_2.pdf (accessed: 27.05.2024).

[38] UNESCO World Heritage Centre – Decision – 18 EXT.COM 4…

[39] Y. Choi, "Vasco da gamaeui saengeae gwanhan yeongu" 바스코 다 가마의 생애에 관한 연구 [A Study on the Life of Vasco da Gama], *Jungnammi yeongu* 중남미연구 [Latin American and Caribbean Studies] 2004, vol. 22, no. 2, pp. 46–68, https://www.dbpia.co.kr/journal/articleDetail?nodeId=NODE06221320 (accessed: 5.06.2024).

that served significant commercial and military functions could be protected and anchored there. In particular, in terms of military heritage, such a site recalls the Age of Exploration, the identity of a specific region, and encapsulates the historical and educational value of heritage. However, the history of conquest and exploitation by Western countries such as England and the Netherlands, a process that started with Portugal, is seen negatively by Eastern countries. The positive and negative sides differ depending on the party concerned.

2.2.7. Historical value

Fortifications and military heritage embody attitudes and world views specific to their development and use periods. These attitudes may be understood through studying and interpreting the military sites and their relationships with contemporary societies (art. 4 of the ICOMOS Guidelines 2021, *Values*).

In the case of the World Heritage Hwaseong fortress, its value was seen by Silhak as a collection of Eastern and Western fortress technologies.[40] Hwaseong fortress was not only an expression of filial piety toward a father,[41] but also was created as the center of political planning to reconstruct the country devastated by the two major wars on the Korean Peninsula during the sixteenth and seventeenth centuries and to strengthen royal authority. It was designed by Jeong Yak-Yong, a civil servant and Silhak scholar of the royal library (*Gyujanggak*), drawing on technical books from East and West. The construction of Hwaseong fortress began in January 1794 and was completed in September 1796. Its total length is 5.744 m, and it covers an area of 130 ha. The eastern terrain of Hwaseong fortress is flat, and the western side is on Paldal Mountain; so it combines a flatland fortress and a mountain fortress.[42]

[40] Silhak was a Korean Confucian social reform movement in the late Joseon Dynasty. 'Sil' means 'actual' or 'practical,' and 'hak' means 'studies' or 'learning.'

[41] Crown Prince Jangheon (also known as Crown Prince Sado), King Yeongjo's son and King Jeongjo's father, was put to death under his father's wrath as a victim of a power struggle among the factions. He died from being confined in a wooden rice chest. Grieving, King Jeongjo moved the tomb of his father, Crown Prince Sado, from Yangju County, Gyeonggi Province, to southern Suwon-bu County and frequently paid homage to the tomb. He renamed Suwon-bu Hwaseong and built the fortress there to sanctify the region. "A History of Korea", http://contents.history.go.kr/mobile/kh/main.do (accessed: 5.06.2024).

[42] Hwaseong fortress, UNESCO, https://whc.unesco.org/en/list/817 (accessed: 13.01.2024). The facilities of the fortress are four Main Gates (*Mullu*), 2 Water sluices (*Sumun*), 3 Observation posts with transit space (*Gongsimdon*), 2 Command Posts (*Jangdae*), 2 Archery platforms (*Nodae*), 5 Sentry towers (*Poru*), 5 Bastions (*Poru*), 4 Corner pavilion (*Gangnu*), 5 Auxiliary Gates (*Ammun*), 1 Beacon tower (*Bongdon*), 4 Flanking towers (*Jeokdae*), nine lookouts (*Chiseong*), two hidden waterways (*Eungu*), Etc. In total, it consists of f 48 facilities, and many facilities such as Hwaseong Haenggung temporary Palace, Mid-alarm tower (*Jungposa*), Inner Alarm tower (Naeposa), and Altar for State deities of earth and grain (*Sajikdan*) were built as annexed facilities within the

Hwaseong fortress is clear evidence of an exchange of science and technology between East and West. At that time, new construction machines such as cranes were devised and used to move and lift heavy stones. These results were based on the tradition of constructing fortress walls in Korea. In particular, during the sixteenth and seventeenth centuries, most of the emergency capital, the temporary palace, and the major fortifications distributed near the capital city were rebuilt; there was a stone masonry tradition of constructing fortress walls. The methods of fixing stone masonry (45 × 45 cm size stone materials) applied in the construction of Namhansanseong were also applied to Bukhansanseong mountain fortress (1711) and Tangchundaeseong defense wall (1716); the latter connects Bukhansanseong and Hanyangdoseong (Hanyang capital wall, currently Seoul city wall). These models later influenced the construction of the Hwaseong fortress (1796).[43] Therefore, this site offers clear evidence of the history of the development of fortress construction techniques in Korea.

Hwaseong Seongyeok Uigwe,[44] published in 1801 after the construction of Hwaseong fortress in Suwon, contains not only the construction plan, system, and principles underlying the defenses, but also information about personnel involved, the source and use of materials, budget and wage calculations, construction machinery, material production methods, and a daily record of construction, etc. All these are documented in detail. This book proves that the Hwaseong fortress has left a remarkable footprint in the history of architecture, especially in the construction of fortresses. At the same time, it has great historical value and is currently listed in the UNESCO Memory of the World. These royal protocols of the construction of the Hwaseong fortress were collected by Collin de Plancy,[45] a French ambassador in Korea, and donated to the Oriental Language School in Paris[46] and the National Library of France. Later, Henri Chevalier, who was later appointed Consul General of Japan, translated the Hwaseong Seongyeok Uigwe into French with the help of Jong-Woo Hong, who was the first Korean to study in France at the Oriental

fortress. All four main gates have outworks (*Ongseong*), but the direction of entry and exit differs. Janganmun North gate and Paldalmun South gate have closed semicircular lookouts outside the gate, and Hwaseomun West gate and Changnyongmun East gate have semi-open lookouts.

43 Y. Shin, "Chukseongsuleul tonghae bon bukhansanseongeui yusanjachi" 축성술을 통해 본 북한산성의 유산가치 [The Wall Construction Method of Bukhansanseong Fortress & It's Outstanding Universal Value], *Paeksan Hakbo* 백산학보 [The Paek-San Society] 2019, vol. 115, p. 20, http://paeksan.com/subList/32000000526 (accessed: 27.05.2024).

44 The *Uigwe* (의궤), a unique record born from a culture of preserving tradition, was listed as a UNESCO Memory of the World in 2007. Hwaseong Seongyeok Uigwe means royal protocol for the construction of the Hwaseong fortress.

45 He worked for almost a decade from 1884 as French Minister to Joseon (1390–1910), which was a dynastic kingdom of Korea. He was the first French Minister and published „Joseon Seoji (朝鮮 書誌)" while working in Joseon.

46 Institut Nationale des Langues et Civilisation Orientales à Paris.

Language School. *Cérémonial de l'achèvement des travaux de Hoa-Syeng*[47] was published in an abridged version in 1898. Hwaseong fortress was inscribed in the UNESCO World Heritage list in 1997, with an emphasis on its fortress walls. However, at this point, it is necessary to reinterpret related heritages that reflect phases of the times when the fortress was built. In particular, military landscapes such as the Doksanseong mountain fortress, which was built during the reorganization of the capital defense system in the late Joseon Dynasty, and the irrigation facility and *doongeon* (屯田) garrison farmland (established because of severe drought in the year following the beginning of the Hwaseong fortress in 1793), provided a formative basis for the construction of Hwaseong fortress. The construction should be reexamined from various perspectives, such as the relocation of the tomb of Crown Prince Sado and facilities related to King Jeongjo's Royal Parade. In addition, the Hwaseong Museum in Suwon, the Hwaseong Fortress Administration Office, the Suwon History Museum, and the Suwon Cultural Foundation can be cited as the agents of reinterpretation or in-depth research on the value of the above heritage sites. With regard to the Hwaseong fortress, these organizations have established a mid-to-long-term comprehensive maintenance plan for the relevant cultural property and operate a multidisciplinary conservation management system. An example of the preservation and transmission of intangible heritage is the Suwon Hwaseong Cultural Festival, centered on the royal funeral procession of King Jeongjo. Numerous local governments and regional organizations consisting of local communities support and collaborate on the reappearance of King Jeongjo's procession, and there are autonomous districts in Seoul, Siheung City, Anyang City, Uiwang City, Suwon City, and Hwaseong City in Gyeonggi province of Korea that focus on preservation, transmission, and utilization centered on each local community. A variety of activities take place there.

2.2.8. Social/economic value

The recognition of the social value of fortifications, through appropriate enhancement actions, must activate a stimulus effect giving economic benefit to the communities and activating the recognition of new values and knowledge (art. 4 of the ICOMOS Guidelines 2021, *Values*).

Fortifications and military heritage retain values and meanings that are both tangible and intangible, material and spiritual. However, quantitative research should be actively carried out by focusing on the resources invested in heritage conservation and utilization. Through this, it is necessary to establish the feasibility of conservation and management of heritage, to win over various stakeholders including the communities living inside and outside the region throughout which the heritage is

[47] H. Chevalier, "華城城役儀軌, Hoa Syeng Syeng Yek Eui Kouei, Cérémonial de l'achèvement Des Travaux de Hoa Syeng (Corée) (1800)", *T'oung Pao* 1898, vol. 9, no. 5, pp. 384–396, http://www.jstor.org/stable/4525362 (accessed: 27.05.2024).

distributed, and to consider ways to generate socio-economic effects such as job creation through heritage conservation and utilization. In other words, it is necessary to visualize the value of heritage quantitatively, and it is necessary to build up the capacity of a site manager by expanding the budget for heritage conservation and utilization and by developing an expertise in managing human resources, which is a prerequisite for sustainable heritage conservation. The economic ripple effects of heritage conservation and the total value of the heritage involved must be evaluated, and a feedback process must be instituted to secure conservation management costs appropriate to the value of the heritage. In addition, a systematic education system needs to be established to expand the expertise of heritage management personnel, who are among the main stakeholders of heritage conservation and utilization. Ultimately, a multidisciplinary review of sustainable economic, environmental, and social development approaches should be undertaken periodically, as well as establishing an integrated strategy for sustainable development in the spirit of the 1972 World Heritage Convention.

Because of the different historical backgrounds of each country, positive and negative views on military heritage coexist. Since Namhansanseong was inscribed in the World Heritage list in 2014, it has been able to improve its image as an emergency capital of Joseon and a treasurehouse of the history of fortress development through a reinterpretation of history, breaking away from the negative image of Namhansanseong Prison and food tourism in pursuit of chicken stews. To further enhance the value of military sites and prove the validity of sustainable protection, business agreements have been signed with eight local universities near the sites, the Namhansanseong History and Culture Center has been established, and various collaborations with residents have taken place. Those activities are an excellent example of the project of raising awareness on the site's value carried out by the Gyeonggi-do Namhansanseong World Heritage Center, a body dedicated to integrated conservation management.

3. Conclusions

Many movements to inscribe fortifications and military heritage on the UNESCO World Heritage list can be observed. Further, one of the results of the international community's efforts to achieve adequate protection and management of the UNESCO World Heritage is the enactment and revision of charters and rules, which can be subdivided into various forms of preparing laws, principles, rules, guidelines, action plans, etc. Most of all, such activities contain recommendations that conservation of the original form of cultural heritage is a prerequisite, and efforts to preserve a site's original form and historic state make up an extensive part of discourse on heritage research, protection, and utilization.

ICOMOS, the advisory body in the cultural heritage field of the UNESCO World Heritage Committee, prepares the charters, principles, guidelines, and declarations for cultural heritage conservation in different categories and disseminates them to the world. Among them, the ICOMOS guidelines on fortifications and military heritage adopted by ICOMOS in 2021 present eight directions to establish the value of fortifications and military heritage. This article has focused on a discussion of the value-based definition of fortifications and military heritage. In addition, this paper has stressed how important it is for stakeholders to understand efforts to identify World Heritage values and to conserve their properties. It does so by discussing existing cases from the World Heritage list, the World Heritage tentative list, and the related fortifications and military heritage in Korea, Asia, and other regions. In the process of World Heritage nomination, it is necessary to identify the heritage value and to establish what the attributes are that convey the heritage authenticity and integrity. Those attributes related to fortifications and military heritage can be derived based on "barrier and protection," "command," "depth," "flanking," and "deterrence," which are presented in ICOMOS Guidelines. When defining the value of fortifications and military heritage, it is important to refer to the eight defined value classifications of architectural and technical value, territorial and geographical value, cultural landscape value, strategic value, human and anthropological value, memory, identity educational value, historical value, and social and economic value. Furthermore, the establishment of appropriate and sustainable conservation management policies and preparation of a comprehensive plan for the attributes conveying the value of fortifications and military heritage should go hand in hand with the above. Conservation management should be established with multidisciplinary experts, including site managers whose skills must be developed appropriately. Next, it is necessary to prepare an appropriate communication system to expand the understanding of the defined value to the various stakeholders related to fortifications and military heritage. These efforts can lead to benefits for many communities, including those living near the heritage. Furthermore, these efforts again generate social and economic effects providing legitimacy for heritage conservation and management.

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SUMMARY

Doo-Won Cho

VALUE-BASED STUDIES RELATING TO THE ICOMOS GUIDELINES ON FORTIFICATIONS AND MILITARY HERITAGE

Fortifications are the outcome of the historical development of human settlements, regions, and even nations. From the prehistoric era to modern times, fortifications have been an essential component of the self-defense of any human community. Fortifications were integrated with their settings in various ways.

ICOMOS (International Council on Monuments and Sites), an advisory body in the field of cultural heritage of the UNESCO World Heritage Committee, prepares charters, principles, guidelines, and declarations to effectively establish, conserve, and utilize various categories of cultural heritage, and promotes them to the world. ICOFORT (International Scientific Committee on Fortifications and Military Heritage), one of the international scientific committees under ICOMOS developed a charter on the protection, conservation, and interpretation of fortifications and military heritage from 2007 to 2021. This charter was officially adopted during the ICOMOS General Assembly in 2021 under the title of "the ICOMOS Guidelines on Fortifications and Military Heritage." ICOMOS Guidelines set out how to identify the basic attributes of fortifications and military heritage indicating their value. In this paper, the aim is to provide directions for stakeholders, mainly site

managers in specific fields of fortifications and military heritage, on how to identify, disseminate a fortification's value, conserve its attributes embodying the value, and utilize its heritage through a value-based approach. It considers and offers an interpretation of the attribute system that reflects the functional authenticity of the fortifications and military heritage.

Keywords: ICOMOS Guidelines, value, fortifications, military heritage, world heritage

STRESZCZENIE

Doo-Won Cho

BADANIA OPARTE NA WARTOŚCIACH ODNOSZĄCE SIĘ DO WYTYCZNYCH ICOMOS W SPRAWIE FORTYFIKACJI I DZIEDZICTWA WOJSKOWEGO

Fortyfikacje są wynikiem historycznego rozwoju ludzkich osad, regionów, a nawet narodów. Od czasów prehistorycznych po czasy współczesne fortyfikacje były istotnym elementem samoobrony każdej ludzkiej społeczności. Były one zintegrowane z otoczeniem na różne sposoby.

ICOMOS (Międzynarodowa Rada Ochrony Zabytków i Miejsc Historycznych), organ doradczy w dziedzinie dziedzictwa kultury Komitetu Światowego Dziedzictwa UNESCO, przygotowuje karty, zasady, wytyczne i deklaracje w celu skutecznego ustanowienia, ochrony i wykorzystania różnych kategorii dziedzictwa kultury oraz promuje je na świecie. ICOFORT (Międzynarodowy Komitet Naukowy ds. Fortyfikacji i Dziedzictwa Wojskowego), jeden z międzynarodowych komitetów naukowych w ramach ICOMOS, opracował kartę ochrony, konserwacji i interpretacji fortyfikacji i dziedzictwa wojskowego na lata 2007–2021. Karta ta została oficjalnie przyjęta podczas Zgromadzenia Ogólnego ICOMOS w 2021 r. pt. „Wytyczne ICOMOS w sprawie fortyfikacji i dziedzictwa wojskowego". Wytyczne te określają sposób identyfikacji podstawowych atrybutów fortyfikacji i dziedzictwa militarnego, wskazujących na ich wartość. Celem niniejszego dokumentu jest dostarczenie wskazówek dla zainteresowanych stron, głównie zarządców obiektów w określonych dziedzinach fortyfikacji i dziedzictwa wojskowego, w jaki sposób identyfikować, rozpowszechniać wartość fortyfikacji, chronić jej atrybuty ucieleśniające wartość i wykorzystywać jej dziedzictwo poprzez podejście oparte na wartościach. W Wytycznych ICOMOS przedstawiono i omówiono zbiór atrybutów, które odzwierciedlają funkcjonalną autentyczność fortyfikacji i dziedzictwa wojskowego.

Słowa kluczowe: Wytyczne ICOMOS, wartość, fortyfikacje, dziedzictwo wojskowe, dziedzictwo światowe

RONAN BRETEL*

NATIONAL TREASURES (國寶, *KOKUHŌ*) IN JAPANESE LAW: FROM ZEN BUDDHISM TO LIVING NATIONAL TREASURES

If there is one country which radiates a strong cultural identity forged by its heritage, linked to its mythical history and its sacred imperial dynasty, it is Japan. In the eyes of Western jurists, its law is reputed to be nationalistic, and adapted to the singularities of insularity. This article looks at the particularities of Japanese cultural heritage law as regards the protection of its movable heritage. Moreover, within the category of tangible cultural property (有形文化財, *Yūkei bunkazai*), it offers a historical and epistemological look at 'national treasures' by discussing the philological origins of the term, which is rooted in centuries-old religious and philosophical traditions, reinvested in and developed during the Meiji era. Works of art and artefacts were protected by a series of three laws, passed in 1897, 1929, and 1950, which established the modern term 'national treasures.' This legal framework has been regularly updated over the last 75 years to reflect the new categories of heritage that are constantly emerging. After a brief study of the legal regime for designating the status of important cultural property (*jūbun*) and national treasures (*kokuhō*), I also examine the spread in society and legal culture of the term 'Living National Treasure,' so often put forward to highlight the visionary nature of Japanese law, even though it is only a term from popular language, not a legal concept, but one which has shaped international law on intangible cultural heritage and nurtures a heritage imagination[1] that moves beyond the legal category proposed for tangible goods.

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[1] C. Pottier, « Notes sur la protection patrimoniale au Japon », *Bulletin de l'École française d'Extrême-Orient* 1995, vol. 82, pp. 339–351.

1. The spiritual and mythical foundations of the idea of national treasures

1.1. The Buddhist roots of the 'treasures of the land'

The Japanese term for a national treasure[2] expressed in kanji is 国宝. This wording is made up of two sinograms meaning 'national treasure.' It is in fact the modernised version (*shinjitai*) of an older form (*yūjitai*: 國寶). The ideographic whole is translated into the Western alphabet as the word *kokuhō*.

The expression originated in the *Tendai-shū* (天台宗) school of Buddhism founded by the monk Saichō (最澄) at the end of the eighth century CE. In his systematisation of *Mahāyāna* Buddhism known as 'the Great Vehicle' (大乘, *dàchéng*, in Chinese), this was the name given to the initiates who were most advanced on the spiritual path, to those close to enlightenment. The Japanese term therefore originated on the other side of the North Pacific Sea, in Chinese Buddhist philosophy, which was particularly influenced by the precepts of the philosopher Mozi (墨子, *Mö-tseu*; 479 BC – 392 BC). This 'vital' dimension of the term would be found later, in the mid-twentieth century with the consecration of the term 'Living National Treasure' (人間国宝, *Ningen Kokuhō*).

The link between tangible assets that we, in the West, would call 'heritage,' and this idea of national identity, linked to a spiritual influence received and intended to be passed on, was affirmed with the *Sōtō* tradition that emerged in the first half of the thirteenth century around *Dōgen* (1200–1253). The Zen master told his first disciples about his pilgrimage from China, from where he brought back a relic[3] of *Siddhārtha Gautama*, the Buddha (signifying 'the awakened one'), which he then named 重國寶, *Jūkokuhō*, 'important treasure of the country.'

1.2. The origins of a national history: Japan's three 'sacred treasures

Alongside this religious root of the term national treasure, the attachment of cultural property (文化財, *bunkazai*[4]) to a national history[5] is also grounded in the

[2] A. Seidel, « Kokuhō : note à propos du terme 'trésor national" en Chine et au Japon », *Bulletin de l'École française d'Extrême-Orient* 1981, vol. 69, pp. 229–261.

[3] F. Girard, « Quête et transmission des reliques de la Chine au Japon au XIIe siècle », *Studia Religiosa Helvetica*, 2005, vol. X: *Les objets de la mémoire. Pour une approche comparatiste des reliques et de leur culte*, dir. Ph. Borgeaud, Y. Volokhine, pp. 149–179.

[4] A recent term in Japanese, based on the transliteration of 'cultural property' by Yūzō Yamamoto.

[5] This is not linked to material authenticity in the sense of the 1964 Venice Charter. Hence the idea of 'progressive authenticity' in the 'Nara Document' adopted in 1994 by UNESCO, ICCROM and ICOMOS.

mythical account of the founding of the Japanese archipelago known as 日本神話 (*Nihon shinwa*[6]), which recounts that the goddess Amaterasu (天照) ordered her grandson Ninigi-no-Mikoto (瓊瓊杵尊), father of the first emperor Jimmu Tennō (神武天皇), to rule the Universe. She then offered him three artefacts known as the 'three sacred treasures of Japan' (三種の神器, *Sanshu no jing*), which are the material symbols of the legitimacy of the imperial lineage since Emperor Jinmu.[7]

Tradition describes these treasures as Yasakani's Magatama (八尺瓊曲玉, *Yasakani no magatama*), Yata's mirror (八咫鏡, *Yata no kagami*), and the sword of Kusanagi (草薙剣, *Kusanagi no tsurugi*), kept in the Imperial Palace, Ise Shrine, and Atsuta Shrine respectively. Tradition relates that this prehistoric stone from the *Jōmon* period and the mirror were used to lure Amaterasu out of the sun goddess's cave (天岩戸, *Amano-Iwato*); while the sword is said to have been found by Susanô, God of Storms, in one of the tails of the dragon Yamata-no-orochi.

These three objects are the tangible, earthly expression of the sacred nature of the Japanese Empire and the foundation of the shintō of the Imperial Household. Relevant archives testify to the continuous presentation of these exceptional objects to every new Emperor for several centuries by High Priests during the imperial enthronement ceremony, of which this is the high point. This part consists of showing the new sovereign a chest, the nature of which is ambiguous: is it full or empty, a copy (modern or historical?) or an original? The originality of the goods contained in th chest is a matter of debate among rationalists, but thisis of no importance in the Japanese tradition, for which a symbol does not need physicality to exist ('シンボルがオブジェクトを必要としません'). As the presentation is not public,[8] there are no photographs of the three treasures, nor is there an exact graphic representation of them. In any case, the new Emperor is responsible for preserving these items of regalia, which underpin his authority and constitute the legitimacy of the Imperial Household (皇室, *Kōshitsu*), and he is responsible for passing them on to his successor, and more broadly to the next generation as 'historical objects that must be transmitted with the throne,' under art. 7 of the Imperial Household Economy Act of 1947.[9]

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[6] « 192. Nihon shinwa », *Dictionnaire historique du Japon* (Iwao Seiichi, Iyanaga Teizō, Ishii Susumu, Yoshida Shōichirō, Fujimura Jun'ichirō, Fujimura Michio, Yoshikawa Itsuji, Akiyama Terukazu, Iyanaga Shōkichi, et Matsubara Hideichi), vol. XV, Libraire Kinokuniya, Tokyo 1989, pp. 141–142.

[7] Jinja shinpô of 14 November 1974 and 13 January 1975.

[8] E. Seizelet, « Les « trois Trésors sacrés » de la monarchie japonaise : un « patrimoine caché » ? », *In Situ* 2020, no. 42, https://journals.openedition.org/insitu/28162 (accessed: 21.05.2024).

[9] T. Usami, Chambre des représentants, Commission du Cabinet, 30 mars 1962, n° 6. See: N. Ashibe , K. Takami, Nihon rippô shiryô zenshû 7 kôshitsu keizaihô [Compendium of Japanese Legislation, vol. 7, The Imperial Household Economy Act, Shinzansha, Tokyo 2002, p. 655.

2. State competence and national unity: Inventory and proto-protection during the Meiji era

This dual genealogy – Buddhist and mythical,[10] religious and national – of the 'country's treasures' was at the root of the emergence of the term 'national treasure' in the early twentieth century to designate the country's most exceptional cultural properties. In fact, the very idea of 'national heritage' did not exist in Japan until the opening of the Meiji era (1868–1912). Originally, the conservation of major artefacts was a religious mission of the priests of Shintō shrines from the time of Nara (710–794). Alongside strictly religious objects, precious objects, war ornaments and historical documents were added to this primary core of national heritage from the Tokugawa Shogunate of the Edo period (1603–1868) onwards.

It was at this time that the daimyo Matsudaira Sadanobu (1759–1829), who had just left his role as adviser to the shogun Tokugawa Ienari (1773–1841), initiated a major national inventory of Japan's heritage, commissioning a group of artists close to him to do so. This individual initiative gave rise to a printed edition called *Collection of ten kinds of antiques* (集古十種, *Shūko-Jisshu*), which was published over a period of fifteen years. The 85 issues are illustrated with 2,000 xylographs of these paintings, musical instruments, inscriptions, armour, calligraphy, etc. This historical inventory is still considered to be the first realization of a national heritage consciousness in Japan, and was reprinted until the beginning of the Taishō democracy (1912–1926). Counter-intuitively, the emergence of a national approach to heritage and museums only came about with the end of the archipelago's isolationist policy in 1853, when the first diplomatic and commercial exchanges with the Americas and Europe began, and the first Japanese diplomats discovered American, English and French museums.[11]

However, it was the Meiji Restoration (1868), the recovery of the Emperor's powers, and the establishment of State Shintoism that were decisive in initiating a fundamental movement to identify and preserve heritage on a national scale, by making it a public prerogative. The movement known as *Haibutsu kishaku* (廃仏毀釈), which advocated the expulsion of Buddhism from the country, led to the destruction of many Buddhist shrines at this time, whose exceptional statuary subsequently was brought to Western museums. This series of destructions and abandonments of key historical testimonies to Japan's national history led to

[10] M. Bourdier, « Le mythe et l'industrie ou la protection du patrimoine culturel au Japon », Genèses. Sciences sociales et histoire 1993, n° 11, pp. 82–110.

[11] N. Akagawa, *Heritage Conservation and Japan's Cultural Diplomacy. Heritage, National Identity and National Interestcoll*, Routledge Contemporary Japan Series, Routledge, Londres 2014.

‘heritage emotions’[12] that raised the political awareness necessary for the adoption of the first legislation on cultural heritage, particularly movable heritage.

In 1870, when culture became a responsibility of the new ‘Ministry of Public Education’, Machida Hisanari (町田久成, 1838–1897), who founded the Tokyo Museum, became Secretary of State on his return from England, where he had studied and admired the British Museum. He then set up the Museographic Office, a department of the new Ministry of Public Education responsible for implementing a public policy of heritage protection. He pleaded his case to the Ministry of Supreme Affairs (太政官, *daijō-kan*), headed by the Chancellor of the Realm (太政大臣, *daijō-daijin*), expressing his concern at the disappearance of antiquities ‘that could serve as evidence for the study of the past.’ He insisted on the fundamental role of museums of antiquities in Western countries in ‘providing elements for learning about historical evolution, as well as the institutions and material civilisation of ancient times.’[13] The great councillors were sensitive to this undertaking, which helped to legitimise the re-established imperial lineage, and also made it possible to unify Japan’s various provinces (国, *kuni*) around a shared material history. However, the lack of funding for the mission led to its premature demise. The first impetus for protection came with the publication of the decree of 23 May 1871 for the conservation of antiquities and ancient things (古器旧物保存方, *Koki kyūbutsu hozon kata*), which required each prefecture, Buddhist temple, and Shinto shrine to list its significant artistic and architectural assets. But at this time, Japan was more focused on the future than on its past. The priorities of the young Meiji government at the time were geared towards an expansionist trade policy to ensure a strong economy, an essential vector for political legitimacy and national unity. At best, historical artefacts were promoted as models of craftsmanship abroad, notably at the various World Fairs, and in return for these exchanges, a category of ‘fine arts’ was introduced into Japanese law by means of a Western transliteration (美術, *bijutsu*).

However, in the last twenty years of the century, as part of its efforts to rebuild the country, the government financed the restoration of looted religious sites, both Buddhist and Shinto. In 1874, the first funds were allocated to the most important Shintō shrines, and in fourteen years, 539 religious buildings were restored or rebuilt. The ‘museum office’ also became part of the Ministry of Agriculture and Trade, and then, in 1886, of the Ministry of the Imperial Household (宮内省, *Kunaishō*), which, after having taken over religious matters, and in particular the management of national shrines, asserted a broader jurisdiction in the protection of antiquities.

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[12] *Émotions patrimoniales,* ed. D. Fabre, Ethnologie de la France, Éditions de la Maison des sciences de l’homme, Paris 2013.

[13] C. Marquet, « Le Japon moderne face à son patrimoine artistique », Cipango : cahiers d’études japonaises : mutations de la conscience dans le Japon moderne, INALCO, Paris 2009, p. 21.

In 1886, the *Kunaishō*, also known as the 'Imperial Agency,' became responsible for the Tokyo National Museum, founded in 1872. At the same time, the government commissioned the construction of museums in Kyoto and Nara to unite the modern capital of the archipelago with the two former imperial capitals. Baron Kuki Ryūichi 九鬼 隆一 (1850–1931) was appointed head of the 'Provisional Investigation Bureau of the Country's Treasures' (臨時全国宝物取調局, *Rinji zenkoku hōmotsu torishirabe-kyoku*) from 27 September 1899. He enlisted the services of the painter Kanō Eitoku (狩野永徳), the universalist and orientalist Ernest Fenollosa, and the Japanese scholar Okakura Kakuzō (岡倉覚三), who together organised the largest inventory undertaking ever carried out in the Archipelago. The mission led to the identification of 215,000 works of artistic or historical value among the country's 170,000 sanctuaries and monasteries, justifying the 'classification of works of art according to a scale of values set by the State' (entry on the dedicated ministerial inventory), and the acquisition of the most exceptional among them to fill the display cases of the three national museums, spearheading the cultural and heritage policy of the reinstated Empire.[14]

3. 1897–1950: The 'legalization' of the protection of Japan's national heritage

3.1. Law no. 49 of 5 June 1897 on the protection of ancient temples and shrines

The protection of these first movable cultural properties through their identification echoed a renewed interest, both political and more broadly cultural, in the historic sites of Japanese Buddhism and Shintoism. Kunaishō officials, now connected to the Western world, also became aware at this time of the first laws on the protection of cultural heritage adopted in Italy, France, England, and Greece. As early as 1896, the Minister of the Interior set up a 'committee for the protection of ancient religious buildings' under the direction of the architect Itō Chūta 伊東忠太 (1867–1954), which led to the adoption on 5 June 1897 of Law No. 49 for the Protection of Ancient Temples and Shrines (古社寺保存法, *koshaji hozon-hō*), the first regulation aimed at the general preservation of the country's cultural heritage. The twenty-article text distinguishes between movable objects, now known as national treasures (國寶, *kokuhō*), and specially protected religious buildings (特別保護建造物, *tokubetsu hogo kenzōbutsu*).

[14] The 150th anniversary exhibition of the Tokyo National Museum, which opens in October 2024, will feature a rotating display of all 89 objects in the museum's collection of national treasures. In 2015 museums also made it possible to exhibit more than 8,000 national treasures in various museums across the country.

This was the first text to use the term 'national treasure,' which is defined as 'any work of exceptional artistic or historical importance according to criteria established by the State.' In this first system of protection, these criteria are those of modern historical and heritage science imported from Western art history, but still fundamentally the criteria of '*kokugaku*' (國學), a Japanese philological movement supporting a national tradition, distinguished from foreign influences, primarily Chinese, seen as having erased the true Japanese spirit for over a thousand years.[15]

This first law, which was essentially conceptual, was quickly supplemented by a second, more operational law, of 15 December 1897. The reform provided the young public heritage policy with subsidies ranging from 20,000 to 150,000 yen (art. 2) to conserve and restore listed religious buildings (art. 1), whose destruction was criminalised.

In the case of movable items, the main aim is to prohibit their sale (art. 3), but the text also stresses the importance of regular public display of listed works in national museums, for their spiritual, historical, and artistic value. These national treasures, which must belong to the State or to religious institutions and not to private individuals, must demonstrate their age, as well as their 'superior artistic quality' or their 'particular historical value,' and are classified into five categories: painting, sculpture, calligraphy, books, or handicrafts.

An initial wave of classification in 1897 led to the protection of 44 buildings and 155 works of religious art, and a category dedicated to swords was soon added. From 1914, responsibility for classification was transferred to the Ministry of Education. By 1929, 3,704 works of art and 845 buildings had been protected in this way.

3.2. The National Treasures Preservation Act of 1 July 1929

Japan adopted a new text ten years later, this time devoted entirely to national treasures, during the reign of Emperor Hirhito (裕仁, *Shōwa*), when in 1919 Japan adopted a second law on the conservation of historical relics, sites, and natural species to be preserved (史蹟名勝天然 紀念物保存法, *Shiseki meishō tennen kinenbutsu hozon-hō*), one that uses the term 'classification' (指定, *shitei*) for the first time.

On 1 July 1929, the National Treasures Preservation Act (国宝保存法*, kokuhō hozonhō*) was enacted, replacing the 1897 legal framework. Heritage protection is systematised in these twenty-five articles. Similar to the French law of 31 December 1913 on Historic Monuments, protection became indifferent to ownership, and national treasures could now belong to prefectures, but also and above all to private owners, companies, and individuals. The aim was to prevent the destruction and, above all, the export of the movable treasures lining the castles, tea houses, and

[15] B.J. McVeigh, Nationalisms of Japan : managing and mystifying identity, Rowman & Littlefield, Lanham 2004.

noble residences that had been privatised after the Meiji Restoration. The law, thus, included both buildings and objects in its application categories.

It would take several years for the text to be deployed in a second wave of classifications, and beyond buildings of the first rank for Japanese heritage such as the shoin-zukuri Yoshimura villa in Osaka, the Ogawa villa in Kyoto, or the Nandaimon gate at the Tōdai-ji in Nar, Japan went on to protect a number of items of movable property, including paintings by Yosa Buson (与謝 蕪村) and Ike no Taiga (池大雅), and the famous illustrated scrolls of the Tale of Genji (源氏物語, *Genji monogatari*) acquired by Masuda Takashi.

In 1933, Japan was hit by the 'Great Depression', which had a major impact on cultural heritage. To prevent the mass flight of works and objects of art abroad, the Law on the Preservation of Important Fine Arts (重要美術品等ノ保存ニ関スル法律, *jūyō bijutsuhin tōno hozon ni kan suru hōritsu*) was passed on 1 April 1933. The distinctive feature of this text is that it is fully integrated into the 1898 Civil Code and specifically targets the fine arts. The procedure for designating these works is lighter, and prevents the export of the 8,289 items classified on its basis.

3.3. The summary law on the protection of cultural heritage of 30 May 1950

During the occupation of Japan, the Arts and Monuments Service, a branch of the administration of the Supreme Commander of the Allied Powers (SCAP), took charge of heritage conservation and did not call into question the laws in force before its arrival.[16]

As a result of the Sino-Japanese war from 1937 onwards, and then as a result of the aerial and atomic devastation of the Second World War, Japan's national heritage was badly shaken. On 26 January 1949, in Nara, the golden Hōryū-ji, the first temple to be protected in 1897, went up in flames. The loss of such exceptional cultural achievements greatly moved the Japanese, and led to the accelerated adoption of a law to reorganise heritage protection in Japan[17] with the adoption on 30 May 1950 of the Cultural Heritage Protection Law (文化財保護法, *bunkazai hogohō*), applicable from 29 August of that year until the present day. It is primarily a summary law structuring Japanese heritage into three categories, including tangible cultural property (登録有形文化財). It is the first Japanese legal text – and the first in the world – to embrace the idea of intangible cultural heritage, known as 'living heritage' (無形文化財, *Mukei bunkazai*), the fragility of which had been

[16] G.R. Scott, "The cultural property laws of Japan: social, political, and legal influences", *Washington International Law Journal* February 2011, vol. 12, no. 2, pp. 316–402.

[17] W. Edwards, "Japanese Archaeology and Cultural Properties Management: Prewar Ideology and Postwar Legacies" [in:] A Companion to the Anthropology of Japan. Blackwell Companions to Social and Cultural Anthropology, ed. J.E. Robertson, Wiley-Blackwell, Oxford 2005, pp. 36–49.

highlighted by the disappearance of human beings during mid-twentieth-century conflicts. More institutionally, the text also created the Committee for the Protection of Cultural Heritage, headed by the then Prime Minister of Japan, Shigeru Yoshida 吉田 茂 (1878–1967).

In the case of movable property, however, the post-war period was marked by a lively black market in cultural goods within a battered economy. Collectors' sales also intensified in order to escape the 1946 tax reform that taxed these items,[18] and some items were given in dation to pay the new property taxes that had been introduced. In this field of movable property, the law established the criterion of 'high artistic or historical interest' for all cultural property, with the exception of archaeological finds, which had to be of 'high academic interest.'

The 1950 reform articulated a dual level of protection in its designation system (指定制度), which is still in force, distinguishing between 'important cultural property' and 'national treasures'. The latter is elective among the assets of the former, making up around 10% of it. Important tangible cultural property (重文, *jūbun*) is itself selected from among the tangible cultural properties inventoried by the Committee for the Protection of Cultural Property, nearly three-quarters of which consists of movable property.

Designation may take place at several levels: municipal (市定重要文化財), prefectural (県定重要文化財) or national (国定重要文化財), but the designation measure may mention a combination of levels in the cultural interest. The 'designation' (指定制度) is made by decree after a preliminary report and consultation with a sub-committee of specialists, who apply indicative criteria regularly revised and published by the Kunaishō.[19] The designation decision is then published in the Official Journal, and a classification certificate is subsequently issued to the property owner. Nearly 13,000 properties have been designated as important cultural assets, two-thirds of which are movable. As far as buildings are concerned, in addition to individual designations, by decision of the Diet (the Japanese Parliament), all properties listed as Unesco World Heritage Sites are automatically designated as *jūbun*.

In parallel, there is a lighter procedure, known as 'registration' (登録制度) as a 'tangible cultural property' (登録有形文化財, *tōroku yūkei bunkazai*). However, it is aimed almost exclusively at immovable property, and essentially provides access to low-interest loans for the restoration of sites and public funding for half of the costs incurred by owners. For the few movable properties concerned, registration mainly opens the door to support for the display of cultural heritage via the National Institutes for Cultural Heritage (独立行政法人国立文化財機構, *Dokuritsugyōseihōjin Kokuritsubunkazaikikō*). This category of 'registered tangible cultural property'

[18] Supreme Commander of the Allied Powers, *Weekly Report*, vol. 77–78, Natural Resources Section, Tokyo 1947, p. 16.

[19] *Bunja database*: bunka.nii.ac.jp (accessed: 1.06.2024).

(有形登録文化財, *Yūkei tōroku bunkazai*) added in 1996 provides useful protection for some twentieth-century creations, and since 2004 for arts and crafts.

Among the mass of 'designated' jūbun. property, the most selective core, that of national treasures (國寶, *kokuhō*), includes property 'of exceptional interest or special value to the Japanese people'. In addition to later designations, all objects recognised as *kokuhō* under the Empire according to old laws were classified *jūbun*, and many of them designated *kokuhō* under the new system, from the first wave of classification begun in the summer of 1951. Administrative practice, moreover, referred to the other properties designated at that time as 'new national treasures' (新国宝, *shinkokuhō*) to distinguish them from those designated under the previous laws.

4. 1950–2024: Developments in Japanese law in relation to the new emerging categories of patrimony

Since this 1950 text, which constitutes the matrix of all contemporary Japanese legislation on cultural heritage,[20] the system was very modestly amended in 1954 in the categorisation of important cultural property, going from three to four categories of *jūbun*, so as to add 'folk documents' (民俗資料, *minzoku shiryō*), derived from the 1975 category 'folk cultural property' (民俗文化財, *minzoku bunkazai*) to designate items of ethnological heritage. A new and independent category was also dedicated in 1954 to buried cultural property (埋蔵文化財, *Maizō bunkazai*), which was further clarified and diversified with the 1975 reform.

At the same time, the 1966 law on the protection of former capital cities strengthened the protection of historic sites and landscapes by introducing an authorisation system. The legislator emphasised the link between these sites and the many national treasures they contain. This period of analysis of the gaps in protection since the law of 1950 also led to increased protection for the country's western architecture from the 1960s onwards, essentially as part of the policy of designation. The 1975 reform also extended the system of designating buildings to all Japanese municipalities, via two categories of designation for this purpose: 'traditional building group protection areas' (伝統的建造物群, *Dentōteki kenzōbutsu-gun*) and 'important protected district' (重要伝統的建造物群保存地区, *Jūyō Dentōteki Kenzōbutsu-gun Hozon-chiku*).

20 L.V. Prott., T. Kono, W. Kowalski, M. Cornu, *Témoins de l'histoire : Recueil de textes et documents relatifs au retour des objets culturels*, UNESCO, Paris 2011, p. 191.

From then on, the management of heritage policy was decentralised to the prefectures[21], but it was not until 1999 that the classification policy became their responsibility.

At central level, the system also underwent a major institutional change when, in June 1968, the Bureau of Cultural Affairs of the Ministry of Education and the Commission for the Protection of Heritage and the Commission for the Protection of Cultural Property were merged to create the Agency for Cultural Affairs (文化庁, *bunkachō*), currently attached to the Ministry of Education, Culture, Sports, Science and Technology, known as *Monbushō* (文部省). At the end of the millennium, the system of protection was amended very slightly on several occasions, in particular by opening up the concept of national treasure with the recognition of 'great value from the point of view of world culture, as irreplaceable treasures of the nation' (art. 27 of the revised 1950 law). In 1996, an emergency classification procedure was also created, originally aimed primarily at buildings awaiting designation as important cultural assets but whose condition required rapid intervention by the State.

The latest reform of the 1950 law in 2004, in the wake of the Convention on the Protection of Cultural and Natural Heritage adopted in Paris on 16 November 1972, created a new category of 'cultural landscapes' (文化的景観, *bunkateki keikan*), and also placed greater emphasis in intangible cultural heritage law on techniques among 'folk cultural goods' (民俗文化財, *Minzoku bunkazai*), linking them with 'Living National Treasures' (*below*). This twofold entanglement of tangible movable heritage with, on the one hand, natural heritage and, on the other hand, with persons who possess knowledge or know-how, including heritage conservation (文化財の保存技術, *Bunkazai no hozon gijutsu*), sets Japanese law apart from contemporary Western law.

5. The protection regime for designated *jūbun* and *kokuhō*

In May 2024, a total of 14,051 items of movable property had been granted the status of important cultural property (*jūbun*), including 1,021 national treasures (*kokuhō)*, made up mainly (90%) of items of Japanese origin; the 10% of foreign items were mostly historical testimonies of Chinese Buddhism.

The distinction between national treasures and other important tangible cultural property, however legal, remains essentially symbolic. There are, in fact, no

[21] I. Takashi, « L'évolution de la protection du patrimoine au Japon depuis 1950 : sa place dans la construction des identités régionales » [The Evolution of Heritage Preservation in Japan since 1950 and its Role in Constructing Regional Identities], trans. L. Nespoulous, *Ebisu. Études japonaises* 2015, no. 52: *Patrimonialisation et identités en Asie orientale*, p. 2146.

provisions specific to national treasures, with the exception of the obligation to restore them. For both types of property, the law places responsibility on the owners of registered property, whether public or private, who are required to ensure its proper conservation, under the supervision of the Agency for Cultural Affairs. Registration requires authorisation for any physical movement of the designated items of furniture, and they cannot be permanently exported. Similarly, any sale, exchange, gift, or bequest must be authorised by the public authorities. Theft and unauthorised alteration and destruction are specifically criminalised by special provisions.

In return for the restrictions imposed on the owners of these exceptional assets, they benefit from various tax advantages, and the tax levied on them may be partially or fully waived. Owners also receive support and advice on how to manage their tangible personal property, in particular with regard to safekeeping, proper preservation and even restoration. Under the terms of the law, the owner of a designated property is responsible for its care, conservation and, where appropriate, restoration. What is more, the owner is obliged to make every effort to organise its annual exhibition to the public in the event of public aid for conservation. Since art. 8 of the 1897 law, Japanese law has provided a more general incentive to exhibit, in that it provides for financial compensation in the event of deposit in a public museum institution for a minimum period of five years.

6. From tangible to 'Living National Treasures'

Japanese law was one of the first countries to give legal consideration to the issue of intangible cultural heritage,[22] and served as an example in the design of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage adopted in Paris by the UNESCO General Conference on 17 October 2003, as well as in other national legislation.[23] France, for example, introduced the title 'Master of Art' in 1994, based on the Japanese model of Living National Treasures. From 1975 onwards, the protection of cultural heritage went beyond tangible movable and immovable property to include techniques for preserving these assets, in

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[22] C. Alassimone, *Protection du patrimoine intangible et politique culturelle au Japon*, unpublished doctoral thesis, Université Bordeaux III.

[23] E. Bitauld, « Comparaison des systèmes nationaux de trésors humains vivants de la Corée, de la Thaïlande, des Philippines, de la République tchèque et de la France, en vue de l'évolution du système français en fonction des objectifs de la convention sur le patrimoine culturel immatériel », Résumé de la communication présentée le 16 juin 2006 à la Réunion des conseillers à l'ethnologie et des ethnologues régionaux, Mission à l'ethnologie, Dapa, Ministère de la culture, 2006, p. 26.

recognition of the gradual disappearance of traditional craftsmen as a result of industrialisation.[24]

Today, Japan is often highlighted in studies on the transmission of know-how, techniques and practices, when talking about the category of 'Living National Treasures.' Although this popular expression is commonly used, in society and in administrative circles, to refer to people certified as 'conservators of important intangible cultural property' (重要無形文化財保持者, *Jūyō Mukei Bunkazai Hojisha*), the legal framework laid down by the 1950 law only applies to sites, and movable and immovable property.

However, while the expression 'Living National Treasure' (人間国宝, *Ningen Kokuhō*) is not a legal concept but a popular expression, it is derived from the legal linguistic history traced in this contribution, and relies on the categorisation of *jūbun,* and, in particular, important intangible cultural property (重要無形文化財, *jūyō mukei bunkazai*) to dedicate an elective category to intangible heritage. For example, exceptional mastery of a technique or art that links tradition and transmission[25] through contemporary practice gives the right to funding of two million yen per year, and additional financial support for public demonstration and professional transmission as part of apprenticeship to these craft arts (ceramics, lacquer, woodwork, etc.) and performing arts (nō, kabuki, etc.).

Certification of such skills can be carried out by prefectures and municipalities, and includes two categories: performing arts (芸能, *geinō*) and craft skills (工芸技術, *Kōgei Gijutsu*). Recognition can take place on three scales: through individual certification (各個認定, *Kakko Nintei*), collective (総合認定, *Sōgō Nintei*), or as part of diffuse practices to a preservation group (保持団体認定, *Hoji Dantai Nintei*) reserved for fine crafts.

In 2024, there were 116 people certified (the maximum allowed by the Japanese government) as still living, among the almost four hundred people who were recognised as 'Living National Treasures'. The popularity of this term bears witness to a legal vocabulary that is itself a heritage.[26]

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[24] K. Harumi, « La labellisation Trésor national vivant dans le contexte du mouvement Mingei au Japon » [in:] *Les labels dans le domaine du patrimoine culturel et naturel*, ed. Ph. Tanchoux, Presses universitaires de Rennes, Rennes 2020, pp. 389–400.

[25] A. Noriko, "Excellence and authenticity: 'Living National (Human) Treasures' in Japan and Korea", *International Journal of Intangible Heritage* 2014, no. 9, pp. 37–51.

[26] See more on this dynamic: N. Fiévé, « Patrimoine et architecture au Japon : note sur les mots du monument historique » [in:] *L'abus monumental. Actes des Entretiens du Patrimoine*, ed. R. Debray, Fayard, Paris 1999, pp. 323–345.

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Legal acts

Decree of 23 May 1871 for the conservation of antiquities and ancient things
Law no. 49 of 5 June 1897 on the protection of ancient temples and shrines
Law of 15 December 1897
National Treasures Preservation Act of 1 July 1929
1933 Law on the Preservation of Important Fine Arts
Imperial Household Economy Act of 1947
Law no. of 30 May 1950 for Cultural Heritage Protection
Convention on the Protection of Cultural and Natural Heritage adopted in Paris on 16 November 1972
UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage adopted in Paris by the UNESCO General Conference on 17 October 2003

SUMMARY

Ronan Bretel

NATIONAL TREASURES (國寳, *KOKUHŌ*), IN JAPANESE LAW: FROM ZEN BUDDHISM TO LIVING NATIONAL TREASURES

The concept of ‘national treasure’(國寳, *kokuhō*) appeared in Japanese law in 1897. But it was not until the Law of 30 May 1950 that it was backed by a real legal regime. This transliteration is the modernised version of 國寳, originating in Chinese Buddhism, in which the Sōtō tradition speaks of 重國寳, *Jūkokuhō*, ‘important treasure of the country.’ The link between movable cultural heritage and Japan’s national history also revolves around the central role played by the ‘three sacred treasures of Japan’ (三種の神器). Since 1950, the concept, which is indifferent to the oppositions between movable and immovable, tangible and intangible, has been developed in the light of the new categories of heritage that have emerged. The expression has even left the strict confines of the law and entered

everyday language to designate 'conservators of important intangible cultural property' (重要無形文化財保持者), commonly known as 'Living National Treasures.'

Keywords: Japan, *jūbun*, *kokuhō*, Living National Treasures, national treasures

STRESZCZENIE

Ronan Bretel

SKARBY NARODOWE (國寶, *KOKUHŌ*) W JAPOŃSKIM PRAWIE: OD BUDDYZMU ZEN DO ŻYWYCH SKARBÓW NARODOWYCH

Pojęcie „skarbu narodowego" (國寶, *kokuhō*) pojawiło się w japońskim prawie w 1897 r. Jednak dopiero w ustawie z 30 maja 1950 r. zostało wsparte przez ujęcie go w prawdziwym systemie prawnym. Ta transliteracja jest zmodernizowaną wersją 國寶, wywodzącą się z chińskiego buddyzmu, w której tradycja Sōtō mówi o 重國寶, *Jūkokuhō*, „ważnym skarbie kraju". Związek między ruchomym dziedzictwem kultury a narodową historią Japonii obraca się również wokół centralnej roli odgrywanej przez „trzy święte skarby Japonii" (三種の神器). Od 1950 r. koncepcja ta, która jest obojętna na opozycje między dziedzictwem ruchomym i nieruchomym, materialnym i niematerialnym, została opracowana w świetle nowych kategorii dziedzictwa. Wyrażenie to opuściło nawet ścisłe granice prawa i weszło do języka potocznego, w którym odnosi się ono do „konserwatorów ważnych niematerialnych dóbr kultury" (重要無形文化財保持者), powszechnie znanych jako „żywe skarby narodowe".

Słowa kluczowe: Japonia, *jūbun*, *kokuhō*, żywe skarby narodowe, skarby narodowe

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THE ARTISTRY OF TRADITION: A COMPARATIVE ANALYSIS OF CRAFT HERITAGE PROTECTION IN EUROPE AND JAPAN

1. Introduction

The evolution of civilization is gradually eroding the bond between products and their geographical roots, propelled by the dissemination of knowledge and uniform distribution. In this era of increasing standardization, there is a burgeoning appreciation for goods endowed with distinct characteristics. The value of a crafted item increases when its uniqueness is validated by tradition, establishing an enduring connection between production and environment. Crafts, serving as mirrors of centuries-old traditions, encapsulate national identity and cultural richness. The preservation of these crafts becomes a guardian of an unwritten yet meticulously cultivated heritage.

The aim of this comparative study is to provide an overview of contemporary regulations protecting the art of craftsmanship, in the context of craft products in the regulations of the EU and Japan, to gain insight into best practice and potential areas for improvement in the protection of traditional crafts globally. The protection of industrial products in both the EU and Japanese regulations has been deliberately omitted in order to narrow the scope of the comparative work. Because of the breadth and complexity of the matter at hand, the focus is mainly on the regulations concerning the protection of crafts in the context of the Living National Treasures programme and the regulations introducing the programme in Japan, and those introduced by the new Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending regulations (EU) 2017/1001 and (EU) 2019/1753 (OJ L, 2023/2411, 27.10.2023) (hereinafter: Regulation (EU) 2023/2411).

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2. Protecting craft heritage in the context of "The Living Human Treasures" programme

In the context of considering cultural heritage within the framework of specific values, the conscious adoption of protective measures is imperative.[1] The United Nations Educational, Scientific and Cultural Organization (UNESCO) consistently endeavors to undertake such actions on a global scale, notably exemplified by the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, drawn up in Paris on 17 October 2003 (*Journal of Laws* of 2011, No. 172, item 1018) (hereinafter: the 2003 UNESCO Convention). Within this legal framework, intangible cultural heritage is defined as practices, ideas, messages, knowledge, skills, instruments, artifacts, and associated cultural spaces recognized by communities, groups, or individuals as integral parts of their cultural heritage. Intangible cultural heritage, continuously reproduced in connection with the environment, the influence of nature, and historical context, imparts a sense of identity and continuity.[2] Its protection requires manifestation and materialization, with the Convention highlighting oral traditions, performing arts, and knowledge/skills associated with traditional crafts as its pivotal manifestations (art. 2 of 2003 UNESCO Convention). Currently, UNESCO fulfills the objectives of the 2003 UNESCO Convention by undertaking and inspiring actions aimed at safeguarding living heritage. It initiates and facilitates the exchange of best practices in this regard, notably through the creation of a register of intangible heritage – a system of lists[3] that highlight these values and honor the communities associated with them. One of these lists is the Representative List of the Intangible Cultural Heritage of Humanity (hereinafter: ICH List).[4] This initiative aims to highlight selected phenomena of intangible heritage and the cultural spaces associated with them on the global stage, as well

[1] Mention may be made here, for example, of: The Convention on the Protection of Cultural and Natural Heritage adopted in Paris on 16 November 1972 by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its seventeenth session (*Journal of Laws* of 1976, No. 32, item 190); UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, drawn up in Paris on 20 October 2005 (*Journal of Laws* of 2007, No. 215, item 1585); The Polish Committee for UNESCO, "Program Pamięć Świata" [The Memory of the World Program], https://www.unesco.pl/komunikacja-i-informacja/pamiec-swiata/ (accessed: 20.04.2024).

[2] J. Adamowski, K. Smyk, *Niematerialne dziedzictwo kulturowe: źródła – wartości – ochrona* [Intangible Cultural Heritage: Origins – Values – Protection], Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej Narodowy Instytut Dziedzictwa, Lublin – Warszawa 2013, p. 10.

[3] Representative List of the Intangible Cultural Heritage of Humanity, https://ich.unesco.org/en/lists?text=&country[]=00176&multinational=3#tabs (accessed: 20.04.2024).

[4] Lists of Intangible Cultural Heritage and the Register of good safeguarding practices, https://ich.unesco.org/en/lists (accessed: 20.04.2024).

as to disseminate knowledge about them.[5] The list includes such elements as: The Polonaise,[6] the Szopka tradition in Kraków[7], washi,[8] and Yuki-tsumugi.[9] Acknowledging the need for broader protection, UNESCO extends support by designating individuals as "Living National Treasures,"[10] those who embody the requisite expertise. The primary objective is to preserve knowledge and skills linked to culturally significant intangible heritage. This protection not only bestows public recognition but also provides resources, such as grants and subsidies, supporting skill consolidation, development, training programs, and documentation efforts. Designees must demonstrate excellence, commitment, and the ability to pass on knowledge to prevent the disappearance of intangible heritage. Various countries adhering to the Convention have adopted titles such as "Bearer of the Tradition of Folk Crafts"[11] in the Czech Republic, "Master of Arts and Crafts"[12] in Poland, or "Living National Treasure"[13] in Japan. Despite recommendations for implementing the protection of Living National Treasures, its full realization for cultural heritage remains inadequate, as is illustrated later in this article via the example of Japan.

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5 M. Rozbicka, "National Heritage Institute in the process of implementing in Poland the provisions of the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage" [in:] *Niematerialne dziedzictwo kulturowe: doświadczenia w ochronie krajów Europy Środkowej i Wschodniej oraz Chin. 10-lecie wejścia w życie Konwencji UNESCO z 2003 roku w perspektywie zrównoważonego rozwoju* [Immaterial Cultural Heritage Experience in the protection of Central and Eastern European countries and China 10th anniversary of the entry into force of the UNESCO Convention of 2003 in view of sustainable development], ed. H. Schreiber, Narodowy Instytut Dziedzictwa, Warszawa 2017.

6 K. Rząca, "Polonaise, traditional Polish Dance", https://ich.unesco.org/en/RL/polonaise--traditional-polish-dance-01982 (accessed: 20.04.2024).

7 A. Janikowski, "Nativity scene (szopka) tradition in Krakow", UNESCO, 2018, https://ich.unesco.org/en/RL/nativity-scene-szopka-tradition-in-krakow-01362 (accessed: 20.04.2024).

8 "Washi, craftsmanship of traditional Japanese hand-made paper", UNESCO, https://ich.unesco.org/en/RL/washi-craftsmanship-of-traditional-japanese-hand-made-paper-01001 (accessed: 20.04.2024).

9 "Yuki-tsumugi, silk fabric production technique", UNESCO, https://ich.unesco.org/en/RL/yuki-tsumugi-silk-fabric-production-technique-00406 (accessed: 20.04.2024).

10 *Guidelines for the Establishment of National "Living Human Treasures" Systems*, https://ich.unesco.org/doc/src/00031-EN.pdf (accessed: 20.04.2024).

11 Government Regulation 5/2003 of 16 December 2002 on Cultural Awards presented by the Ministry of Culture, https://mk.gov.cz/en/the-title-bearer-of-the-tradition-of-folk-crafts-en-1766 (accessed: 20.04.2024).

12 Article 3a of the Act of 22 March 1989 on crafts (consolidated text: *Journal of Laws* of 2020, item 2159, as amended).

13 *Cultural Properties for Future Generations: Outline of the Cultural Administration of Japan*, Agency for Cultural Affairs, Japan, Tokyo 2022, https://www.bunka.go.jp/tokei_hakusho_shuppan/shuppanbutsu/bunkazai_pamphlet/pdf/93693501_01.pdf (accessed: 20.04.2024).

3. Protection of craft heritage in Japan's legislation

3.1. Historical background

During the difficult period of World War II for the preservation of craft arts in Japan, many works of material art were destroyed by warfare.[14] These were in danger of extinction because of a number of factors which included the recruitment of soldiers into the Japanese army, an aging population, mortality among artists, the presence of fewer artists willing to continue their artistic work during and after the war[15] as a result of the suspension and marginalization of the state's conservation policy. The end of World War II, because of hyperinflation and a reluctance to cultivate traditional crafts caused by Japan's defeat in World War II, also marginalized the protection of cultural heritage. This lasted until the fire in 1949 at the Horyuji Temple, Japan's oldest wooden structure with Buddha wall paintings. This provided animpetus for the establishment of the Law for the Protection of Cultural Properties in 1950,[16] under which cultural property was protected under three categories: tangible (covering both movable cultural property such as crafts and sculptures along with immovable property such as temples and buildings). The second category was historical sites, including the ruins of Japan's ancient capitals, along with natural monuments and landscapes. A further category included intangible cultural assets including performing arts or music played on traditional instruments such as the *shamisen*.[17] The implementation of the protection described above was the responsibility of institutions of a local nature involving local governments in cooperation with central institutions of the national government.[18] The wide-ranging

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[14] D. Fedman, K. Cary, "A Cartographic Fade to Black: Mapping the Destruction of Urban Japan during World War II", *Journal of Historical Geography* 2012, vol. 38, no. 3; I. Trifu, "Reform in Late Occupation Japan. The 1950 Law for the Protection of Cultural Properties", *Journal of Japanese Law* 2017, no. 43, p. 212; N. Noriaki, "Heritage Management in Present-day Japan" [in:] *The SAGE Handbook of Modern Japanese Studies*, ed. J.D. Babb, SAGE Publications Ltd, London 2015.

[15] I. Trifu, "Reform in Late Occupation Japan…", p. 212, G.R. Scott, "The Cultural Property Laws of Japan: Social, Political, and Legal Influences", *Pacific Rim Law & Policy Journal* 2003, vol. 12, no. 2, p. 45, N. Noriaki, "Heritage Management…"; J.R Rutkowski, "Imperialist Legacies in East Asia: a comparative analysis of Living National Treasures in Japan, China, Korea, and Mongolia", A thesis submitted to the School of Graduate Studies Rutgers, The State University of New Jersey, New Brunswick, New Jersey, 2021, https://rucore.libraries.rutgers.edu/rutgers-lib/66735/ (accessed: 20.04.2024).

[16] E. Kakiuchi, "Cultural heritage protection system in Japan: current issues and prospects for the future", *Gdańskie Studia Azji Wschodniej* 2016, issue 10, pp. 7–8.

[17] Shamisen: The Magic of Japanese Instruments (Japanese Traditional Music), https://www.youtube.com/watch?v=by4g6_uQleo (accessed: 28.02.2024).

[18] E. Kakiuchi, "Cultural heritage…", p. 12.

scope of the above-mentioned act also regulates measures to safeguard "Living National Treasures" – artists, often craftsmen, representing the highest degree of mastery in the relevant techniques and arts.[19]

3.2. Living National Treasures Program

The government's primary objective in introducing this program is to ensure the transmission of traditional craftsmanship to future generations. Recognition of holders can take one of three forms: individual, collective, or group acknowledgment.[20] The agency responsible for conferring the title is the National Commission for the Protection of Cultural Properties, which has categorized cultural goods into specific general groups: ceramics, dolls, textile arts, metal, paper, lacquer, bamboo, and carpentry.[21] These categories define a particular group of products without specifying names or verbal designations. The procedure aims to protect craftsmen characterized by the highest degree of artistic craftsmanship in their own, often niche, field. This does not imply that a craftsman must be the most outstanding representative of a general field representing a broad Japanese tradition (e.g., pottery). Instead, it protects their artistic craftsmanship within a specific type of craft work, such as polychrome enamel glazing on porcelain.[22]

3.3. Procedure

The process of awarding the title of Living National Treasure in Japan involves multiple stages. Initially, the Cultural Affairs Agency appoints a National Commission for the Protection of Cultural Properties (NCPCP), comprising experts across various crafts and arts, including researchers, architects, writers, historians, art curators, and a representative from the Ministry of Education, Culture, Sports, Science, and Technology. This commission identifies individuals or groups eligible for the title, creating a list of former and current Living National Treasures based on the allocated annual budget for grants.[23] The National Commission selects

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[19] Agency for Cultural Affairs of Japan, "Intangible Cultural Properties", https://www.bunka.go.jp/english/policy/cultural_properties/introduction/intangible/ (accessed: 20.04.2024).

[20] B.C Adachi, "Preserving the Intangible: Japan's Living National Treasures", *Craft Horizons* 1978, vol. 38, no. 5; K. Kikuchi, "The Training Course for Safeguarding of Intangible Cultural Heritage 2011 – session 1: Japanese Administrative System for Safeguarding ICH", 1.02.2011, https://www.irci.jp/assets/site/2011PartnerProgram/en/session1.html (accessed: 20.04.2024).

[21] J. Allen, "National Living Treasures: Japan's Living Embodiments of Culture", *Unseen Japan*, 28.03.2023, https://unseen-japan.com/japan-national-living-treasures/ (accessed: 20.04.2024).

[22] Agency for Cultural Affairs of Japan, "Intangible Cultural Properties", https://www.bunka.go.jp/english/policy/cultural_properties/introduction/intangible/ (accessed: 20.04.2024).

[23] J.R Rutkowski, "Imperialist Legacies in East Asia…", p. 21.

a maximum of 116 potential title bearers,[24] considering the significance of specific traditional fields. In addition to the budget, the recognition of a specific traditional field as "important" by the National Commission is also crucial.[25] An example of an individual with this title is Yasumasa Komiya, known for his expertise as a dyer of "Edo Komon" kimono fabrics.[26] Legal criteria for selection include acquiring skills in Japan, a deep-rooted connection to Japanese tradition passed down through generations,[27] and the ability to pass on knowledge and skills to successors.[28] Additional criteria include high artistic standing, craftsmanship,[29] and the creation of practical works.[30] Upon approval of initial candidates, the Committee of Examining Experts, comprising scholarly researchers, professors, and experts in specific fields, examines the eligibility prerequisites.[31] Documents on candidates' profiles are publicized[32] in e.g *The Japan Times*, and after deliberations by the Council for Cultural Affairs,[33] the Minister of Education, Culture, Sports, Science, and Technology makes the final decision, submitted for approval by the full government cabinet.

This approval is implemented through individual (*Kakko Nintei*), collective (*Sogo Nintei*), and conservation group (*Hoji Dantai Nintei*) certification. The title has a state character and is associated with national recognition. Receiving the title is not only an honor and a distinction but also comes with certain obligations to preserve the protected heritage. The Living National Treasure title can also be given to those who are engaged and are masters in their own fields, such as playing traditional instruments, ceremonial tea brewing, and flower arranging (*ikebana*[34]). The grant awarded for this title amounts to 2 million yen (approx. 12,250 euros).[35]

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24 D. Mcowan, "The Living National Treasures of Japan", *Dai Ichi Arts, Ltd.*, 14.03.2023, https://www.daiichiarts.com/blog/57/ (accessed: 20.04.2024).

25 T. Kono, "The Legal Protection of the Intangible Cultural Heritage in Japan" [in:] *The Legal Protection of the Intangible Cultural Heritage: A Comparative Perspective*, ed. P.L. Petrillo, Springer International Publishing, Cham 2019.

26 K. Grzybczyk, *soft power, a prawo własności intelektualnej* [Asian soft power, and intellectual property law], Wolters Kluwer, Warszawa 2024, p. 96.

27 T.Y. Hui, J. Bremen, E. Ben-Ari, *Perspectives on Social Memory on Japan*, Brill, Kent 2005.

28 "Living National Treasures – the link between past, present and future", TOKI, 17.08.2023, https://www.toki.tokyo/blogt/2023/8/9/living-national-treasures-the-link-between-past-present-and-future (accessed: 20.04.2024).

29 J.R Rutkowski, "Imperialist Legacies in East Asia…", p. 21.

30 This is how, for example, swords are counted as a protected craft, due to their tradition of usefulness, or dolls displayed on *tokonama*, the use of which relates to the decoration of a traditional Japanese home, intended to demonstrate the lavishness of a particular home.

31 J. Allen, "National Living Treasures…"

32 J.R Rutkowski, "Imperialist Legacies in East Asia…", p. 24.

33 "Living National Treasures…"

34 *Ibidem.*

35 J. Allen, "National Living Treasures…"

The main purpose of conferring these titles is to preserve traditions and pass on skills through diverse activities. Government funding supports skill maintenance, improvement, and educational activities, decided by the title holder. Examples include workshops, seminars, and lectures at universities. In addition, the products produced must be of a practical nature and must not be produced for decorative purposes. Traditional craft learning, often within families, relies on meticulous observation of technique of the master (*sensei*).[36] This enduring practice, rooted in ancient methods, involves strict teaching, learning from mistakes,[37] and striving for perfection. It imparts not just skills but also philosophy, historical context, and spiritual rituals, ensuring cultural continuity. However, Japan's westernization, low profitability, strict adherence requirements, and material unavailability contribute to diminishing interest in these ritualistic craft techniques among new apprentices.[38] Furthermore, the craftsmen themselves, who hold the above-mentioned title, emphasize the drawbacks of the formalization and establishment of procedures for granting the title of Living National Treasures. They highlight the pressure of creation and the significant responsibility that comes with increasing expectations, which can lead to premature death or hinder the actual development of cultural heritage.[39] This pressure arises from the inability to create unusual pieces, as artists are often constrained to produce only traditional art.

Additionally, the overly formalistic procedures associated with documenting their works prevent artists from genuinely focusing on the intangible, long-lasting rituals that enable the creation of artworks that are national heritage.[40] The organization of the above-mentioned educational activities is handled by The Japan *Kogei* Association.[41] In the context of the further creation and development of traditions, mention should be made of NFT's "ON-KO-CHI-SHIN" project[42], part of the "JINP" (Japan Inspired NFT Portal), which presents a digital representation of works by *kogei* artists, including Living National Treasures. Its creative director is

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36 T. Y. Hui, J. Bremen, J. Ben-Ari, *Perspectives on Social Memory…*; "Living National Treasures…"

37 J. Allen, "National Living Treasures…"

38 "Living National Treasures..."

39 T. Y. Hui, J. Bremen, J. Ben-Ari, *Perspectives on Social Memory…*

40 Conclusions after discussions with Living National Treasures at the international conference entitled. "Jikihitsu – the signature of the artist. The presence of Japanese tradition in contemporary Polish art", Warsaw, 10–12 June 2019.

41 *Handbook for the Appreciation of Japanese Traditional Crafts*, https://www.nihonkogeikai.or.jp/en, (accessed: 20.04.2024).

42 CyberZ Inc., "Announcing the launch of 'ON-KO-CHI-SHIN,' an NFT project in which the 'Living National Treasures' worldly showcase the captivating legacy of the Japanese *kogei* in hopes to preserve the traditional cultures", PR Newswire, 30.01.2023, https://www.prnewswire.com/news-releases/announcing-the-launch-of-on-ko-chi-shin-an-nft-project-in-which-the-living-national-treasures-worldly-showcase-the-captivating-legacy-of-the-japanese-kogei-in-hopes-to-preserve-the-traditional-cultures-301733113.html (accessed: 20.04.2024).

"RK" , whose goal is to pass on the *kogei* tradition to future generations. The project offers unique NFTs, emphasizing the importance of preserving cultural practices in both the traditional and digital realms. Purchasers of the NFT are not entitled to any intellectual property rights, prohibiting reproduction, editing, or alteration. Only non-commercial use on social media platforms is permitted.

4. Protection of crafts under the Agreement between the European Union and Japan for an Economic Partnership

In the context of the protection of craft products in Europe, mention should be made of the new Regulation (EU) 2023/2411, effective from 2025, which introduces comprehensive Europe-wide protection of geographical indications for craft and industrial products.

The regulation aims to protect these products from imitation, even in the realm of domain names on the Internet. The genesis of this regulation lies in the recognition of the potential to individualize goods by indicating their geographical origin,[43] which prompted the adoption of legislation to protect against unfair competition and unlock economic potential.[44] Regulation (EU) 2023/2411, while not an isolated piece of legislation,[45] is a response to the need to preserve craft products representing traditions passed down from generation to generation.

Because of the introduction of the above-mentioned protection in 2025, it should be assumed that, as in the case of geographical indications for food and wine products, cooperation between EU and Japan in this regard will take place on the basis of the Agreement between the European Union and Japan for an Economic Partnership signed on 17 July 2018 (OJ L 330/3, 27.12.2018) (hereinafter: EPA). Pursuant to it, both Parties shall establish or maintain in their territories a system of registration and protection of the said indications, which shall include an official way of making the list of registered geographical indications available to the public, an administrative procedure to verify whether a geographical indication identifies

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43 The Agreement for the Suppression of False or Misleading Designations of Origin of 14 April 1891 (World Intellectual Property Organisation),TRT/MADRID-IP/001; Paris Convention for the Protection of Industrial Property adopted in Paris on 20 March 1883 (as amended on 28 September 1979), World Intellectual Property Organisation, TRT/PARIS/001.

44 E. Nowińska, *Prawo własności przemysłowej, wzory przemysłowe, znaki towarowe, oznaczenia geograficzne, topografie układów scalonych* [Industrial Property Law, industrial designs, trademarks, geographical indications, topographies of integrated circuits], vol. 2, Kantor Wydawniczy Zakamycze, Kraków 2005, p. 83.

45 An example of the act: Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ L 343, 14.12.2012, pp. 1–29).

a good as originating from the territory of a Party or from a region or locality in the territory of that Party, when a given quality, reputation or other characteristics of a good are essentially attributed to its geographical origin, an objection procedure that allows the legitimate interests of third parties to be taken into account and a procedure for cancellation of the indication in question, taking into account the legitimate interests of third parties and users of the registered geographical indications in question (chapter 14 art. 23 of EPA). The registration procedure provided for in the new EU regulation is similar to the existing protection of agricultural products and foodstuffs,[46] as well as trademarks (art. 25 para. 1 of the Regulation (EU) 2023/2411), including a regulated opposition procedure of two months at the national level and three months at the EU level for those entitled to object. The lists of said designations protected in the EU as well as Japan, in addition to bringing commercial benefits, provide consumers with a guarantee of authentic products from two regions with rich culinary and cultural wealth.[47]

5. Conclusions

Comparing the legal solutions described above, it is possible to come to the conclusion that legislators clearly recognize the need to effectively respect cultural heritage in international, European, and national regulations, despite the differences in the catalogs in terms of the main premises underlying consideration of cultural heritage. Preservation and protection of the traditions of a given region, the desire to individualize a given commodity and, as a result, increase its value are only some of them. It should also be pointed out here, for example, that the historical-sociological relationship between the initiators of the protection of cultural heritage of UNESCO and Japan see its goals in a demonstration of state repentance for and rejection of the militaristic image of Japan,[48] and the pursuit of internal restructuring of its own cultural policy and reintegration into international society.[49] Regardless of the rationale for emphasizing the value of preserving the heritage of handicrafts, efforts and endeavors to protect them should be viewed positively,

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[46] I. Barańczyk, *Ochrona prawna oznaczeń geograficznych* [Legal Protection of Geographical Indications], Difin, Warszawa 2008, p. 233.

[47] "EU-Japan: An additional 42 geographical indications protected for both sides", 27.09.2023, https://www.eeas.europa.eu/delegations/japan/eu-japan-additional-42-geographical-indications-protected-both-sides_en (accessed: 20.04.2024).

[48] Japan was the first member allowed to join UNESCO after World War II ; see: T. Kono. „The Legal Protection…", p. 55.

[49] T. Saikawa, "Returning to the International Community: UNESCO and Post-War Japan, 1945–1951" [in:] *A History of UNESCO: Global Actions and Impacts*, ed. P. Duedahl, Palgrave Macmillan UK, London 2016.

given the need to continue national practices of a cultural nature and protect the intangible cultural heritage resulting from traditional handicrafts. Legislators in both Europe and Japan appear to have noticed a link between the protection of traditions and international cultural promotion.[50] The protection of food-like products, present in European regulations since 1950,[51] has its genesis in this assumption. The initiative to extend the scope of crafts recognized by the Living National Treasures program eligible for protection and recognition with the aforementioned Japanese national title to culinary products is consistent with this. In this context, it is important to point out that the Japanese efforts to recognize the traditional dietary cuisine *Washoku* as an intangible cultural heritage of humanity by UNESCO are related to its ritual significance.[52] As an addendum, it is also important to highlight the amendment of the Law on the Protection of Cultural Property to create a registration system for intangible cultural property and intangible folklore property in 2022. According to its content, intangible goods considered important in Japan will be registered if they require protection. Entities with registered goods will be able to receive state financial support.[53] A global initiative aimed at safeguarding endangered crafts is worth noting: ARCH (Alliance for Rare Crafts Heritage), which brings together partners who combine their knowledge and networks in a think tank dedicated to rare crafts and to initiating collaborative interventions.[54]

The institutionalized and formalized nature of craft heritage protection seems a necessary and appropriate form of documenting and an attempt to materialize what is intangible and most valuable – traditions and skills passed down from generation to generation that can develop into cultural promotion on an international level. The basis of any materialized craft work is the labor-intensive acquired skills of the artisan, which is noted by attempts to protect intangible cultural heritage in international regulations and, as a result, also in Japanese law regulating this matter.

Opponents of the protection described stress that bureaucratic efforts to record and preserve artistic techniques by empirical means are inherently limited in their ability to effectively maintain and transmit the artistic methods mentioned. Each,

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[50] In this context, it is crucial to point the revision of the National Tourism Promotion Act in Japan per K. Kikuchi, "The Training Course…", p. 7.

[51] Paris Convention for the Protection of Industrial Property (as amended on September 28, 1979); The Agreement for the Suppression of False or Misleading Designations of Origin.

[52] "Japan Eyes Adding Culinary Masters as 'Living National Treasures'", *Kyodo News+*, 4.01.2020, https://english.kyodonews.net/news/2020/01/59188737e10b-japan-eyes-adding-culinary-masters-as-living-national-treasures.html (accessed: 20.04.2024).

[53] *Cultural Properties for Future Generations Outline*…; "Special Feature 1: Development of Cultural Policies that Promote Social and Economic Values", Ministry of Education, Culture, Sports, Science and Technology – Japan, https://www.mext.go.jp/b_menu/hakusho/html/hpab201701/detail/1418065.htm (accessed: 20.04.2024); K. Grzybczyk, *Azjatycki soft power*…, p. 96.

[54] "About the ARCH", https://www.thearch.org/ (accessed: 20.04.2024).

unique example of craftsmanship, both in Japan and Europe, conceals a specific technique, meaning, aesthetics, and patterns that are rooted in human experience. The memory of them is intangible, even elusive, just like the transmission of the skills involved: it takes place in the absence of words.[55] It seems difficult, if not simply impossible, to materialize the heritage in the form of word markings or titles of national character.

Paradoxically, these goals are united by the project proposed by "RK": "ON-KO-CHI-SHIN" combining *kogei* heritage with contemporary art, since the use of NFT technology makes it possible to digitize cultural heritage, which can contribute to its long-term preservation. The digital representation of the heritage created by Living National Treasures can contribute to easier preservation and making it available for future generations. However, this can take place only in the context of the present-day disadvantages of the necessarytechnology, which include energy-intensive mining processes of blockchain networks (such as Ethereum) or security risks. Thus, thisdoes not seem to be a timeless solution or the most appropriate one. Taking into account all the aspects described above, the protection of word designations of craft products proposed by European legislation appears currently to be the best compromise, although its full effectiveness in the context of safeguarding the cultural heritage of craftsmen will only be determined over time after its full implementation.

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SUMMARY

Wiktoria Sikorska

THE ARTISTRY OF TRADITION: A COMPARATIVE ANALYSIS OF CRAFT HERITAGE PROTECTION IN EUROPE AND JAPAN

The article undertakes a comparative analysis of the protection of craft heritage in Europe and Japan, focusing on the "Living Human Treasures" program within the framework of UNESCO Guidelines for the Establishment of National "Living Human Treasures." Additionally, the study addresses the protection of crafts based on Regulation (EU) 2023/2411 concerning the protection of geographical indications for craft and industrial products, narrowing its scope to the protection of craftsmanship. It analyzes the foundations of protection, its structure, and presents examples of products qualifying for protection. The comparative study contributes to a nuanced understanding of the diverse approaches and legal frameworks employed by Europe and Japan in safeguarding their rich craft heritages. By juxtaposing the European Regulation and the Japanese "Living National Treasures" system based on UNESCO protection, the article aims to draw insights into best practices and potential areas for improvement in the protection of traditional crafts on a global scale.

Keywords: Craft heritage, Geographical indications**,** Living National Treasure

STRESZCZENIE

Wiktoria Sikorska

KUNSZT TRADYCJI: ANALIZA PORÓWNAWCZA OCHRONY DZIEDZICTWA RZEMIEŚLNICZEGO W EUROPIE I JAPONII

W artykule przeprowadzono analizę porównawczą ochrony dziedzictwa rzemieślniczego w Europie i Japonii, koncentrując się na programie „Żywe skarby ludzkości" w ramach

wytycznych UNESCO dotyczących ustanowienia krajowych „żywych skarbów ludzkości”. Ponadto badanie dotyczy ochrony rzemiosła w oparciu o rozporządzenie 2023/2411 w sprawie ochrony oznaczeń geograficznych produktów rzemieślniczych i przemysłowych. Przeanalizowano podstawy ochrony, jej strukturę oraz przedstawiono przykłady produktów kwalifikujących się do ochrony. Studium porównawcze przyczynia się do lepszego zrozumienia różnych podejść i ram prawnych stosowanych w Europie i Japonii w celu ochrony ich bogatego dziedzictwa rzemieślniczego. Poprzez zestawienie europejskiego rozporządzenia i japońskiego systemu „Living National Treasures” opartego na ochronie UNESCO artykuł ma na celu wyciągnięcie wniosków na temat najlepszych praktyk i potencjalnych obszarów wymagających poprawy w zakresie ochrony tradycyjnego rzemiosła w skali globalnej.

Słowa kluczowe: dziedzictwo rzemieślnicze, oznaczenia geograficzne, żywy skarb narodowy

LUIZA KLICZKOWSKA*

"JAPAN HERITAGE": AN EXEMPLARY PROJECT PROMOTING LOCAL DEVELOPMENT TROUGH JAPANESE CULTURAL PROPERTY

1. Introduction

The history associated with heritage protection in Japan represents a relatively concise legislative evolution, interspersed with periods of stagnation and intensified efforts towards legal safeguarding of heritage. Over several decades, Japan has witnessed the enactment of pivotal laws aimed at expanding the scope of heritage protection, including the preservation of historical sites, scenic locations, and national monuments. Despite periods of economic decline and global conflict, the commitment to heritage preservation has endured, exemplified by legislative actions such as the Act on the Protection of Cultural Property in 1950[1] – a watershed document that introduced critical categories and frameworks for the safeguarding of tangible and intangible cultural assets.

This legislative development underscores Japan's unwavering dedication to preserving its cultural heritage and the ongoing evolution of legal instruments designed to foster appreciation, conservation, and promotion of the nation's diverse cultural tapestry. The legislative milestones reflect not only a commitment to safeguarding tangible remnants of the past but also a profound recognition of the intangible traditions and narratives that define Japan's cultural identity. Through these legislative endeavours, Japan continues to navigate the dynamic intersection of heritage preservation, community revitalization, and global cultural engagement, ensuring the enduring legacy of its cultural heritage for generations to come.

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[1] Act No. 2014 of 30 May 1950 on the Protection of Cultural Property (文化財保護法 – *Bunkazai hogo-hō*). The translation of the Act from Japanese into English was prepared by the Japan Centre for International Cooperation in Conservation, Tokyo National Research Institute for Cultural Properties.

Unlike Europeans, the Japanese prioritize the authenticity of their heritage based on form rather than substance.[2] It is grounded in two primary foundations: cultural and natural conditions. Shintoism and Buddhism teach that all material in the world is imbued with equal spiritual significance. Therefore, the original building material of a monument does not hold priority value in heritage protection. Essentially, a centuries-old temple element is considered as valuable as its modern counterpart under these principles.[3]

According to Japanese religious beliefs, each element possesses equal spiritual strength and value. Additionally, the intersecting principles of Shintoism, Buddhism, and Confucianism view immortality through cycles and repetition rather than constancy, reflecting eternity in Japanese culture. Japanese culture also emphasizes the non-material aspects of life. This leads to the core of its understanding of cultural authenticity. Japanese heritage preservation mirrors this approach to religion and life, valuing the intangible essence of culture over its physical form. Japanese perceive a cultural property's essence through its function, which often dictates its form.[4] Also, it has to be noted that in Japan, wood has been the primary building material as a result of the country's terrain and climate.[5] Using such unstable building materials exposed to harsh weather and frequent fires would make it impossible to preserve monuments for more than a few centuries, if the European approach to cultural heritage authenticity were followed. Therefore, it is imperative to recognize the Japanese methodology for comprehending the authenticity of cultural property as a suitable one. It is prudent to incorporate the unique natural and cultural circumstances of each region into the legislative development process.

A compelling example of raising broader awareness about the essence of Japanese cultural heritage – focusing not just on its physical form but also on its creation techniques, building materials, associated customs, and the individuals involved – is the Japan Heritage initiative, led by the Agency for Cultural Affairs since 2015. Unlike World Heritage Sites, which primarily prioritize site protection, the Japan Heritage program transcends this approach by highlighting the narratives and historical contexts that underlie cultural assets. Since its inception, the Japan Heritage program has played a leading role in recognizing and supporting local communities as they demonstrate their rich cultural heritage through unique historical elements and cultural properties. Through Japan Heritage, local communities are empowered

[2] K. Schatt-Babińska, "Europocentryczne i dalekowschodnie spojrzenie na wartość autentyzmu zabytku – dokument z Nara jako próba pogodzenia odmiennych poglądów" [A eurocentric and Far Eastern look at the value of authenticity of a monument – a document from Nara as an attempt to reconcile different views], *Gdańskie Studia Azji Wschodniej* [The Gdańsk Journal of East Asian Studies] 2016, issue 10, pp. 28–39.

[3] A. Buchaniec, *Autentyzm – podstawa wartości w konserwacji zabytków architektury*, unpublish doctoral thesis, Faculty of Architecture, Cracow University of Technology, Kraków 1999, p. 116.

[4] *Ibidem*, p. 112.

[5] Approximately 90% of cultural goods are made from timber.

to share their distinctive stories with the world, contributing to cultural preservation and promoting Japan's national heritage on a global stage. In subsequent sections of this article, I endeavor to discuss this topic, exploring its intricacies to achieve a more comprehensive understanding.

2. Legislative history of heritage protection laws in Japan

The legislative history of heritage protection laws in Japan represents a pivotal evolution spanning over a century, culminating in a sophisticated framework aimed at preserving the nation's rich cultural legacy. The journey commenced in 1897 with the inaugural legal act addressing Japan's cultural heritage protection, signifying a concerted effort to systematize the diverse cultural assets of the country. This legislative endeavour gained further impetus following Japan's victory in the First Sino-Japanese War (1894–1895),[6] which instilled a renewed sense of patriotism and national identity. As historical sources indicate, Japan experienced a mental awakening following this triumph, redirecting its ambitions towards global leadership and reigniting patriotic sentiments among its populace: "The defeat of a formidable China by a Japan that had previously been perceived as underdeveloped underscored Japan's emergence as a mature partner or adversary to nations with imperial aspirations. This conflict profoundly heightened Japanese awareness of their national identity (…)."[7] Consequently, there arose a pronounced emphasis on safeguarding Japan's national heritage, prompting legislative measures from 1897 to allocate funds for conservation and to enact laws for the protection of ancient temples and significant cultural artifacts. The significance of this act is underscored within the context of Japan's current cultural heritage protection laws, notably for introducing the concept of "national treasure" (*kokuhō* 国宝) into the lexicon, a term still in use today. Over subsequent decades, Japan witnessed the enactment of pivotal laws aimed at expanding the scope of heritage protection, including the preservation of historical sites, scenic locations, and national monuments (1919, 1929, 1933).

The following several years were characterized by a period of stagnation in terms of the protection of Japan's cultural heritage.[8] This lasted until the tragic consequences of the fire that occurred in 1949, which damaged part of the Hōryūji Temple in Nara Prefecture.[9] This event led to a renewed focus on the issue of

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[6] J. Tubielewicz, *Historia Japonii*, Ossolineum, Wrocław 1984, pp. 372–374.

[7] *Ibidem,* p. 373.

[8] The outbreak of World War II and the diminished morale among the Japanese population resulting from the war's outcome influenced this issue.

[9] The Act on the Protection of Cultural Property in 1950; see more: G.R. Scott, "The cultural property laws of Japan: Social, political, and legal influences", *Pacific Rim Law & Policy Journal* 2003, vol. 12, no. 2, pp. 315–402.

heritage protection in Japan and resulted in the issuance of the Act on the Protection of Cultural Property in 1950.

Initially, the Act distinguished three major classes of cultural property. Tangible Cultural Property is listed as the first class and is divided into two subclasses: tangible property, including works of fine arts and artistic crafts, such as paintings, sculptures and others; and real estate, including buildings and other structures. The second major class in the Act includes intangible cultural goods, including performing arts and music. The third class defines the most important monuments – thus creating the most discretionary category of all those indicated in the Act – including those of particular historical and aesthetic value, including entire historical areas, such as historic cities or their districts.[10] The Act of 1950 on the Protection of Cultural Property has been amended many times (1954, 1968, 1975, 1996, 1999, 2004, 2007). At the same time, the catalogue of cultural property grew with new classes.[11]

3. The Role of Tradition and Local Community in Tangible and Intangible Cultural Property

Considering the unique nature of Japan and how customs and folk traditions have profoundly shaped its culture, it is important to emphasize the influence of folk elements on the Japanese cultural heritage. In 1954, a significant step was taken when the category of folk cultural property was included as a distinct class in art. 2 of the Act of 1950 on the Protection of Cultural Property. Initially, only the material aspects of folk cultural property were legally protected. However, about twenty years later, in the 1970s, amendments to the law reflected the rapid changes in Japanese lifestyle by extending protection to the intangible aspects of this heritage. As a result, folk cultural property under the law was categorized into tangible elements (such as costumes, instruments, and traditional architecture) and intangible elements (including etiquette, customs, traditions, and performing arts). In Japan, culinary practices, food production techniques, folk religious beliefs, and traditional residential architecture are also considered intangible aspects of folk culture.

Within the context of this discussion, a specific type of legally protected property that deserves attention is conservation techniques, which were introduced into the law through an amendment in 1975. While the logical classification of this category among legally protected cultural property may raise some concerns due to its

[10] The Act on the Protection of Cultural Property in 1950; G.R. Scott, "The cultural property laws…", pp. 315–402.

[11] See more: K. Zeidler, L. Kliczkowska, "Prawna ochrona dziedzictwa kultury w Japonii – zarys tematyki", *Azja-Pacyfik* 2021, issue 24, pp. 117–128.

unique nature – neither strictly tangible nor intangible – it is important to note that this aspect was acknowledged by the Japanese legislator.[12]

As was noted in the introduction, Japanese cultural property is defined as a tangible representaextion of history, initially focusing on the physical remnants of the past. The true value of the heritage is seen in the process of creation, in function, and in the story behind it.

4. Japan Heritage: stories behind the national treasures

Japan Heritage is a unique initiative spearheaded by the Agency for Cultural Affairs, focusing on the recognition and celebration of stories that embody Japan's rich cultures and traditions. Unlike World Heritage Sites and designated Cultural Properties, Japan Heritage emphasizes the revitalization of local communities by linking narratives, regions and cultural properties to create collective spaces of cultural significance.[13] While World Heritage Site listings focus mainly on site protection, Japan Heritage goes beyond by introducing stories and historical contexts behind them.

The key aspect of Japan Heritage is the recognition of Cultural Narratives, which are stories rooted in historically unique traditions and local customs that have been passed down through generations. These narratives highlight the core themes of an area's cultural appeal, incorporating tangible and intangible cultural properties. The main purpose of initiating the Japan Heritage program was to significantly enhance the recognition and distinctiveness of the featured areas, promote local identity and foster community pride. The designation as Japan Heritage aims to be a catalyst for cultural engagement and tourism development, exploiting the unique narratives and traditions associated with these regions. Through strategic promotion and preservation efforts, Japan Heritage plays a pivotal role in revitalizing local economies and safeguarding Japan's diverse cultural heritage, ensuring its enduring legacy for generations to come.

However, to qualify for Japan Heritage status, narratives must meet specific criteria. There is also a strict application process to be followed. The applicant can be an individual or organization committed to regional revitalization initiatives through Japan's cultural heritage. This may include a Regional Tourism Development Corporation (DMO), a Tourist Association, or other entities affiliated with the Council engaged in regional revitalization efforts. Depending on the above, Japan Heritage status is categorized into local and collective narratives. It is required that a subject of the application must consider at least one nationally designated Tangible or

[12] See more: *ibidem*, pp. 117–128.

[13] See more: "Japan Heritage", https://www.bunka.go.jp/english/policy/cultural_properties/japan_heritage/ (accessed: 27.04.2024).

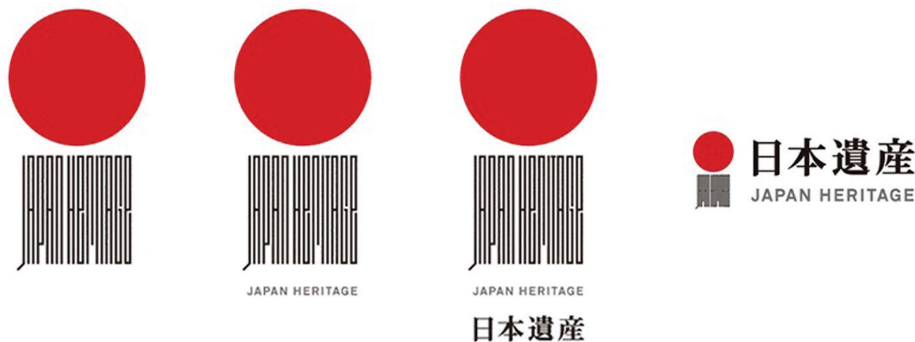

Fig. 1. Japan Heritage logo[14]

Intangible Cultural Property. The other key criterion is the appropriateness of the cultural narrative, ensuring it reflects the community's history and distinctive characteristics.

Submitted narratives undergo rigorous screening by the Japan Heritage Review Board. Criteria for review include the narrative's historical distinctiveness, future development strategy using cultural properties and making efforts toward local revitalization through effective domestic and international promotion.[15] Recognized communities receive financial support and expert guidance for three years to further promote their cultural stories. Moreover, The Agency for Cultural Affairs appoints Ambassadors of Japanese Heritage, who collaborate in promoting Japanese Heritage extensively both domestically and internationally.

The Agency for Cultural Affairs has been promoting this project since 2015, recognizing and supporting local communities' efforts to demonstrate their rich culture and traditions through unique historical elements and cultural properties. Municipal and prefectural governments across Japan submit applications detailing their cultural narratives, which highlight local sites, architectural structures, industries, and customs.

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[14] The logo is designed by the graphic artist Takashi Sato and can be displayed on pamphlets that present the narratives designated as Japan Heritage by the Agency. Agency for Cultural Affairs, https://japan-heritage.bunka.go.jp/ja/about/logomark/ (accessed: 27.04.2024).

[15] See more: *ibidem*.

5. Contextualizing cultural heritage: Deepening appreciation through historical narratives

Mitsunobu Nakajima from the Agency for Cultural Affairs explains that Japan Heritage aims to recognize the broader historical and geographical contexts of local cultural properties, moving away from isolated interpretations.[16] The project seeks to deepen appreciation for cultural heritage by contextualizing it within broader historical narratives. "We want to send out information on the attraction of Japanese culture in and outside the country, and press for regional revitalization," said Hakubun Shimomura, minister of education, culture, sports, science and technology.[17] The initial selection of Japan Heritage sites spanned 24 prefectures and was chosen from 83 proposals submitted by 40 prefectures. This list continues to expand annually, with a current count of 104 designated positions. The list comprises various types of cultural heritage with unique narratives regarding towns, buildings, education institutions, sacred places, and portable artifacts (such as Japan's First "Travel Book," *Travels in Sunshū* relating the journeys of Yaji-san and Kita-san, #094 on the list), associated with nationally designated Tangible or Intangible Cultural Property.

It is important to emphasize that the Japan Heritage program aims to highlight the multifaceted value of Japan's Tangible and Intangible Cultural Heritage by showing local impact within the context of national heritage. This program promotes both national and local sites, which mutually contribute to cultural preservation and promotion. Let us examine specific instances from Japan's Heritage list to illustrate how the program highlights the extensive breadth and profound cultural significance associated with Japan's Cultural Property.

Consider, for instance, the entry ranked 15 on Japan's Heritage list, featuring "Henro: The Pilgrimage Route and 88 Temples of Shikoku." It is linked to temples designated as National Treasures and highlights the cultural and historical significance of the traditions and customs related to them. The Shikoku Pilgrimage is a revered journey that encompasses 88 Buddhist temples associated with the monk Kūkai (Kōbō Daishi) on the island of Shikoku. During this pilgrimage, participants seek enlightenment while surrounding themselves with the sacred temples, natural landscapes, local climate, people, culture, and stone Buddhas along the route. This profound process, integral to Japan's National Treasures, was deemed significantly

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[16] T. Yamabe, "Japan Heritage: Telling the Tales Behind Historical Sites", *Highlighting Japan*, February 2019, https://www.gov-online.go.jp/eng/publicity/book/hlj/html/201902/201902_09_en.html (accessed: 27.04.2024).

[17] Kyodo, "Government names 18 'Japan Heritage' sites in tourism drive", *The Japan Times*, 24.04.2015, https://www.japantimes.co.jp/news/2015/04/24/national/government-names-18-japan-heritage-sites-tourism-drive/ (accessed: 27.04.2024).

important and designated as Japan Heritage. The spiritual pilgrimages of the Japanese are a longstanding tradition handed down from generation to generation. Today, it still remains a popular and distinctive element of the island's cultural landscape, attracting a diverse array of pilgrims (including foreigners), known as *henro,* who embark on the journey for ascetic, spiritual, and tourism-related reasons.[18]

Another example from the Japan Heritage list is "Kakaa Denka: The Silk Story of Gunma" (#002 on the list), from Gunma Prefecture. The tangible properties associated with this heritage site include the Tomizawa Family Residence, the Nagai Method Sericultural School Laboratory House, the Former Obata-gumi Silk Production Brick Warehouse, the Former Model Factory, and the Kiryū Nenshi Gōshi Gaisha Office Building.[19] In 2014, it was also designated as a UNESCO World Heritage Site.[20] The Tomioka model complex and its related sites played a crucial role in revitalizing sericulture and the Japanese silk industry in the late nineteenth century, marking a significant milestone in Japan's transition to the modern industrialized era. The narrative behind it, recognized as Japan Heritage, underscores the profound impact of local women on the silk production process in Gunma. When the Tomioka Silk Mill was established in 1872, girls from across the country were brought in to work as silk workers, while large quantities of cocoons were collected from the region as raw material. This Japan Heritage narrative stands as a testament to their crucial role, dedication, and hard work in facilitating Japan's transition to the modern era; it embodies an image of women active both indoors and outdoors.[21]

Overall, Japan Heritage serves as a platform to explore the interconnectedness between history, culture, and local communities, offering visitors new ways to experience Japan's rich cultural tapestry. The project not only celebrates cultural diversity but also revitalizes local communities by promoting their unique heritage on a global scale.

6. Japan Heritage: A success story

The impact of Japan Heritage initiatives is exemplified by the notable increase in tourism and international attention achieved by recognized communities. A compelling illustration can be found in Misasa Town, located in Tottori Prefecture, which experienced a substantial influx of international visitors following the incorporation of its historical narrative into tourism promotion efforts. In 2015, Misasa Town

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18 I. Reader, "34. Legends, Miracles and Faith in Kōbō Daishi and the Shikoku Pilgrimage" [in:] *Religions of Japan in Practice*, ed. G.J. Tanabe, Princeton University Press, New Jersey 1999.

19 F. Dallas, *Meiji Revisited: The Sites of Victorian Japan*, Weatherhill, New York 1995, pp. 4–22.

20 Tomioka Silk Mill and Related Sites, https://whc.unesco.org/en/list/1449/multiple=1&-unique_number=1992 (accessed: 27.04.2024).

21 *Kakaa Denka* is associated with the slogan "girl power" known all over the world.

was designated as a Japan Heritage site centered on the theme "A Site for Purifying the Six Roots of Perception and Healing the Six Senses – Japan's Most Dangerous National Treasure and a World-Famous Radon Hot Spring." This designation integrated the challenging mountain paths and steep slopes leading up to Nageiredo, a small Buddhist temple designated as a National Treasure, into its narrative, highlighting the town's rich cultural and natural heritage. As a result, the number of international visitors staying in Misasa Town grew by nearly 3 times compared to the time before Japan Heritage recognition.

Many Japanese local communities harbour unique stories related to Japan's national cultural heritage; yet these narratives often remain relatively unknown, both domestically and internationally. The Japan Heritage program was established to address this issue. As part of the application process, there is a requirement to present a comprehensive promotion plan following recognition. This step is crucial for achieving increased tourist engagement, which is a primary objective of the Japan Heritage Program. Another notable success story is that of Tsuwano Town in Shimane Prefecture, recognized for its narrative presenting "100 Views of Tsuwano" from the late Edo period to the present day. The town's promotional strategy included establishing a guidance centre featuring images and panels that elucidate this historical narrative, as well as introducing new ways to explore the town. Consequently, it experienced nearly a twofold increase in tourist traffic within just one year of receiving Japan Heritage recognition.[22]

In conclusion, the impact of Japan Heritage initiatives on local tourism economies is profound and transformative. The notable increase in tourism and international attention experienced by recognized communities like the two mentioned underscores the success of this program. Japan Heritage serves as a beacon of cultural appreciation and community revitalization, offering immersive experiences that celebrate Japan's diverse cultural tapestry. Through this program, local communities are empowered to share their unique stories with the world, contributing to the promotion and preservation of Japan's national cultural heritage on a global scale.

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[22] T. Yamabe, "Japan Heritage…"

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SUMMARY

Luiza Kliczkowska

"JAPAN HERITAGE": AN EXEMPLARY PROJECT PROMOTING LOCAL DEVELOPMENT TROUGH JAPANESE CULTURAL PROPERTY

The article presents a concise overview of Japan's legislative evolution spans from early efforts in the late nineteenth century to modern initiatives like the Japan Heritage initiative launched by the Agency for Cultural Affairs in 2015, reflecting Japan's adaptive and progressive approach to heritage preservation. The author also explores the philosophical foundations underlying Japan's unique perspective on heritage authenticity and examines the influential role of tradition and local communities in shaping Japanese Cultural Properties. Furthermore, the Japan Heritage program is introduced, along with an analysis of its local and global impact. The author underscores Japan's ongoing commitment to navigating heritage preservation within the dynamic interplay of tradition, local community engagement, and global cultural exchange.

Keywords: cultural heritage protection in Japan, cultural heritage law, Japanese cultural properties, Japan heritage

STRESZCZENIE

Luiza Kliczkowska

„JAPAN HERITAGE": PROJEKT WSPIERAJĄCY ROZWÓJ LOKALNY POPRZEZ PROMOWANIE JAPOŃSKIEGO DZIEDZICTWA KULTURY

W artykule zaprezentowano pokrótce ewolucję legislacyjną Japonii, począwszy od wczesnych działań podejmowanych pod koniec XIX wieku po nowoczesne inicjatywy, takie jak inicjatywa Japan Heritage uruchomiona przez Agencję ds. Kultury w 2015 r., która odzwierciedla adaptacyjne i postępowe podejście Japończyków do ochrony zabytków. Zbadano również filozoficzne podstawy unikatowego spojrzenia Japończyków na autentyczność zabytków oraz wpływ tradycji i społeczności lokalnych na kształtowanie się japońskich dóbr kultury. Ponadto bardziej szczegółowo przedstawiono założenia dotyczące programu Japan Heritage, z uwzględnieniem jego lokalnego i globalnego wpływu. W podsumowaniu zwrócono uwagę na trwałe zaangażowanie Japonii w ochronę zabytków, co wiąże się także z dynamiczną interakcją tradycji, zaangażowania społeczności lokalnych i globalną wymianą kulturową.

Słowa kluczowe: ochrona dziedzictwa kultury w Japonii, prawo ochrony zabytków, zabytki japońskie, zabytki niematerialne

DAN WEI*
YI FU**

A COMPREHENSIVE LEGAL APPROACH TO CULTURAL HERITAGE PROTECTION IN CHINA

1. Introduction

With five thousand years of history and a total area of approximately 9.6 million square kilometres, China possesses abundant cultural heritage resources. There are 57 properties in China that have been included in the World Heritage List, while 43 elements are in the List of Intangible Cultural Heritage of The United Nations Educational, Scientific and Cultural Organization (UNESCO).[1] As a non-renewable and irreplaceable resource, Chinese cultural heritage has encapsulated the collective memories of the whole nation. When talking of cultural heritage protection, the public usually concentrate on maintaining cultural relics, displaying cultural relics in collections, standardizing the market for cultural relic trade, and strengthening the protection of cultural heritage, while scant attention is given to the examination of the legal approach. This essay mainly reflects on the legislation, its implementation, and litigation in China.

This article first introduces the legal framework of cultural heritage protection in China, which ranges from constitutional law to local laws and regulations. After examining the characteristics of the Chinese legal structure, it further discusses typical cases published by the Supreme Court and indicates that departmental laws provide a dominant legal basis for cultural heritage protection. Finally, it explores

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1 UNESCO, "Browse the Lists of Intangible Cultural Heritage and the Register of Good Safeguarding Practices", https://ich.unesco.org/en/lists (accessed: 20.03.2024); UNESCO, "World Heritage List", https://whc.unesco.org/en/list/ (accessed: 20.03.2024).

several core topics in litigation, including different verdicts, public engagement and the discretion possessed by procurators.

2. Legislation: The comprehensive legislative mode

2.1. The legal hierarchy of cultural heritage protection

On 4 December 1982, the Constitution of the People's Republic of China (hereinafter: the Constitution) was enacted, raising the protection of cultural heritage to the national level.[2] In 2006, China designated the second Saturday of June in the annual year as Cultural Heritage Day. In China, cultural heritage is mainly divided into two categories, tangible and intangible cultural heritage, with specialized legislation relating to each. This article mainly examines cultural relic protection in China.

In the last century, China introduced a dedicated law in 1982, the Cultural Relics Protection Law (hereinafter: CRPL), which has undergone multiple revisions over the years. The latest revised version of CRPL has been open for public comment since October 2023. CRPL enshrines the ownership of collectives, individuals, and state. It encompasses a wide variety of types, including sites of ancient culture, ancient tombs, ancient architectural structures, cave temples, stone carvings, and mural paintings. CRPL further proposes provisions on unmovable cultural relics, movable cultural relics, cultural relics in collections, and entry and exit of cultural relics to and from the country.The state has also introduced specialized Intangible Cultural Heritage Law (hereinafter: ICHL). Usually, intangible cultural heritage refers to various traditional cultural manifestations such as traditional rituals, festivals, arts, calligraphy, music, acrobatics, crafts, medicine, and so on. ICHL mainly addresses the issue of research using corresponding records and collections, the establishment of catalogues of representative items, and rights and obligations for the representative predecessor. CRPL and ICHL collectively constitute the fundamental basis for cultural heritage protection.

Other than legislation, there are administrative regulations published by the State Council, like the Regulation for the Implementation of the Cultural Relics Protection Law (hereinafter: RICRPL), Notice of the State Council on Strengthening Protection of Cultural Heritages (hereinafter: NSPCH), and so on. Although they are not issued by the legislative body of the nation, they are still authoritative and enforceable, with specific and concrete rules, furnishing guidance for local government entities. For instance, the NSPCH stresses the protection of cultural relics in major construction projects, with corresponding approval, ratification, and filing

[2] Art. 22 of the Constitution indicates the state's responsibility to protects scenic spots and historic sites, precious cultural relics and other important historical and cultural heritage.

systems. Other than the State Council, departments in charge are also eligible to enact rules for reference. For example, Administrative Measures for the Protection of World Culture Heritages is issued by the former Ministry of Culture (currently the Ministry of Culture and Tourism).

At the regional level, local laws and regulations are published by the local people's congress and its committee. Those local laws and regulations are much more specific and only hold jurisdiction within the scope of their administrative district. For instance, as Shanxi Province is home to numerous pieces of distinctive cave architecture and ancient buildings, it enacted Regulations of Shaanxi Province on the Protection of Famous Historical and Cultural Cities, Towns and Villages. As China consists of 56 ethnic groups and there are 155 ethnic autonomous areas, the Constitution also grants the national autonomous governments the autonomy to issue regulations, protecting and sifting through the nationalities' cultural heritage, vigorously developing cultures in their respective areas.

As we can see, the legal framework of cultural heritage encompasses various levels, including the central, provincial, municipal, and county (district) levels, with laws and regulations effective within respective jurisdictions. As is shown in the figure below (fig. 1), China has established a legal hierarchy for cultural heritage protection. Among the various modes of protection, the Constitution takes the leadership with limited articles outlining principles of cultural heritage protection. The second level is the two specific pieces of legislation, the CRPL and the ICHL. The third level mainly consists of administrative regulations issued by the State Council like PICRPL. The fourth level consists of local regulations, autonomous

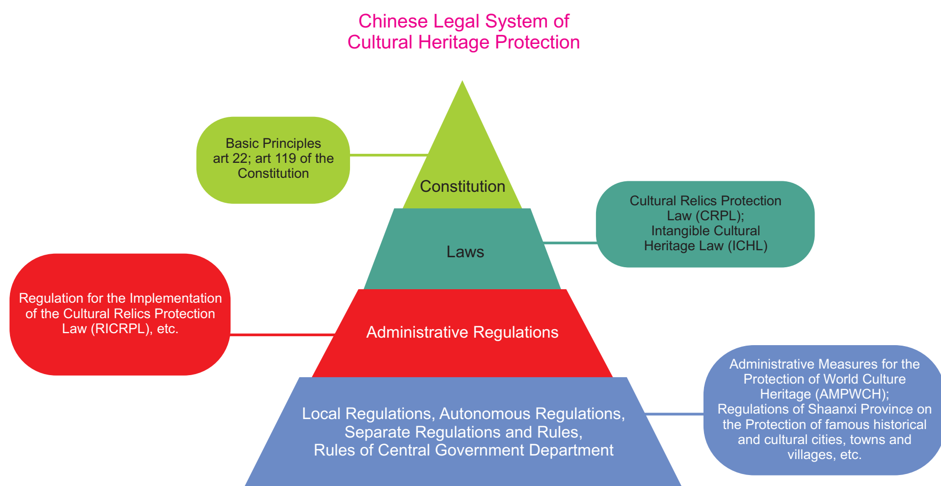

Fig. 1: Chinese Legal System of Cultural Heritage Protection
Source: Author's own elaboration.

regulations, separate regulations and rules in the national autonomous regions, and rules from the Central Government Department. As the hierarchy descends, the scope of application and legal enforceability gradually narrows down.

2.2. Characteristics of Chinese legal culture heritage protection

Upon examination, Chinese legal culture heritage protection is characterized by a broad scope with meticulous classification and pronounced administrative management.

On the one hand, ancient China has a long-standing history with a prosperous economy and robust national achievements. Consequently, it bequeathed a wealth of valuable tangible and intangible cultural treasures. For instance, the Forbidden City, which served as the royal palace in the Ming and Qing Dynasties for five centuries, contains nearly 10,000 rooms with their furnishings, crafts, numerous temples, and garden views. It acts as a treasure chest with extremely valuable relics, containing both movable and unmovable relics. Other than items of tangible cultural heritage, there are also many extrordinary inventions, traditions, and other intangible relics. For instance, the well-known Four Great Inventions – paper making, gunpowder, printing, and the compass-encapsulate the wisdom of the ancient Chinese people. In the contemporary era, creations like the Four Great Inventions are eligible to be protected by intellectual property rights or as commercial secrets. As these inventions are historical, techniques are no longer shrouded in secrecy and are shared worldwide. Their intrinsic value in the past has far transcended time and space, and the dedication to preserve them also serves as a respectful acknowledgement of their historical significance. Consequently, the current Chinese cultural heritage system is very broad, encompassing both tangible cultural heritages and intangible cultural heritages with historical, artistic, and scientific value.

On the other hand, the two basic laws, the CRPL and the ICHL, try to impose specific rights and obligations on entities concerned. For example, the CRPL focuses on the protection, rescue, reasonable utilization and management of cultural relics. The Department of Cultural Relics Administration is responsible for preserving unmovable cultural relics by designating historical and cultural sites, planning preservation projects, delimiting a certain area for construction control, and keeping the ruins of relics free from reconstruction. Under the CRPL, archaeological excavations shall be permitted, registered, appropriately kept, and their findings transferred to state-owned cultural relics collections. There are also many rules for cultural relics in institution collections, like setting different grades with compiled files, holding exhibitions, conducting scientific research, and imposing specific requirements for allocation, exchange, and borrowing of state-owned cultural relics. As cultural relics hold scientific, historical, and cultural value and are matters of public interest, they pertain to matters of an administrative nature. This character is part

of the distinction from other legislation like the Civil Code in China (hereinafter: the Civil Code), which adjusts civil relationships among entities of equal standing.

However, excessive intervention and management on the part of the administrative authorities might lead to the "nine dragons in charge of water" phenomenon.[3] For instance, when the cultural relics to be protected have the attributes of cultural resources, ecological environment, state-owned property, and heroic protection objects simultaneously, administrative bodies such as the Cultural Relics Protection Bureau, the Ecological Environment Bureau, and The Veterans' Affairs Bureau are involved.[4] They may conduct administrative inspections, make administrative decisions, and publish regulations, bringing about administrative and management overlap. Once one body encounters difficulties in management, it may shirk responsibility. Various bodies may behave as if they are kicking a ball one to the other.

2.3. Comparative study with other jurisdictions

Upon reviewing the legislative status quo of cultural heritage protection in major countries (regions) in the world, we can find the legislative mode mainly includes three types: the separate legislative mode, the comprehensive legislative mode, and the unified legislative mode. In some European countries, protection is dispersed across various pieces of legislation but ultimately converges towards unified legislation. For instance, France has issued a specified French Cultural Heritage Code (*Code du Patrimoine*), as the result of a significant endeavour to compile laws and regulations formulated previously.[5] In the meanwhile, other countries like Great Britain and the United States prefer to adopt separate legislative modes. For example, the USA issued the Native American Graves Protection and Repatriation Act in 1990. Based on the hierarchy analysis, China adopts a comprehensive mode, that is, issuing a basic law as guidance, supplemented by specific rules formulated in separate departmental laws.[6]

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[3] J. Jiao, "Unified Measures Drive Successful Conservation", *China Daily*, 15.08.2023, https://www.fujian.gov.cn/english/news/202308/t20230815_6227867.htm (accessed: 22.03.2024).

[4] J. Dong, T. Ming, "Wén wù hé wén huà yí chǎn bǎo hù jiǎn chá gōng yì sù sòng de fǎn sī yǔ jìn lù – yǐ 33 gè diǎn xíng àn lì wéi qiè rù diǎn" 文物和文化遗产保护检察公益诉讼的反思与进路－以33个典型案例为切入点 [Reflection and Approach of Procuratorial Public Interest Litigation on the Protection of Cultural Relics and Cultural Heritage: based on the 33 typical cases], *Shànghǎi fǎ xué yán jiū* 上海法学研究 [Shanghai Law Research Collection] 2023, vol. 12, p. 222.

[5] M. Cornu, N. Wagener, "L'objet patrimoine: Une construction juridique et politique?", *Vingtième siècle* 2018, vol. 1, p. 42.

[6] R. Chai, Y. Liang, "Wǒ guó wén wù bǎo hù lì fǎ mó shì yán jiū" 我国文物保护立法模式研究 [A Study on Legislative Models of Cultural Relics Protection of China], *Xī běi dà xué xué bào (Zhé xué shè huì kē xué bǎn)* 西北大学学报(哲学社会科学版) [Journal of Northwest University (Philosophy and Social Sciences Edition)] 2016, vol. 46, no. 1, p. 77.

Different countries enact specific characteristic designs. France has placed a strong emphasis on expert involvement in the process of restoration, extension, and demolition of peripheral buildings. Italy has developed a comprehensive and strong theory of preventive conservation of architectural heritage, which is specifically shown in the maintenance and restoration in the 2004 National Code of Cultural Heritage and Landscape.[7] Britain embraces diverse funding, which includes fiscal appropriation, loans, and donations.[8] Since 1994, the National Lottery Heritage Fund has awarded £ 8.8 billion to more than 51,000 heritage projects across the UK.[9] In Recent years, China has placed significant emphasis on cultural retrieval. According to statistics from UNESCO, more than 1.6 million cultural relics from China are scattered in 200 museums in 47 countries, and "millions are in private collections."[10] Consequently, the latest draft for the CRPL grants the state the right to reclaim cultural relics lost abroad through theft or other illegal exit, and this right is not subject to limitation. The recovery of lost cultural heritage is intertwined with China's national interests and cultural sentiments. In the long term, China will dedicate itself to fostering an international legal framework that is increasingly conducive to the repatriation of cultural heritage.

3. Implementation: A doctrinal approach to department law

3.1. Three typical cases relating to cultural heritage protection

In February 2023, The Supreme People's Court in China issued verdicts on 15 typical cases relating to cultural heritage protection, covering a wide range of cultural relics, including movable relics of various grades and immovable relics of various types.[11] Among the 15 cases, 6 are criminal cases, 5 are civil cases, 2 are criminal cases collateral to civil proceedings, and 2 are administrative cases, as the chart shows below (table 1).

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7 S. Della Torre, "Italian perspective on the planned preventive conservation of architectural heritage", *Frontiers of Architectural Research* 2021, vol. 10, pp. 108–116.

8 Y. Wang, "Wén huà yí chăn fă jiào chéng" 文化遗产法教程 [Guide to Cultural Heritage Law], Shāng wù yìn shū guăn 商务印书馆 [Commercial Press], Beijing 2012, pp. 286–287.

9 Heritage Fund, https://www.heritagefund.org.uk/ (accessed: 28.04.2024).

10 UNESCO, "The Fight against the Illicit Trafficking of Cultural Objects: the 1970 Convention: Past and Future, information kit, 2013, https://unesdoc.unesco.org/ark:/48223/pf0000227215_eng (accessed: 20.04.2024).

11 The Supreme Court of China, 7 February 2023, https://www.court.gov.cn/zixun/xiangqing/388291.html (accessed: 12.04.2024).

Table 1. Typical cases from the Supreme Court

	Plaintiff	Defendant	Case type	Cause of action
1	procurator	Jiao and 14 other individuals	criminal case	theft, concealing the proceeds of crime
2	procurator	Lu, Luo	criminal case	vandalism
3	procurator	Zhang, Wang	criminal case	negligent destruction of cultural relics
4	procurator	Huo and 10 other individuals	criminal case	resale of cultural relics
5	procurator	Yao and 11 other individuals	criminal case	robbing, excavating ancient cultural sites, ancient tombs, and reselling cultural relics
6	procurator	Miao and 2 other individuals	criminal case	excavation of ancient tombs
7	procurator	Wang and 2 other individuals	criminal incidental civil litigation	excavation of ancient tombs
8	procurator	Sun and 14 other individuals	criminal incidental civil litigation	excavation of ancient tombs
9	procurator	Chen	civil case	disruption of ecological environment
10	procurator	a stone processing limited company	civil case	disruption of ecological environment
11	two village committees	Oscar van Overeem (Dutch collector)	civil case	property rights disputes
12	Xuanfang Investment Management Company	Lv	civil case	breach of contract
13	Liu and 3 other individuals	Ruijin Central Revolutionary Memorial Hall	civil case	property rights disputes
14	procurator	Veterans Affairs Bureau in Jingyu County	administrative case	dereliction and neglect of duty
15	a building materials company	Culture and Tourism Sports Bureau in Lintong	administrative case	disobedience to an administrative decision

Source: The Supreme Court of China, 7 February 2023, https://www.court.gov.cn/zixun/xiangqing/388291.html (accessed: 12.04.2024).

In the six criminal cases, criminals are accused of stealing, robbery, disruption, and excavation. According to the Criminal Law in China (hereafter: Criminal Law), criminal liability can be divided into principal punishment and supplementary punishment. The principal punishments usually include control, criminal detention, fixed-term imprisonment, and the death penalty, while the supplementary punishments include fines, deprivation of political rights, and confiscation of property. In Yao's case, Yao was sentenced to death with a two-year suspension of execution. The crime of obstructing the administration of cultural relics is regulated in Criminal Law under a specific section in chapter 4. Articles 324 to 329 address illegal acts like intentional destruction of cultural relics, illegal sale, gifting precious cultural relics to foreigners, trafficking in cultural relics, private gifting of cultural relics, ancient culture or ancient tomb excavation and robbery, as well as theft from state-owned archives. If a certain illegal action falls within these articles, it will definitely constitute a criminal offence. According to legal doctrine, even if an action does not violate the articles stipulated in the section, it may also not be exempted from the penalties set forth in other general criminal provisions like stealing in art. 264.

In the five civil cases, the causes of the action predominantly fall into three types: ecological damage, property rights dispute, and rental contract dispute. As the CRPL stipulates and recognizes three types of legal ownership, the nation, collectives, and individuals, disputes over property rights and rental contracts inevitably arise. In this sense, the Civil Code can largely solve conflicts through its concrete chapters on contracts, property rights, and infringement.

The two administrative cases originate from failure in administration and disobedience to an administrative decision respectively. Under the CRPL and the ICHL, the relevant administrative departments are obligated to supervise and administer protection of cultural relics within their respective administrative jurisdictions. During the process, the administrative departments may impose administrative penalties upon a citizen, legal person, or another organization. If the concerned person deems that the administrative action infringes upon his/her lawful rights or interests, he/she can file an administrative lawsuit with a court. In addition, if the administrative department has neglected to fulfil its duties, it would be indicted by the prosecution who is obligated to supervise the case.

3.2. Application of departmental law

Law is inherently limited, and it cannot encompass all kinds of legal relations within a single statute. As mentioned, the provisions of the CRPL and the ICHL mainly pertain to administrative management clauses. However, the intricacies of social life dictate the diverse branches of law, bringing about the application of other departments of law. It is also an important approach to realize substantial fairness. For instance, the Civil Code indicates the remediation liability of the tortfeasor, who

shall afford compensation for: the permanent damage, loss of service functions until complete remediation is possible; expenses of investigation, authentication; the assessment fee relating to ecological and environmental damage and pollution removal; and the remediation fee, and other reasonable expenses. Even though there is no specific legislation for cultural heritage infringement, once cultural heritage is deemed to be an environmental site, the Environmental Protection Law (hereinafter: EPL) would be applicable, consequently giving rise to civil liabilities.

As the traditional legal model of judicial decision-making suggests, the application of law is to find a "reasoned response to reasoned argument."[12] During the process, the doctrinal analysis shall be applied to clarify the content of legal facts, while the "judicial process is the exemplification of reason".[13] Different department laws have a mission to regulate corresponding legal interests. It is natural to allocate private disputes to the Civil Code, while those that severely disrupt public order are dealt with under administrative or criminal law. During the process, precedence is accorded to specific statutory provisions, prioritizing special laws over general law ("*Lex specialis derogat generali*" in Latin). That is if the CRPL and other specific laws already contain provisions relating to a certain action, general legislation like the Civil Code or even the Constitution shall not be prioritized.

3.3. Legal lacunae: Deficiency in legal clauses and dilemmas

Although the application of departmental law and doctrinal methods is capable of solving the vast majority of cases, there are still some legal loopholes. In fact, relying solely on tenuous legal clauses to address issues may not be sufficient, and not all abstract legal principles align sufficiently with specific cases.

For instance, art. 9 of the Civil Code indicates the classic green principle that civil activities shall contribute to the conservation of resources and protection of the environment. This principle poses a duty on all civil subjects to behave in an ecological and environmentally friendly manner. It is quite understandable to apply the principle to natural resources, but this may not be suitable for application in cultural heritage protection, whose spirit lies in heritage preservation and cultural diversity.[14] As we can see, the current legal system has its deficiencies, and sometimes, the

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12 F. Cross, E. Tiller, "What is legal doctrine", *Northwestern University Law Review* 2006, vol. 100, issue 1, p. 518.

13 D.L. Shapiro, "In defense of judicial candor", *Harvard Law Review* 1987, vol. 100, issue 4, pp. 731.

14 Y. Zhang, "Cù jìn wén huà yí chăn fă lǜ tĭ xì jīng xì huà jiàn gòu", 促进文化遗产法律体系精细化建构 [Promoting the Elaboration of a Legal System for Cultural Heritage], 8 February 2023, https://www.cssn.cn/gjgc/hqxx/202302/t20230208_5586711.shtml (accessed: 23.04.2024).

principles and clauses in other pieces of legislation may not be suitable for cultural heritage protection under every set of circumstances.

Thus, it is recommended that some specific rules for cultural heritage be set. For instance, the Civil Code specifies and lists several tort liabilities, including motor vehicle traffic accidents, product liability, environmental pollution, ecological damage, ultra-hazardous activity, harm caused by a domestic animal, and harm caused by buildings or objects. It also suggests three kinds of liability: fault liability, no-fault liability, and fault presumption liability. The law has enumerated several situations for no-fault liability and fault presumption liability without specifying fault liability. This leaves uncertainty and discretion for cultural heritage infringement. If the judge considers cultural heritage infringement is not one of the specified situations, then fault liability would be applied. If the judge assumes that cultural heritage falls within the legal scope of the environment, then no-fault liability would be applied. The differences between the two liabilities would cause a tremendous burden for the infringer. Thus, it is necessary for lawmakers to consider which kinds of rules are most suitable for cultural heritage protection and to specify them.

4. Litigation: Public and private engagement

4.1. Different verdicts in administrative and civil lawsuits

When talking of public litigation, the best-known case is *China Biodiversity Conservation and Green Development Foundation v. Huazhuang Village Committee of Xuedian Town and People's Government of Xuedian Town.*[15] In this case, the defendant illegally felled a large number of ancient date trees, which fall within the scope of cultural heritage protection. During transplanting, a substantial number of ancient jujube trees perished due to non-compliance with scientific requirements. The court ultimately rendered a judgment against the defendant with corresponding liability for damages. Firstly, the defendant should cease the infringing behaviour and pay compensation of 3,616,818.9 yuan for the loss of service functions during the restoration of the ecological environment as a result of damage done to its original state. Secondly, the defendant should display an ancient jujube tree that died as a result of transplantation at the site of its relocation and set up warning signs as propaganda. Thirdly, a public apology should be conducted in the national media within 30 days after review by the court.

This case marks the success of public litigation initiated by social organizations, and served as a paramount example for the public. Usually, the administrative authority only shows up in administrative cases as a defendant. However, the cause

[15] Zhengzhou Intermediate People's Court of Henan Province (2016) Yu 01 No. 705, Minchu.

of action in this case was civil infringement, which holds that if a government authority occasions infringements on public interests, it can also be recognized as a civil party and incur corresponding liability. This marks a crucial triumph for the social organizations initiating legal action. Another significant aspect of this case lies in the formality of the liability. As we can see, the judgement placed multiple liabilities on the defendant, including compensation, apology, and setting up warning signs. According to the Civil Code, tort liability mainly includes the cession of the infringement, removal of any obstruction, and elimination of danger. It is quite common to impose compensation and fines in judgements. However, this particular judgment stands out as it mandates that the defendant carry out specific actions like setting up warning signs. This constitutes a distinctive system exclusive to public interest litigation. Traditionally, in private interest litigation, Chinese courts consistently adhere to the principle of "No Trial Without Complaint" and come to a judgment from a neutral position.[16] As public interest litigation entails the interest of the nation, the court is allowed to engage in legal proceedings in a more proactive and active manner. If the court considers the plaintiff's claim insufficient to safeguard public interests, the court has the right to require the plaintiff to change its claim or directly decide to stop the infringement and to restore the ecological environment to the original state.

On the contrary, in the same year in Zhejiang Province, five plaintiffs, as members of the Hangzhou Ancient Capital Culture Research Association, initiated an administrative claim against the Hangzhou Municipal People's Government.[17] In this case, the Southern Song Imperial City site was listed as a national critical cultural preservation unit in June 2001. Accordingly, the land plot of Southern Song Imperial City should be stringently protected. However, the government authorized a company to construct a building on this land, resulting in the destruction of the surrounding atmosphere. The five plaintiffs filed an administrative reconsideration, which was then rejected by the defendant. When the cases were brought to the court, the court considered the eligible applicants stipulated in the administrative reconsideration should be administrative counterparts or interested parties. As the plaintiffs do not have specific legal rights on the historical sites, the court considered the administrative review decision made by the defendant to be legally justified. Finally, the court dismissed the plaintiffs' claim.

The key reason lying behind the two contradictory judgements is the different causes of the action. There is no denying the fact that both plaintiffs brought the lawsuit in the public interest. However, as there are no uniform rules on cultural

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[16] C. Zhang, *Win in Chinese Courts: Practice Guide to Civil Litigation in China,* Springer, Singapore 2023, p. 135.

[17] Hangzhou Intermediate People's Court, Zhejiang Province (2016) No. 579, Zhejiang 01, Xing Chu.

heritage that can be applied, the plaintiffs of the two cases had to utilize other departments of law. Various causes of action lead to distinct law applications, accompanied by various burdens of proof. Traditional tort theory in China requires fault, conduct, damage, and causation in fault liability,[18] and if there is no reversion of the burden of proof, the plaintiff is obliged to produce evidence. Correspondingly, in an administrative lawsuit, according to the Administrative Litigation Law, the court can revoke the alleged administrative action if there is insufficiency in primary evidence, erroneous application of any law or regulation, violation of statutory procedures, overstepping of power, abuse of power, or evident inappropriateness. When the two cases are compared, the case brought by China Biodiversity Conservation and the Green Development Foundation belongs to civil infringements, while the case brought by five plaintiffs is an administrative litigation. The different burden of proof in the two cases consequently yields different judicial outcomes. Thus, it is necessary to consider the causes of action and burden of proof when initiating public interest litigations, which also raises an issue regarding litigation skills.

4.2. Public engagement

When considering public engagement in public interest litigation, there are usually two circumstances. One involves the public acting as the plaintiff, while the other pertains to public supervision.

On the public website of "Chinese Judgement Online," when we type the words "cultural relic" and "public interest litigation" in Chinese, there are a total of 142 judgements and verdicts. Among them, 83 criminal cases actually do not fall into the scope of traditional public interest litigation.[19] In the remaining 59 judgements and verdicts, there are 12 civil lawsuits and 14 administrative lawsuits, with another verdict on the execution of a criminal case. As is shown, seldom do social organizations initiate lawsuits for the sake of public interest.

There are mainly two reasons. Firstly, Chinese social organizations are not as well developed as other jurisdictions, which is significantly related to the political system. In some developed countries with democratic politics, interest groups represent the interests of their members and are eager to initiate claims. Although these claims are quite controversial, and the litigations are regarded as a tool to obtain tactical advantages, particularly gaining relatively cheap publicity, attracting public consciousness, and generating political influence,[20] the claims can still

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[18] S. Wang, "Zhōng huá rén mín gòng hé guó qīn quán zé rèn fǎ shì yì", 中华人民共和国侵权责任法释义 [Explanations to the Tort Liability Law of the People's Republic of China], Fǎ lǜ chū bǎn shè 法律出版社 [China Law Press], Beijing 2010, pp. 39–56.

[19] China Judgements Online, https://wenshu.court.gov.cn/ (accessed: 18.04.2024).

[20] D. Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective", *The Modern Law Review* 1992, vol. 55, no. 1, pp. 44–46.

induce constraints and supervision. Despite the fact that China does not have powerful interest groups because of its national conditions, Chinese people are also reluctant to initiate claims in the public interest without any encouragement. The lack of public engagement also imposes a substantial burden upon the procurator, who is meant to undertake public prosecution over criminal cases. Secondly, neither the CRPL nor the ICHL has left room for public engagement in cultural heritage protection. As mentioned, government departments play the dominant role in the whole process of cultural heritage protection, from project initiation, design, and implementation to review, acceptance, and settlement. Neither in the decision-making, implementation, or supervision process, does the relevant system have any reserved approaches for public participation.[21] Consequently, the public is in an information blind spot, and information asymmetry has led to the absence of public engagement.

In fact, China has a population of more than 1.4 billion, laying a robust personnel foundation for public litigation. By encouraging and stimulating the public, tragedy in cultural protection can largely be avoided. Here, similar experiences in the U.S.A. can be drawn upon for reference. In the U.S.A., citizen suits and the politics of private enforcement provide two models for the public to get engaged in environmental protection. The public may not sustain any injury or minimal injury-in-fact, but they play the role of "private attorneys general."[22] In recent years, China has already acknowledged the importance of public engagement, and the latest draft of the CRPL has introduced an enhanced system for public filing, complaints, and reports. It also suggested that the news media should carry out supervision through public opinion on cultural heritage protection. However, the CRPL Draft still does not induce social organizations and individuals' engagement in litigation, which remains to be further improved.

4.3. Prosecutor's discretion

In December 2023, the Supreme People's Procurator's Office issued Typical Cases of Public Interest Litigation for the Protection of Cultural Relics and Cultural Heritage, providing national guidance for local litigation practice. Among the 8 cases published, only one case is a civil lawsuit, and the others are administrative lawsuits. These cases involve a variety of illegal types and basically cover common problems

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[21] X. Li, "Gōng zhòng cān yù wén huà yí chǎn bǎo hù de gōng yì sù sòng jìn lù yán jiū" 公众参与文化遗产保护的公益诉讼进路研究 [The Way on How the Public Participate into the Cultural Relic Protection through the Approach of Public Interest Litigation], *Zhōng guó gāo xiào shè huì kē xué* 中国高校社会科学 [Social Sciences in Chinese Higher Education Institutions] 2019, issue 6, p. 81.

[22] M.S. Greve, „Private Enforcement of Environmental Law", *Tulane Law Review* 1990, vol. 65, pp. 340–374.

in cultural heritage protection, such as the destruction of cultural relics in the process of carrying out repairs.[23]

In a prosecutorial lawsuit, the procurator would firstly investigate by means of unmanned aerial photography, field investigation, and other forms of identification to confirm the illegal actions based on clues. Subsequently, it would normally issue pre-trial procuratorial advice. If the relevant administrative authority is reluctant to make corrections within the time limit set, the procurator will bring a lawsuit to the court. Typically, upon pre-trial procurator advice, most administrative authorities would make necessary corrections as recommended. This is the tacit understanding among the authorities. Different from the mechanism of separation of the powers, procurator offices and administrative organs in China are both responsible to the People's Congress, and they are reluctant to break the collegial relationships. Consequently, the procurator offices are not prone to readily file lawsuits against the administrative authorities, while the administrative authorities are also reluctant to be sued, something that might affect their annual assessment.

In fact, the procurator has quite flexible discretion on whether an administrative authority has satisfied the requirements upon pre-trial procurator's advice. Theoretically, there are three standards: behavioral standard, outcome standard, and compound standard. The behavioural standard theory implies that if the administrative authority has executed the actions as mandated by law through the designated procedures, in other words, exhausting all statutory measures, it can be considered as fulfilment of its duty.[24] The outcome standard holds that if the public interest is still in a status of infringement or risk of infringement, it can be inferred that the administrative authority has not fulfilled its statutory duties. The compound standard combines the former two theories and pays attention simultaneously to the process of administrative action and to the result.[25] Currently, there is no definitive standard for judging the legitimacy of the administrative authority's behaviour.

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23 G. Ding, "Gōng zhòng cān yù wén huà yí chǎn gōng yì sù sòng de lǐ lùn yǔ shí jiàn" 公众参与文化遗产公益诉讼的理论与实践 [Theories and Practices of Public Participation in Public Interest Litigation relating to Cultural Heritage], *Zhōngguó wénhuà yíchǎn* 中国文化遗产 [China Cultural Heritage] 2023, vol. 4, p. 60.

24 P. Qin, J. He, "Lùn huán jìng xíng zhèng gōng yì sù sòng de qǐ dòng zhì dù – jī yú jiǎn chá jī guān fǎ lǜ jiān dū quán de dìng wèi" 论环境行政公益诉讼的启动制度－基于检察机关法律监督权的定位 [Based on the Legal Supervision from the Procuratorial Organ], *Jǐ nán xué bào (zhé xué shè huì kē xué bǎn)* 暨南学报(哲学社会科学版) [Jinan Journal (Philosophy & Social Science Edition)] 2018, vol. 3, pp. 77–80.

25 Y. Yang, X. Lei, "Wén wù bǎo hù jiǎn chá gōng yì sù sòng de kùn jú yǔ chū lù – Jī yú gān sù děng bù fèn dì qū diào chá shù jù de fēn xī" 文物保护检察公益诉讼的困局与出路－基于甘肃等部分地区调查数据的分析 [The Dilemma and Approach of Public Interest Litigation of Cultural Relics Protection Prosecution–Based on the Analysis of Survey Data in Gansu and Other Regions], *Gān sù lǐ lùn xué kān* 甘肃理论学刊 [Gansu Theory Research] 2021, vol. 6, pp. 104–112.

However, the recognition of cultural heritage is comprehensive and professional, and the prosecutors may not be professional enough to certify the performance of the administrative organ, which afforded considerable discretionary latitude. Although the current system has introduced public hearings, they usually take place subsequent to the issuance of pre-trial procurator's advice.[26] In order to keep a sustaining evaluation, it is strongly advised to conduct a preliminary hearing, which involves the whole-process engagement of archaeologists, conservationists, legal experts, historians, and community representatives who are dedicated to this area and hold authoritative qualifications in this field. As the pre-procurator's advice is currently kept secret and circulated among governmental authorities, it is imperative to bring it under public supervision, as a constraint to discretion on the part of the prosecutor and as a way of preventing the abuse of power.

5. Conclusions

Cultural heritage stands as the shared treasure of the entire nation, encapsulating its history, traditions, and values. In terms of protection, China gives priority to salvage, making rational use of heritage, and strengthening administration. From the legal perspective, although various hierarchies of cultural heritage protection have been provided, there are still legal loopholes and upcoming challenges in the digital and commercial world. Judicial litigation also appeals for the active and scientific engagement of the prosecutor and the public. In fact, cultural heritage protection is not a simple task and requires sustained efforts of protection. China is dedicated to satisfying the aesthetic needs of the public, making available its profound history, and enriching the global mosaic of human civilization.

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[26] J. Liu, C. Li, "Xíng zhèng gōng yì sù sòng sù qián jiǎn chá jiàn yì de guī zé tiáo shì" 行政公益诉讼诉前检察建议的规则调适 [The Rule Adjustment of Pre-Litigation Procuratorial Advice of Administrative Public Interest Litigation], *Hé běi fǎ xué* 河北法学 [Hebei Law Science] 2023, vol. 41, no. 11, p. 77.

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SUMMARY

Dan Wei, Yi Fu

A COMPREHENSIVE LEGAL APPROACH TO CULTURAL HERITAGE PROTECTION IN CHINA

As one of the four ancient civilizations, China possesses a very large cultural heritage. China's current legal framework has adopted comprehensive legislation, covering a broad scope with meticulous classification and emphasis onadministrative implementation. Comparisons reveal that different jurisdictions exhibit distinct legislative frameworks and practices that reflect their respective national circumstances. Cases relating to cultural heritage can be divided into three types: criminal, civil, and administrative lawsuits. Specific rules are expected to be enacted on cultural heritage protection because of existing legal lacunae. Currently, litigation practice has yielded different verdicts on different causes of action in heritage-related cases. Public interest litigation necessitates the collective engagement of the entire society. The procurator system predominates in heritage-related litigation with pretrial procurator's advice, which is expected to be made available to the public.

Key words: cultural heritage protection, litigation, Chinese law

STRESZCZENIE

Dan Wei, Yi Fu

KOMPLEKSOWE PODEJŚCIE PRAWNE DO OCHRONY DZIEDZICTWA KULTURY W CHINACH

Jako jedna z czterech starożytnych cywilizacji Chiny posiadają ogromne zasoby dziedzictwa kultury. Obecne ramy prawne Chin przyjęły kompleksowe ustawodawstwo obejmujące m.in. skrupulatną klasyfikację dóbr kultury i kładące nacisk na wyraźne zarządzanie administracyjne. Z badania porównawczego wynika, że różne jurysdykcje mają odrębne ramy prawne i praktyki, które odzwierciedlają ich krajowe uwarunkowania. Sprawy dotyczące dziedzictwa kultury można podzielić na trzy rodzaje: sprawy karne, cywilne i administracyjne. Oczekuje się, że ze względu na luki prawne zostaną uchwalone szczegółowe przepisy dotyczące ochrony dziedzictwa kultury. Obecnie sądy wydają różne werdykty w różnych sprawach.

Spory sądowe w interesie publicznym wymagają zbiorowego zaangażowania całego społeczeństwa. Prokuratura dominuje w postępowaniach sądowych, udzielając porad przedprocesowych, które powinny być publikowane.

Słowa kluczowe: ochrona dziedzictwa kultury, spory sądowe, prawo chińskie

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PRESERVATION OF CULTURAL HERITAGE IN CHINA: A CASE STUDY OF BEIJING HUTONGS

1. Introduction

Cultural heritage, representing historical achievements, serves as a cornerstone of human civilization, providing an objective basis for understanding the origins, development, and transformations of society and culture.[1] China's millennia-old civilization has left behind a rich cultural legacy. As of the end of 2021, China possessed 108 million pieces (sets) of state-owned movable cultural relics and 767,000 immovable cultural relics. It boasts 56 World Heritage sites, ranking second globally. Given China's vast cultural heritage, preserving and transmitting that heritage is crucial for its cultural development. In the contemporary era, China's heightened emphasis on heritage conservation is evident through ongoing legislative developments. In the era of globalization, safeguarding cultural heritage is a paramount global imperative.[2] China's experience in preserving and developing its cultural heritage can offer valuable governance insights to other nations. Thus, this study will examine the protection and development of hutongs in Beijing's historic urban areas, serving as a case study to review China's progress in cultural heritage preservation.

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[1] Liu Fang, Wu Zhenxin, "Wenhua yichan de shuzi xushi xianxiang fenxi ji yingyong jianyi" [Analysis of Digital Narrative Phenomena in Cultural Heritage and Application Suggestions], *Digital Library Forum* 2023, vol. 19, no. 11, p. 46.

[2] Xia Jiechang, Liu Ruiyi, "Wenhua yichan baohu yu chuanchen de guoji jingyan ji zhengce qishi" [International Experience and Policy Implications for the Protection and Inheritance of Cultural Heritage], *Journal of Ghuizhou Normal University (social science)* 2023, no. 6, p. 64.

Beijing, as an ancient capital of a world civilization, boasts a cultural heritage that is unparalleled both in quantity and quality on a national level. Hutongs serve as quintessential representatives of Beijing's cultural heritage. Cultural heritage can be categorized into tangible and intangible forms. The preservation of hutongs encompasses not only the tangible cultural protection of traditional architectural ensembles in Beijing's historic urban areas but also the safeguarding of intangible cultural heritage. Selecting hutongs in Beijing as the research subject allows one to explore China's cultural heritage protection and development.

This article focuses on the preservation and revitalization of Beijing's hutongs, delineating the origins, response strategies, developmental trajectory, and outcomes of hutong governance issues. Using Beijing's hutongs as a case study, it elucidates the developmental trajectory of China's efforts to conserve its cultural heritage. It further discusses the current status of hutong development in Beijing and analyzes the new trends in China's cultural heritage conservation represented by Beijing's hutongs.

2. Overview of Beijing hutongs and origins of preservation issues

2.1. Hutongs' formation and change

According to the definition in *The Great Dictionary of the Chinese Language* (*Hanyu Da Cidian* 汉语大词典), the term "hutong" originates from the Mongolian word "gudum." During the Yuan Dynasty, alleys and lanes were referred to as "hutong," which later became a general term for northern streets and lanes.[3] The origin of Beijing's hutongs dates back over 700 years to the Yuan Dynasty, and their formation is closely tied to city planning during the construction of the Yuan capital. Initially, the layout of the Yuan capital, known as *Yuan Dadu* 元大都, adhered to the principles outlined in the ancient Chinese city planning theory *Zhouli · Kaogongji* 周礼・考工记. However, in terms of street network arrangement, *Yuan Dadu* not only followed the traditional "nine vertical and nine horizontal" construction pattern (where the city's main roads form a grid consisting of nine major thoroughfares in both north-south and east-west directions) but also drew upon experience acquired since the Song Dynasty, planning evenly spaced east-west alleys between the "nine vertical and nine horizontal" axes for residential areas,[4] which later became known

[3] *Hanyu Da Cidian* [The Great Dictionary of Chinese Language], https://www.hanyudacidian.cn/ (accessed: 6.04.2024).

[4] Beijing Municipal Commission of Planning, Beijing Municipal Institute of City Planning&Design, Beijing University of Civil Engineering and Architecture, *Beijing jiuchen hutong shilu* [An Account of Beijing's old city Hutongs], China Architecture & Building Press, Beijing 2008, p. 2.

as *hutongs* among the people of the Yuan Dynasty. Secondly, during the construction of the capital, measures were taken to ensure access to water resources. Main thoroughfares were planned along water sources. In the city, wells were dug before the construction of houses in streets and lanes, eventually leading to the formation of a layout characterized by "lanes formed around wells."[5] This also explains why the term *hutong* originates from the Mongolian word *gudum*, meaning water well, as some preserved water wells can still be found in certain Beijing hutongs today. Since the Yuan Dynasty, hutongs have evolved alongside changes in urban structures during different dynasties. The capitals of the Ming and Qing dynasties were rebuilt on the foundation of the Yuan capital. Hutongs in the Yuan Dynasty were over 9 meters wide, but after reconstruction during the Ming and Qing dynasties, their width was reduced to around 5 meters. Since the Ming and Qing dynasties, the basic form of buildings on both sides of hutong passages has evolved from single-story structures to *Siheyuan* (四合院).[6] The venerable *Siheyuan*, a traditional Chinese courtyard-style architecture, stands as the predominant structure within hutongs, emblematic of Beijing's architectural heritage.

When one looks back at the formation and evolution of Beijing's hutongs, it is evident that they possess a complex developmental history. Hutongs constitute an integral component of Beijing's historical and cultural narrative, embodying the city's enduring legacy. The preservation of the authenticity of hutongs is of paramount importance for the development of Beijing.

2.2. Tracing the origins of hutong preservation issues

The evolution of hutongs intricately intertwines with Beijing's urban planning and development. Hutongs of various sizes scattered throughout Beijing's urban areas have undergone over 700 years of development, during which both demolition and construction have been integral aspects of their evolution. Nevertheless, against the backdrop of China's swift urbanization and modernization, the semantic and conceptual essence of demolition and construction has undergone profound shifts. Preserving the authenticity of cultural heritage is a global concern. Hutongs, like other historic structures, derive their value from their authenticity. Any compromise of this authenticity inevitably raises serious preservation concerns. Amidst the ongoing processes of demolition and construction, there exists an urgent necessity to safeguard the hutongs as invaluable cultural heritage sites within Beijing's historic urban landscape.

From the perspective of "demolition," after the founding of the People's Republic of China, a series of urban planning and construction activities was carried out in

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[5] *Ibidem*, p. 3.

[6] Duan Bingren, *Beijing hutong zhi* [Beijing Hu Tong Annual], Beijing Publishing House, Beijing 2007, p. 18.

Beijing, resulting in significant changes in the urban landscape and street layout. The demolition of a certain number of hutongs was inevitable. The book *Beijing Jiuchen Hutong Shilu* (An Account of Beijing's old city Hutongs) provides a detailed account of the changes in the number of hutongs: based on investigation and research conducted by the Beijing Institute of Surveying and Mapping and Design in 2004, the number of hutongs in the old city of Beijing was 3,073 in 1949, 2,382 in 1965, 2,290 in 1980, 2,242 in 1990, and 1,559 in 2003.[7] This data has numerous implications. The demolition of hutongs has been ongoing, but 1990 emerged as a pivotal juncture. Between 1980 and 1990, only 48 hutongs were removed, whereas the period from 1990 to 2003 witnessed the demolition of a remarkable 683 hutongs over thirteen years. Such extensive demolition of hutongs in the old city area inevitably attracted widespread attention and concern. The transformations in hutongs after 1990 are closely intertwined with Beijing's urban planning. On 30 April 1990, during the 8th meeting of the standing committee of the Beijing Municipal People's Congress, the decision to "accelerate the restoration of dilapidated houses in Beijing" was made, inaugurating a large-scale restoration of dilapidated houses in the city.[8]

The restoration of dilapidated houses in Beijing is intricately connected with the fate of the city's historic hutongs. Commercial redevelopment has predominated in the transformation of the old city, often entwined with real estate ventures. The government's haste and eagerness for urban revitalization have created opportunities for developers to exploit, resulting in widespread demolition of structures within the old city precincts. Consequently, numerous hutongs and traditional courtyard residences have succumbed to this rapid redevelopment process.[9] The demolition of hutongs not only disrupts the urban aesthetic of Beijing but also poses a threat to the historical and cultural legacy of the old city. Consequently, the developmental trajectory of hutongs has become a focal point, underscoring the pressing need for robust measures to safeguard historical and cultural heritage within urban environments.

From the perspective of "construction", whether it is the "rebuilding" of hutongs by developers or the spontaneous "restoration" by residents within the hutongs, a series of issues have arisen, sparking discussions on hutong preservation. On one hand, in the restoration of dilapidated houses of Beijing, real estate development has brought many benefits, but the construction of new properties often prioritizes economic gain over preserving the long-established architectural layout of hutongs, significantly damaging the urban landscape of old Beijing. Researchers note that due to large-scale demolition in the old city, high land prices,

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[7] Beijing Municipal Commission of Planning, Beijing Municipal Institute of City Planning & Design, "An Account of...", p. 5.

[8] Wei Ke, "1990~2004: Beijing liangci daguimo weigai" [1990~2004: Two Large-scale Renovation Campaigns in Beijing], *Beijing Planning Review* 2005, no. 6, p. 74.

[9] *Ibidem*, p. 77.

and construction costs, developers pursue higher plot ratios and increased building heights, breaching height restrictions. Consequently, many high-rise buildings encroach upon historic residences, courtyard houses, and ancient gardens, encircling them gradually.[10] On the other hand, Beijing's rapid development has attracted numerous migrants, creating a severe imbalance in housing demand and supply. On central Beijing's scarce land, hutong residents resort to unauthorized construction or expansion, while migrants settle in overcrowded large courtyards, impairing living quality. This "restoration" transforms traditional courtyard houses into crowded spaces, severely affecting hutong residents' lifestyle and quality of life.[11] This undermines hutong culture and traditional architectural aesthetics. Consequently, protests from original residents highlight the need to prioritize hutong preservation in urban development agendas.

In conclusion, this article considers the origins of hutong preservation issues, examining both the aspects of "demolition" and "construction." During the period characterized by hutong demolition and construction, particularly from 1990 to 2004, Beijing's urban planning primarily emphasized economic benefits and expanded development space. However, this approach led to substantial destruction of hutongs because of inadequate experience in old city restoration. The second large-scale urban restoration in Beijing in 2004 concluded amidst effective measures by the state and opposition from domestic and foreign experts and scholars.[12] Subsequently, responding to calls from various sectors of society, the Beijing government began prioritizing the protection and restoration of hutongs as crucial cultural heritage. Over the past two decades, significant progress has been made in this endeavor. In what follows I discuss the evolution of hutong preservation in Beijing.

3. The process and achievements of Beijing hutong preservation

The protection and renewal of Beijing's hutongs are integral to the overall urban planning of the old city area. By the late 1990s, the negative effects of the urban restoration of the old city in Beijing had become more pronounced. The extensive renovation of dilapidated houses has resulted in the dwindling number of historically intact neighborhoods within the urban area of Beijing.[13] Faced with the challenging

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10 Tang Hao, "Beijing hutong de lishi yu weilai" [The History and Future of Beijing Hutongs], *City&House* 2009, no. 7, p. 88.

11 Li Hua, Zhang Haibin, "«Jiupin xindan»: renju huanjing shijiao xia de beijing jiucheng siheyuan gengxin" ["Old Bottles, New Spirits": Renovation of Siheyuan in Beijing's old city area from the Perspective of Living Environment], *Huazhong Architecture* 2022, vol. 40, no. 1, p. 19.

12 Wei Ke, "1990~2004: Beijing liangci...", p. 77.

13 Lu Xiang, "Beijing lishi wenhua baohuqu baohu fangfa chutan" [An Initial Exploration of Conservation Methods for Historic and Cultural Protection Areas in Beijing], *Journal of Beijing University of Civil Engineering and Architecture* 2001, no. 1, p. 76.

situation of preserving the rich material and intangible cultural heritage within the old city of Beijing, relevant municipal departments began exploring methods for the protection of historical and cultural neighborhoods. Within the framework of protecting historical and cultural neighborhoods in old Beijing, the preservation and restoration of hutongs occupy a significant space. Therefore, considering the history of hutong preservation involves an exploration of the history of preservation of historical and cultural neighborhoods in old Beijing.

In terms of the protection of historical and cultural neighborhoods in old Beijing, it is evident that the core of preservation efforts lies in the establishment and management of historical and cultural protection zones, exhibiting several key characteristics: firstly, government leadership and increased policy support; secondly, extensive participation of experts and scholars; and thirdly, active improvement of relevant laws and regulations. This article outlines the developmental trajectory of Beijing's hutongs within the framework of historical and cultural protection zones, organized according to the timeline of government-led initiatives. In general, its developmental trajectory since the 1990s can be divided into three stages.

The first stage, from 1990 to 2004, can be characterized as the nascent period of conservation awareness. This stage marks the era of demolition and construction in the old city and the initial formation period of the protection system for the old city. At the end of 1999, in response to the negative impacts of urban renewal, the Capital Planning and Construction Commission approved the *Plans for the Protection of the Historical Cultural Relics of the old city of Beijing and for the Areas Under Control*.[14] This plan initially delineated 25 historical and cultural protection zones within the old city area of Beijing.

Ultimately, in 2001, the People's Government of Beijing Municipality approved the *Plans for the Protection of Twenty-Five Pieces of Historical Cultural Relics of the old city of Beijing*, prepared by the Capital Planning and Construction Commission. This undoubtedly marks a significant milestone in the development of historical preservation in old Beijing. As is noted by scholars in the field, this represents the first instance of the People's Government of Beijing Municipality explicitly committing itself to the protection of historical and cultural districts.[15] Among these 25 pieces of historical cultural relics, there are six main categories of protected areas, with traditional hutong residences ranking second among them. This planning addresses the previous limitations of cultural heritage protection units being restricted to palaces and temples, giving full attention to folk buildings such as traditional neighborhoods. More importantly, it explicitly recognizes hutongs and Siheyuan as tangible

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[14] *Ibidem.*

[15] Liu Hong, Zhao Lianwen, "Beijing lishi wenhua baohuqu de zhengtixing baohu yanjiu" [A Study on the Holistic Conservation of Historic and Cultural Protection Areas in Beijing], *Journal of Beijing Union University (Humanities and Social Sciences)* 2008, no. 2, p. 36.

cultural heritage. In 2002, the National People's Congress passed the "Cultural Relics Protection Law of the People's Republic of China". The establishment and improvement of laws and regulations provide a legal basis for hutong protection.

But at this stage, the most critical issue of dilapidated house renovation remained unresolved, and ambitious developers violated the strict "control indicators" set forth in the protection plans.[16] Under various pressures, in 2004, the government halted large-scale renovation projects. The era of extensive demolition and construction finally came to an end, and the old city entered a long and difficult period of improvement.

The second stage, from 2005 to 2016, can be described as a period of improvement and of tackling challenges. The work on the old city historical and cultural protection zones was comprehensively carried out, and a well-defined protection system has been established within the historical and cultural protection zones. Awareness of cultural heritage protection at the social level has been significantly heightened, and widespread attention has been drawn to the protection zones's efforts. Moreover, a team of experts and scholars has spearheaded a series of specialized studies.

Specifically, the management system of the old city protected area has been continuously refined. These conservation efforts no longer solely focus on preserving and revitalizing the landscape of the protected area; rather, the scope of this work has expanded to encompass the entire old city of Beijing. For instance, in January 2005, Overall Plans for the Metropolis of Beijing (2004–2020) were formally issued, explicitly arguing for the "overall protection of the old city" as a basic principle.[17] As conservation efforts progressed, the work regulations became increasingly standardized and detailed. In 2007, the Beijing municipal government issued the Technical Guidelines for Renovation and Protection of old city Houses in Beijing, which provided specific methods for the renovation and protection of old city houses in Beijing.[18] The continuous improvement of the institutional framework has provided clear guidelines for the work within the old city historical and cultural protection zones, reflecting the advantages of government leadership and overall planning.

During this stage, work within the old city historical and cultural protection zones was systematically carried out. The principles of conservation planning were

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16 Wei Ke, "1990~2004: Beijing liangci...", p. 77.

17 Sun Shimeng, Shang Qian, Zhang Yue, "Beijing jiuchen jili gengxin guancha 2005–2016" [Observations on the Renewal of Beijing's Old Urban Fabric 2005–2016], *Architectural Journal* 2018, no. 6, p. 23.

18 Song Han, Gao Chao, Ma Tingting, "Beijing laochen lishi wenhua jiequ baohu gengxin celv yanjiu – yi tazhuan hutong lishi wenhua jiequ weili" [A Study on Conservation and Renewal Strategies for Historic and Cultural Districts in Old Beijing: A Case Study of Zuantou Hutong Historic and Cultural Distric], *Huazhong Architecture* 2024, vol. 42, no. 1, p. 79.

explicitly outlined in the reserve plan issued by the Capital Planning and Construction Commission. These principles include preserving the overall appearance of each neighborhood according to its nature and characteristics, maintaining the historical authenticity of the neighborhoods, and preserving historical relics and original features. The implementation of a "micro-circulation" renovation model was advocated, aiming for gradual improvement.[19] This approach is specifically aimed at key historical buildings and individual courtyards within the protection zone, closely related to the renovation and renewal of hutongs. Guided by this philosophy, the renovation and reconstruction of hutongs aim to preserve the traditional *Siheyuan*, maintain the original layout of the hutongs, and ensure architectural styles harmonize with the surrounding environment, while also demolishing dilapidated houses to increase living space and improve living conditions. Such principles are both scientifically sound and sustainable.

According to research by relevant scholars on the urban fabric renewal during this period, visible changes occurred in approximately 11.8% of the land within the old city area. Among these changes, 9.3% of the area underwent renewal, while 2.5% saw demolition. Within the protection zone, approximately 7.9% of the area underwent changes, while outside the protection zone, approximately 13.5% of the area underwent changes.[20] The old city of Beijing, covering an area of 93 square kilometers, serves as the core functional area of the capital. It is the most densely populated area in terms of both surface public transportation and rail transit in Beijing. Moreover, it boasts rich educational and medical resources, making it the core functional area of the city with a significantly higher population density than other areas. Therefore, the transformation of the old city is challenging. Data on the renewal of the old city fabric demonstrates that during this period, the renovation of the old city, especially within the protection zone, was subject to strict control and gradual improvement.

However, the progress during this challenging phase of improvement was not without flaws, and many new issues emerged during this period. Evaluation reports on the implementation of the 2004 Overall Plans for the protection of the old city were issued in 2010 and 2015. These reports highlighted a significant issue with the old city protection strategy, namely that since 2004, the protection strategy for the old city primarily focused on preserving traditional areas of cultural significance, while showing "a lack of serious consideration and practice" towards areas that had already undergone modernization.[21]

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19 Zhao Xiuchi, "Beijing jiuchen baohu gaizao yanjiu" [Research on the Protection and Renovation of Beijing's old city], *Journal of Commercial Economics* 2016, no. 21, p. 216.

20 Sun Shimeng, Shang Qian, Zhang Yue, "Beijing jiuchen jili...", p. 28.

21 *Ibidem*.

In fact, the demolition of the old city had not ceased. Developers were still eyeing opportunities for commercialization in prime locations of the capital. This is precisely the concern raised in the evaluation reports: while urban fabric renewal within the reserve of the old city was to some extent controlled, the issue of protection and renewal of the old city outside the reserve had not received sufficient attention and intervention. The segmented management approach of delineating the reserve highlighted the focus of work in the early stages of old city protection. However, after a considerable period of exploration during this stage, significant experience had been accumulated in the protection and renewal of the old city. It was time for protection efforts to shift focus and give due attention to the concept of "overall protection" of the old city, which had long been proposed but overlooked. With the update of the overall plans for the metropolis of Beijing in 2017, the protection of the old city also entered a new historical stage.

The third stage, from 2017 to the present, represents a period of mature development. At this stage, the profound need for urban renewal in Beijing significantly influenced the protection and renovation of the old city. The conservation of the old city has entered a mature stage of development, while at the same time Beijing's urbanization process has reached a certain stage, one where the mode of development and construction of the city and the mode of economic growth will be transformed, and will inevitably face the important issue of urban renewal.[22] In 2017, during the 19th National Congress of the Chinese Communist Party, it was proposed that "China's economy has shifted from a stage of high-speed growth to a stage of high-quality development." Subsequently, in September of the same year, the People's Government of Beijing Municipality formally approved a new version of the Overall Plans for the Metropolis of Beijing (2016–2035). The revised overall plan introduced clearer and stricter requirements regarding the content, scope, and intensity of the protection of Beijing's old city, emphasizing that no further demolition should occur. Some researchers argue that with the implementation of the new regulations, Beijing's urban renewal efforts have officially entered a new stage of comprehensive management. This shift signifies a systematic approach aimed at promoting sustainable urban development, high-quality development, and high-level governance.[23]

What distinguishes this stage of urban planning is primarily systemic renewal. In addition to the Overall Plans for the Metropolis of Beijing, in 2019, the Beijing Government issued the "Guidelines for the Protection and Renovation of Historical and Cultural Blocks in Beijing," further clarifying the methods and approaches

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[22] Ma Hongjie, "Beijing chenshi gengxin fazhan licheng he zhengce yanbian – quan shengming zhouqi guanli he pinggu zhidu tansuo" [The Development Process and Policy Evolution of Urban Renewal in Beijing: Exploration of Whole Lifecycle Management and Evaluation System], *World Architecture* 2023, no. 4, p. 4.

[23] *Ibidem*, p. 5.

for the protection and renovation of historical and cultural blocks within the old city of Beijing.[24] In 2020, the government issued the Control Detailed Plan of the Capital's Functional Core Area (Block Level) (2018–2035), proposing to strengthen the overall protection of the old city and build the capital into a top-notch city with a first-class living environment. The new system highlights key points for the protection of the old city. Firstly, it emphasizes overall protection, and secondly, it shifts the focus of the old city's renovation from material transformation to a people-oriented approach, prioritizing improvements in the living environment.

In this context, the specific situation of hutong preservation and renewal also aligns with the requirements of the overall planning of this stage. Firstly, with the new regulations implemented in 2017, it was finally stipulated that all hutongs and *Siheyuan* within the old city must not be demolished. Secondly, the renovation of hutongs and associated buildings has shifted from material transformation to a focus on improving the living environment. This includes initiatives to improve hutong traffic and environmental greenery, making hutongs more liveable. Simultaneously, there is a greater emphasis on the quality of hutong preservation and renewal, focusing on the inheritance of intangible cultural heritage. One major characteristic of the intangible cultural heritage in hutongs is that it is closely linked to the tangible cultural heritage of the hutongs themselves. Many aspects of the intangible cultural heritage in hutongs can only be manifested through the daily lives of hutong residents. Moreover, intangible cultural heritage elements are often combined with the development of cultural industries to drive the development of cultural tourism in hutongs. Transitioning from the protection and renovation of tangible cultural heritage to the development and revival of intangible cultural heritage, and from commercialization to the development of higher-quality tertiary industries, hutongs have entered a new stage of development alongside the urban renewal of Beijing.

This article delineates three stages of preservation and revitalization of Beijing's old city. From the era of demolition and reconstruction to the implementation of pilot improvements within protected areas, and subsequently to comprehensive urban planning, the metamorphosis of hutongs has been striking. With a shift of focus from material redevelopment to prioritizing cultural heritage preservation, hutongs now exhibit a renewed vitality. Hence, research on hutongs should be closely intertwined with studies on urban planning in Beijing. As Beijing continues its emphasis on downsizing and the ongoing relocation of what are non-essential functions for a capital city, the evolution of hutongs is poised to persist into the future. The preservation of hutongs will continue unabated. As methods for protecting tangible heritage, such as physical structures, become more advanced, the challenge of safeguarding the intangible cultural heritage within hutongs becomes

[24] Song Han, Gao Chao, Ma Tingting, "Beijing laochen lishi...", p. 79.

more pronounced. Focusing on the protection of intangible cultural heritage is emerging as a key trend in the future of hutong preservation.

4. The new trends in Beijing hutong and Chinese cultural heritage preservation

In the new era, starting from a standpoint of protection and using new developments in modern technology, digital development and integration of cultural tourism resources serve as important means for the preservation of cultural heritage. Two distinct new trends have emerged in the protection of Beijing's hutongs, as well as Chinese cultural heritage as a whole: modernized cultural tourism development and cultural digitization.

On the one hand, in terms of cultural tourism development, "hutong tours" have been popular in the Chinese tourism market since the 1990s. However, the development of hutong cultural tourism in the new era faces various challenges. Firstly, hutongs are located in the core urban areas of Beijing, which, as the millennium-old capital, boasts extremely rich cultural tourism resources. Beijing has seven World Heritage Sites listed in the World Heritage List, and according to the Beijing Cultural Relics Bureau, there are more than seventy national key cultural relics protection units in Beijing. In comparison to Beijing's abundant tourism resources, hutong tours are not very competitive. Many researchers have even pointed out that the actual development of hutong tourism in recent years has been relatively poor.[25] Secondly, in modern society, people's tourism demands are becoming increasingly diverse, while also pursuing greater depth and quality in their travel experiences. However, there have been few updates to projects offering a hutong experience, and there are even a series of problems. The modernization and development of hutong cultural tourism are urgently needed.

On 1 October 2020, Beijing began to implement the Service Standards for Hutong Tours, which stipulate that hutong tours should not affect the normal lives of local residents, that infrastructure within the hutongs should be improved, and that a mechanism for handling tourist complaints should be established.[26] The government's attention and support have laid the foundation for the modernization and development of hutong cultural tourism. Different hutongs have undertaken various directions of cultural tourism development based on their own characteristics. Additionally, the design of hutong-related cultural and creative products has

[25] Xu Meimei, Che Liangliang, "Jiyu SWOT fenxi de Beijing hutong lvyou fazhan duice yanjiu" [A Study on Development Strategies for Beijing Hutong Tourism Based on SWOT Analysis], *Tourism Overview* 2023, no. 5, p. 184.

[26] *Ibidem*, p. 183.

also developed. Hutong cultural and creative products cater to the recent trend of "cultural and creative tourism" in China's tourism industry and have become a major feature of modern hutong cultural tourism development.

On the other hand, regarding cultural digitization, with the accelerated development of twenty-first-century technologies such as big data, visualization, virtual reality, and artificial intelligence, there has been an explosive growth in digital documentation and data archives.[27] This is of great significance for the preservation of intangible cultural heritage. Preserving the intangible cultural heritage within hutongs is vital for maintaining their authenticity. This heritage embodies the most charming and vibrant aspects of hutongs; yet its preservation and transmission are notably challenging. Intangible cultural heritage is characterized by its intangibility, perishability, and fluidity, often heavily reliant on its inheritors.[28] However, through digital means, the knowledge and information of traditional intangible cultural heritage can be expressed in entirely new media forms such as images, audio, and video data. In recent years, there have been numerous examples of digitizing intangible cultural heritage in China.

As tangible entities of traditional architecture, hutongs, like other ancient architectural complexes, primarily focus on the digitization of their architectural guide systems. With the rapid advancement of GPS and China's Beidou navigation satellite system, digital navigation systems have incomparable advantages over traditional guide systems.[29] In the digital era, the digital transformation of guide systems has become an important development direction for hutongs.

A typical example is the digital navigation design for Beijing's Dongsi Hutong. Based on the cultural characteristics of Dongsi Hutong, the designers constructed the navigation system to reflect the cultural image of Dongsi Hutong. They conducted detailed collection, classification, summarization,[30] and extraction of various data, including the historical origins of Beijing hutongs and the customs and culture of the capital city, as well as the spatial composition, housing and utensils, historical documents, folk legends, and other data specific to Dongsi Hutong. This laid the foundation and necessary conditions for the realization of the digital navigation system. After such a database is established, it can be combined with other digital technologies to further innovate the spatial presentation of hutongs. The designers also proposed integrating interactive technologies such as touchscreens,

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[27] Tang Shukun, "«Shuzihua shengcun» tiaojian xia zhonghua duominzu feiyi chuanbo de xinshengtai" ["Digital Survival": The New Ecosystem of Transmitting Chinese Multi-Ethnic Intangible Cultural Heritage], *Journal of Shanghai Jiao Tong University (Social Science)* 2024, vol. 32, no. 3, p. 1.

[28] *Ibidem*.

[29] Xu Lang, Zhang Junpei, "Beijing hutong daolan xitong de shuzihua gaizao tanxi-yi dongsi hutong daoshi sheji weili" [Digital Transformation Analysis of Beijing Hutong Guide System: A Case Study of Dongsi Hutong Guide Design], *Art and Design (Theory)* 2021, vol. 2, no. 10, p. 60.

[30] *Ibidem*, p. 61.

multi-touch, voice input, and gesture interaction with navigation design to create an interactive navigation system. This transition from 2D to 3D presentation of hutong spaces enhances the overall presentation.[31] In addition to Beijing's hutongs, digital navigation systems have been widely used in the preservation and transmission of historical and cultural heritage throughout the country. Cultural digitization not only represents the modern development direction of hutong cultural heritage preservation, but also reflects the trend of China's cultural heritage protection in the digital era.

Adapting to the changes of the times, hutong preservation and renovation are also keeping pace with the times. Whether promoting the development of the modern cultural tourism industry or utilizing digital technology, both are essential paths for the revitalization and renovation of hutong culture in contemporary society. Represented by hutongs, we can explore the new development trends of Chinese cultural heritage protection in the new era, and look forward to the future of heritage protection in China.

5. Conclusions

This article examines the development and changes of Beijing's hutongs, which represent a significant cultural heritage of China. It explores the origins of hutong protection issues. With a history of over 700 years, these hutongs have witnessed the dynamic transformations of Beijing, carrying a rich tangible and intangible cultural heritage. However, rapid urbanization and modernization have posed challenges to their preservation, particularly because of commercialization and frequent demolition and reconstruction activities. The article reveals three stages in hutongs' protection: the budding stage of protection awareness (1990–2004), the stage of improvement and tackling challenges (2005–2016), and the stage of development and maturity (2017–present). This division elucidates the development process of hutong protection in Beijing. Using Beijing's hutongs as a case study, this article identifies common challenges and solutions in the preservation of tangible cultural heritage in China. While hutong protection faces unique challenges, such as the conflict between commercialization and cultural heritage preservation, and the loss of intangible cultural heritage, the experiences gained are invaluable for similar endeavors. The protection of cultural heritage is closely intertwined with national cultural development strategies and economic strength. This study indicates a growing focus on revitalizing cultural heritage and developing the cultural industry, with hutong cultural tourism rapidly modernizing and the digitalization of cultural

[31] *Ibidem*, p. 62.

heritage becoming an unstoppable trend. In the future, mutual learning among nations is essential for the long-term progress of cultural heritage protection.

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SUMMARY

Yinhui Mao, Yan Sun

PRESERVATION OF CULTURAL HERITAGE IN CHINA: A CASE STUDY OF BEIJING HUTONG

The aim of this paper is to delve into the historical preservation of hutong as cultural heritage. Research reveals that in response to the needs of urbanization and modernization in Beijing, hutong has undergone continuous cycles of demolition and reconstruction, facing intricate developmental dilemmas. With the strengthening awareness of cultural heritage preservation in Chinese society, there has been a considerable increase in support from national laws and policies, emphasizing the importance of preserving and renovating old city areas such as hutong. Moreover, this study finds that Beijing Municipality has comprehensively revitalized hutong from the perspective of residential environment, transportation, and cultural tourism development, yielding a series of positive outcomes. Understanding the preservation process of Beijing hutong offers insights into China's advancement in cultural heritage conservation, highlighting its people-centered and context-specific approach, thus providing a deeper understanding of China's new developments in cultural endeavors in the contemporary era.

Keywords: hutong, Cultural Heritage in China, renovating, cultural tourism

STRESZCZENIE

Yinhui Mao, Yan Sun

OCHRONA DZIEDZICTWA KULTURY W CHINACH: STUDIUM PRZYPADKU HUTONGÓW W PEKINIE

Celem artykułu jest zbadanie historycznej ochrony hutongów jako dziedzictwa kultury. Badania pokazują, że w odpowiedzi na potrzeby urbanizacji i modernizacji w Pekinie hutongi poddawano ciągłym cyklom rozbiórek i odbudowy. Wzrost świadomości chińskiego społeczeństwa w zakresie ochrony dziedzictwa kultury wpłynął na politykę i prawodawstwo,

które zaczęto tworzyć z myślą o zachowaniu i renowacji starych obszarów miejskich, w tym hutongów. Ponadto władze Pekinu kompleksowo odnowiły hutongi, koncentrując się na środowisku mieszkalnym, transporcie i rozwoju turystyki kulturowej, co przyniosło wiele pozytywnych rezultatów. Zrozumienie procesu ochrony hutongów w Pekinie pozwala na lepsze zrozumienie postępu Chin w zakresie ochrony dziedzictwa kultury. Zauważalne jest w tym kontekście uwzględnianie potrzeb społeczeństwa.

Słowa kluczowe: hutong, dziedzictwo kultury Chin, renowacja, turystyka kulturowa

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BUSINESS ETIQUETTE: THE HERITAGE OF CHINESE CULTURE IN TRADE NEGOTIATIONS

1. Introduction

Business etiquette is associated with requirements and expectations referring to social and business behavior. It refers to a valid way of behaving in certain environments. Business etiquette is a crucial element of trade negotiations because it plays an important role in building relationships and reputation and achieving business success.[1]

The heritage of Chinese culture is the key to understand business etiquette during negotiations with Chinese partners.[2] First of all, trade negotiations with Chinese people are deeply rooted in Chinese culture, and Chinese culture is deeply rooted in Confucianism.

The Chinese communication style is described as indirect and polite. The historical context of Chinese business culture refers not only to communication styles, body language, dress codes, banquets, lunches, and gift-giving practices, but also to taboo topics in trade negotiations. Chinese business is traditionally based on mutual trust, and this is known as *guanxi*. Also the concept of *mianzi* is crucial in business interactions.[3] Understanding Chinese business culture means better communication and collaboration in bilateral trade relationships.

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[1] „Podstawowe zasady etykiety biznesowej", *Biznesowe Inwestycje*, 28.09.2023, https://biznesowe-inwestycje.pl/podstawowe-zasady-etykiety-biznesowej/ (accessed: 14.02.2024).

[2] "Business culture in China", *myNZTE*, 14.12.2021, https://my.nzte.govt.nz/article/business-culture-in-china (accessed: 14.02.2024).

[3] "Top Culture and Business Etiquettes in China", *Medium*, 10.07.2023, https://medium.com/heritage-digest/top-culture-and-business-etiquettes-in-china-7d51befb237d (accessed: 14.02.2024).

Negotiations refer to any form of direct or indirect communication and consist of three main phases: exchanging information, bargaining (opening talks, a confrontational phase, an arrangements phase, and an execution phase), and closing negotiations.[4] From the point of view of the importance of business etiquette in trade negotiations, attention in this paper is given to the following elements of the negotiation stages that result from these phases: establishing cooperation (language, hierarchy), visits and delegations (greeting, proper negotiations, taboo topics), and other elements of business etiquette such as banquets and lunches, and gift-giving practices. The authors pay attention to the importance of business etiquette in trade negotiations with Chinese partners, for whom cultural heritage is extremely important.

2. Cultural determinants of Chinese business ethics

Because of its geographical location and historical policy of isolationism, which persisted into the twentieth century, China remained largely cut off from Western influences for a long time. Additionally, it is a country with a "socialist market economy."[5] There are numerous state-owned enterprises and certain sectors of the economy are strictly reserved for them, such as banking, telecommunications, transportation, and energy. Thisis enshrined in the Chinese constitution.[6] While the market determines demand and price, the government still decides on supply, investments, and allocations.[7] Hence, there are significant differences between Western and Chinese business practices.

China has transitioned from being the „world's factory" to become a „power of innovation."[8] In 2023, China ended the year with a GDP growth of 5.2% and a CPI of only 0.2%.[9] Companies such as Xiaomi, Huawei, Lenovo, Haier, and Oppo have moved beyond simply copying Western technologies to become leading brands in their own right. In 2023, Xiaomi ranked third in the world in terms of market share in mobile phone sales, with a 13% share, while Oppo ranked fourth with a 9%

[4] G. Osika, „Negocjacje – charakterystyka problemu", *Zeszyty Naukowe Politechniki Śląskiej. Organizacja i Zarządzanie* 2000, no. 1467, issue 1, p. 62.

[5] Z. Wiktor, „Istota 'chińskiego marksizmu' i 'socjalizmu z chińską specyfiką'", *Nowa Krytyka* 2012, no. 29, pp. 147–173.

[6] Y. Mao, *The logic of China's economy*, 25.11.2018, http://english.unirule.cloud/highlights/2018-11-25/1127.html (accessed: 14.02.2024).

[7] K. Seitz, *Chiny. Powrót olbrzyma*, trans. T. Mazur, Dialog, Warszawa 2013, p. 303.

[8] S. Pangsy-Kania, „Od 'Made in China' do 'Created in China' – droga Chin do supremacji innowacyjnej", *Gdańskie Studia Azji Wschodniej* 2021, issue 19.

[9] A. Huld, "GDP Expands 5.2% in 2023 – Analyzing China's Key Economic Indicators", *China Briefing*, 18.01.2024, https://www.china-briefing.com/news/chinas-gdp-in-2023/ (accessed: 14.02.2024).

share.[10] Almost twenty years earlier Lenovo acquired the American company IBM, and the Chinese car manufacturer Geely Holdings acquired Volvo.[11] The development of China is obvious and cannot be ignored. It is a market with 1.4 billion potential customers.[12] However, to achieve success in trade negotiations, one must also take into account cultural differences.

"Eastern teachings start with spirit, while Western teachings start with matter," said Liang Qichao (1873–1929), Chinese reformer and co-creator of The Hundred Days Reform.[13] This quote effectively summarizes the Chinese approach to action. They are guided by the teachings of thinkers from thousands of years ago – Confucius, Sun Tzu, and Buddha. What unites them are: lack of haste, long-term thinking, hierarchy, subordination, prioritizing the common good over their own, dualism, restraint, preserving „face," ancestor worship and ceremonialism. Especially Confucianism, described by the Encyclopaedia Britannica not only as a philosophical current, but as „a way of life propagated by Confucius,"[14] has left its mark on the functioning of China both in the second century CE as well as today.[15]

The most famous work by Confucius is *The Four Books and Five Classics*. As described by James Legge, the first professor of sinology at the University of Oxford, it is "the most exact and complete monograph which the Chinese nation has been able to give of itself to the rest of the human race."[16] Especially the recorded customs and rituals of the people and rulers in the *Book of Rites* (礼记 *Lǐjì*) are still relevant today. Based on it, the court ceremonial of the earliest dynasties before our era can be reconstructed; over time this turned into diplomatic protocol and business etiquette.

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10 "Global smartphone market declined just 4% in 2023 amid signs of stabilization", *Canalys*, 31.01.2024, https://www.canalys.com/newsroom/worldwide-smartphone-market-2023 (accessed: 14.02.2024).

11 „Firmy, o których nie wiedziałeś/aś, że są chińskie – o dynamicznym wzroście chińskich firm na globalnym rynku", *AsianShip*, https://www.studiawchinach.pl/blog/firmy-o-ktorych-nie-wiedziales-as-ze-sa-chinskie-o-dynamicznym-wzroscie-chinskich-firm-na-globalnym-rynku (accessed: 14.02.2024).

12 C. Textor, "Total population of China from 1980 to 2023 with forecasts until 2028", *Statista*, 17.04.2024, https://www.statista.com/statistics/263765/total-population-of-china/ (accessed: 14.02.2024).

13 K. Gawlikowski, „W Państwie Środka" [in:] *Obrazy świata białych*, ed. A. Zajączkowski, Państwowy Instytut Wydawniczy, Warszawa 1973, p. 118.

14 „Confucianism", https://www.britannica.com/topic/Confucianism (accessed: 14.02.2024).

15 C.P. Fitzgerald, *Chiny. Zarys historii kultury*, trans. A. Bogdański, Państwowy Instytut Wydawniczy, Warszawa 1974, pp. 155–156.

16 *The sacred books of China. The texts of Confucianism*, trans. J. Legge, part IV: *The LÎ KÎ*, I–X, *Sacred Books of the East*, vol. 27, Clarendon Press, Oxford 1885, scanned by J.B. Hare 2000, http://www.sacred-texts.com/cfu/liki/liki00.htm (accessed: 14.02.2024).

Another determinant that has had a huge influence on the shaping of Chinese business etiquette was the sinocentric worldview. It was not until the Opium Wars of the nineteenth century that this view was disrupted. In Chinese, China is called 中国 *Zhōngguó* – literally the "Central Country." Chinese people believe that their country has continuously existed for 5,000 years.[17] For many centuries, they were at a significantly higher level of civilization than surrounding peoples and nations. The world owes to China: gunpowder, paper, ink, tea, silk, porcelain, fireworks, the compass, the wheelbarrow, the canal lock, the flamethrower, the sternpost rudder, and even the precursor of pipelines.[18] In the seventh century CE, neighbouring countries such as Japan, Korea, and Vietnam adopted Chinese writing, literature, and philosophy.[19] This only reinforced the vision of China as the Central Country and its civilization as the „centre of true culture."[20] Chinese conquerors such as the Jurchen, Mughal, and Manchus adopted Chinese writing, customs, and offices, assimilating with the Chinese and being captivated by their sophisticated culture and system of governance.[21] This was done through the „five bait principles for barbarians" – refined cuisine, music, lavish clothing, dignified accommodations, and luxurious lifestyles, to entice invaders to aim at sinicization.[22] This principle still operates today and is applicable in business etiquette.

Additionally, China has repeatedly implemented a policy of isolationism. This occurred both as early as the second century CE and later, towards the end of the Ming Dynasty (seventeenth century CE) and during the Qing Dynasty (seventeenth-nineteenth centuries CE), as well as in the twentieth century when Mao Zedong came to power. The aim was to limit foreign influence on the functioning of the state, strengthen the ruling power, increase influence within the country, and bolster internal structures. China's opening to the world began only with Deng Xiaoping in 1978.[23] Consequently, Chinese culture and customs stand out distinctly from those of other countries.

In China, the most important entity is the nation, and national interest takes precedence over the needs of individual citizens. Additionally, because of China's vast territory, numerous conquests and changes in power, a strong sense of community has developed among the Chinese. Therefore, attachment to the country 民族主义 (nationalism) – is vigorously promoted. In the nineteenth century, it was

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17 H. Kissinger, *O Chinach*, trans. M. Komorowska, Wydawnictwo Czarne, Wołowiec 2014, p. 21.

18 T. Bieliński, *Kapitał ludzki a innowacyjność gospodarki Chin*, PWE, Warszawa 2016, pp. 42–50.

19 K. Seitz, *Chiny…*, p. 59.

20 G. da Cruz, *Traktat o sprawach i osobliwościach Chin*, trans. J. Kazimierczyk, I. Komorowska, Novus Orbis, Gdańsk 2001, p. XI.

21 K. Seitz, *Chiny…*, pp. 62–63.

22 H. Kissinger, *O Chinach…*, p. 38.

23 M. Chi-Kwan, „Hostage diplomacy: Britain, China, and the politics of negotiation, 1967–1969", *Diplomacy & Statecraft* 2009, vol. 20, issue 3, p. 473.

a form of resistance against Western imperialism and a manifestation of opposition to brutal foreign policies. In the twentieth century, it served to legitimize power and maintain internal integrity after the collapse of the Soviet Union.[24] Currently, in addition to uniting the nation, nationalism is used by Chinese politicians to rationalize their decisions, especially on the international stage. It is worth noting that in China, nationalism does not carry negative connotations; indeed, it is often synonymous with patriotism. It has a strong influence on the foreign relations of the People's Republic of China, both at the state and corporate levels. The Chinese are sensitive how they are perceived globally and it is easy to offend them, potentially leading to the loss of million-dollar contracts or a sense of security in the Chinese market. Chinese authorities also adeptly manipulate the nationalism of their citizens by encouraging boycotts of brands or countries – such as the boycott of the French hypermarket chain Carrefour in 2008, when protests against Chinese government pressure on Tibet took place in Paris during the Beijing Olympics.[25]

It is also worth looking at the determinant of cultural typologies. According to the contextual model of Edward Hall (1914–2009), China belongs among cultures of high context, characterized by ritualization of life, ceremoniousness, collectivism expressed in the form of „we" rather than „I," and vague, indirect communication, where nonverbal communication accounts for up to 90% of the message.[26] Chinese value subtlety in expression and avoid showing strong emotions. Chinese people typically avoid direct eye contact with their interlocutors. The manner of expression, and often even the choice of words, vary depending on the listener's status. Communication aims to establish and deepen relationships rather than simply convey information.[27]

John Mole's organization map places China on the side of organic organizations,. This entails: the significant influence of personal relationships on conducting business, flexibility in following procedures and meetings, lack of strict agendas; further, punctuality may not be a priority and agreements and contracts tend to be flexible. As for leadership, it is characterized by individual leadership: decisions are

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[24] E. Kingsley, B. He, „The rise of nationalism and China's foreign policy" [in:] *Ashgate Research Companion to Chinese Foreign Policy*, ed. E. Kavalski, Ashgate Publishing, Burlington 2012, pp. 75–77.

[25] E. Ng, J. Lam, J. Zhang, "Dolce & Gabbana's China faux pas shows global brands must tread gently on local sensitivities", *South China Morning Post*, 1.12.2018, https://www.scmp.com/business/companies/article/2175852/dolce-gabbanas-china-faux-pas-shows-how-global-brands-must-tread (accessed: 14.02.2024).

[26] E.T. Hall, *Beyond Culture*, Anchor Press, New York 1976; M. Chen, "Comparison of High and Low Context Differences between China and the West", *Frontiers in Humanities and Social Sciences* 2023, vol. 3, no. 8, pp. 161–168.

[27] M. Chen, "Comparison of High and Low Context…", p. 167.

made by the team leader, senior individuals dominate meetings, and one partner typically dominates in agreements.[28]

According to Geert Hofstede's cultural dimensions, China is characterized by a high power distance, low uncertainty avoidance, collectivist culture, masculinity, hierarchical structure, restraint, and long-term orientation.[29] In business, it represents i a pro-partnership, ceremonial, polychromic, and restraint-oriented culture.[30]

3. The most important elements of business etiquette in successful business negotiations

3.1. Guanxi 关系 *(guānxi)*

The concepts of *guanxi* and *mianzi* are closely intertwined with the cultural and historical aspects of conducting business in China. *Guanxi* can be loosely interpreted as a network of relationships. In China, relationships are more important than knowledge and skills written on paper.[31] Building long-term relationships is more important than immediate profit. To start a business in China, it is essential to establish such a network and build mutual trust. Creating and maintaining bonds are extremely important, as they intersect with and complement all aspects of a Chinese person's life. Up to 85% of Chinese managers believe that *guanxi* is essential part for a functioning company.[32] Western businessmen often perceive *guanxi* as a form of favouritism, cronyism, or nepotism, and they fail to see its positive aspects. Trust and mutuality are associated with *guanxi*.[33] Having the right connections makes it easier to conduct business in China – acquiring partnerships, signing contracts, negotiating prices, etc. Despite having the appropriate qualifications and credentials, a lack of connections can result in rejected offers or unsigned agreements. In China, a contract is seen as a symbol of the relationship between

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28 J. Mole, *Mind Your Manners: Managing Business Cultures in the New Global Europe*, Nicholas Brealey Publishing, London 2003, pp. 44–50.

29 Country comparison tool, https://www.hofstede-insights.com/country-comparison-tool?-countries=china (accessed: 14.02.2024).

30 A. Łącka, B. Krawczyk-Bryłka, „Percepcja różnic kulturowych w negocjacjach na przykładzie Polski i Chin", *Research on Enterprise in Modern Economy – theory and practice* 2015, no. 15, p. 18.

31 N. Rifki, "Guanxi, or the rule of man that overrules the rule of law in China", *Medium*, 13.01.2016, https://medium.com/@RifkiNada/guangxi-or-the-rule-of-man-that-overulls-the-rule-of-law-in-china-3c36d6ef024c (accessed: 14.02.2024).

32 Y. Luo, *Guanxi and business*, World Scientific, Singapore 2000, p. 49.

33 L. Niewdana, „Cud gospodarczy" społeczności chińskich sukcesem wolnorynkowym?" [in:] *Zrozumieć Chińczyków. Kulturowe kody społeczności chińskich*, ed. E. Zajdler, Dialog, Warszawa 2014, p. 208.

the signatories, ensuring that they have the best intentions, and any discrepancies or issues will be resolved amicably, based on good relations between the parties.[34] Both sides have a moral obligation to support and exchange favours and gifts. Therefore, creating a network of contacts can consume up to 5% of the costs of doing business.[35]

3.2. Mianzi 面子 (*miànzi*)

Mianzi literally means "face," but in a cultural context it refers to someone's image, authority, social status, reputation, and ego. *Mianzi* is used to is used to mean saving face. Chinese people fear "losing face," which can be compared to the Western sense of shame, loss of honour, disappointing someone, or making a mistake.[36] This can make cooperation with the Chinese party difficult, as they avoid saying that they are unable to do something or will not meet a deadline; they do not ask for additional explanations or they prolong the decision-making process to please as many people as possible[37]. Therefore, expressions like „we'll see what can be done," „maybe," „we can try," or avoiding a direct answer – both orally and in writing – should be interpreted as a refusal.

4. Cultural heritage in Chinese business ethics during trade negotiations

4.1. Preparation for negotiations – establishing cooperation

As mentioned earlier, China, as a pro-partnership and high-context culture, relies on *guanxi* to establish cooperation. Therefore, it is advisable to use the services of an intermediary or establish an office in China with China-origin employees. The tasks of the intermediary include not only establishing cooperation but also verifying the credibility of the Chinese side, conducting audits, checking the quality of goods and representing the company at trade shows or conferences.[38] Additionally, they will be of invaluable assistance during visits of Western parties to China, as

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[34] N. Rifki, "Guanxi…"

[35] L. Niewdana, „Osobowe relacje (*guanxi*) w chińskim biznesie" [in:] *Zrozumieć Chińczyków…*, pp. 208, 215.

[36] Z. Wesołowski, „Konfucjańskie podstawy porządku społecznego i zjawisko 'twarzy'" [in:] *Zrozumieć Chińczyków…*, pp. 196–197.

[37] B. Wang, "Chinese Leadership: 5 Critical Differences with the West", *IEDP*, 1.01.2018, https://www.iedp.com/articles/chinese-leadership-5-critical-differences-with-the-west/ (accessed: 14.02.2024).

[38] *Bezpieczny import z BigChina*, http://import.bigchina.pl/oferta (accessed: 14.02.2024).

despite English being widely accepted as the language of business, only 7% of Chinese people were proficient in it in 2012.[39] It is worth mentioning that during the isolation caused by the announcement of the Covid-19 pandemic, China's English proficiency decreased.[40]

Face-to-face meetings are very important for Chinese people. They strengthen *guanxi*. Contact should be intensified through shared meals, visits to the Chinese partner's hometown, visits on occasions such as birthdays, childbirth, or weddings. The Chinese side will also feel grateful when invited for a return visit. A visit with a Chinese counterpart should be announced well in advance. This is especially so when a large delegation arrives, typically for several days. For the Chinese, besides the obvious information such as the company they represent, the number of people, and the duration of the visit, the positions of the individuals in the delegation are the most important. Delegating someone who holds a lower position than those from the Chinese side to a meeting with a Chinese counterpart may be seen as disrespectful and could be a serious reason for breaking off negotiations.[41] However, if the Chinese side sends someone with a lower position than those announced by the other party, it means they are not interested in the offer.

In addition to the format of the visit, an important part of planning a trip is timing. It is always crucial to consider national and local holidays. Meetings should never be scheduled during 春节 *Chūnjié*, the Chinese New Year. This is a movable holiday, usually falling in the second half of January or the first half of February. For large companies, this is the only long holiday in the Chinese calendar year, during which time off can range from one week for office workers or shop employees to one month for factory workers or immigrants. Additionally, it is advisable to avoid trips around the following holidays: 清明节 *Qīngmíngjié* – Tomb Sweeping Day (April 4th/5th); May 1st – Labor Day, 端午节 *Duānwǔjié* – Dragon Boat Festival (late May/early June); 中秋节 *Zhōngqiūjié* – Mid-Autumn Festival (late September/early October); and 黄金周 *Huángjīnzhōu* – so-called Golden Week – the anniversary of the founding of the People's Republic of China (early October).[42] During these days, Chinese people have time off, most places are closed, and transportation is disrupted as a result of significant internal migration.

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39 K. Bolton, D. Graddol, „English in China today", *English Today*, September 2012, vol. 28, issue 3, https://doi.org/10.1017/S0266078412000223 (accessed: 14.02.2024).

40 "China's increasing language gap", 15.11.2023, https://opportunities-insight.britishcouncil.org/news/news/chinas-increasing-language-gap-0 (accessed: 14.02.2024).

41 "China", http://www.ediplomat.com/np/cultural_etiquette/ce_cn.htm (accessed: 14.02.2024).

42 National Holidays in China in 2024, https://www.officeholidays.com/countries/china/index.php (accessed: 14.02.2024).

4.2. Negotiations as the key element of visits and delegations

As emphasized earlier, for the Chinese side building long-term relationships is more important than immediate profit. The first meeting is dedicated to getting to know each other and strengthening bonds. Because of distance and censorship, Chinese people have a different level of knowledge about the world compared to their guests. Therefore, they are curious about how China is perceived globally and inquire about the political and economic situation of the guest's country, as well as the situation of the guest's company and sector of the economy. Topics quickly turn to more personal inquiries, which may easily surprise or even offend a Westerner, but are entirely commonplace in China. These include, for example, asking about blood type, marital status, and pressing for a reason if one is unmarried, inquiring about age and income, as well as commenting on the height and weight of the interlocutor.

A traditional way of greeting in Asian countries, including China, is a gentle bow; so not all Chinese people are accustomed to shaking hands when greeting.[43] It is best to leave the initiative to them when greeting; they may offer a handshake, bow, or something that is uncommon in the West, the whole delegation can start clapping. Responding to this last form of greeting also involves clapping. Later, they line up according to their position to exchange business cards. In China, exchanging business cards is an important part of the greeting.[44] When exchanging cards with Chinese people, it is always done with both hands, which signifies respect towards the other party. It is important to become acquainted with them immediately in order to learn the interlocutor's name and the hierarchy within the group. Chinese people often use self-made English names, not their original Chinese name, when interacting with foreigners to make it easier for the other party to pronounce and remember them. Chinese business cards may resemble European ones in appearance. However, Chinese people often like to add decorations and print the letters in gold, which is believed to symbolize prosperity. Often, the design of their business cards is not standardized within one company – employees personalize the appearance of their cards. In China, hierarchy and authority are highly valued, so decisions are never made on the spot but await the decision of the management.[45] Additionally, what is spoken is often considered more important than what is written. The Chinese proverb „nothing written on paper is worth as much as the paper it's written on" is popular. Therefore, mutual trust and the belief that the other party will fulfil their part of the agreement are important. A written contract is merely seen

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[43] *Poradnik eksportera i inwestora do Chińskiej Republiki Ludowej*, 5th ed., Wydział Promocji Handlu i Inwestycji Ambasady RP w Pekinie, Pekin 2012, p. 39.

[44] "China", http://www.ediplomat.com/np/cultural_etiquette/ce_cn.htm (accessed: 14.02.2024).

[45] W. Yen, *From the Great Wall to Wall Street. A cross-cultural look at leadership and management in China and the US*, Palgrave Macmillan, London 2016, p. 165.

as the beginning of cooperation for a Chinese person, rather than the conclusion as perceived in the West.[46]

4.3. Closing negotiations – other elements of business etiquette

An important aspect of Chinese culture is eating. Chinese people love lavish, long, group meals. Even Confucius, in the *Book of Rites*, devotes a significant section of the text to meals and the culture of dining. Allegedly, during the Zhou Dynasty, there were 120 dishes on the table – the so-called 宫廷菜 – "Imperial food."[47] This was part of "the five baits for barbarians" principle. It remains an integral part of negotiation meetings today. Dining together serves to strengthen relationships. Usually, the atmosphere is relaxed, and time is spent on casual conversations, especially on topics such as Chinese culture and art, city architecture, places visited, and, above all, the meal being consumed. Taboo topics mainly revolve around politics – both current and past. Criticizing the authorities is categorically avoided and attempting to elicit sincere opinions on the Chinese side about the Party's policy is not advisable. Other topics not discussed at a Chinese table include Tibet, Mongolia, and Xinjiang, and the violation of human rights in those areas. For the average Chinese person, Taiwan is a „rebel region" belonging to the People's Republic of China, and Hong Kong has always belonged to China and was only temporarily leased to Great Britain. It is important to remember that censorship is pervasive in China, and access to sources of information other than domestic ones is restricted. Most Chinese people, to avoid endangering themselves with the authorities and for their own convenience, do not seek additional information beyond official sources.

The host selects dishes from the menu; often only they receive the menu at the table. The seat opposite the door is the most important place at the table and that is where the host points for the guest to sit. The host sits opposite the main guest. A large number of dishes always appear on the table; there can even be dozens of them.[48] It is appreciated if one tries each of them and compliments the taste. However, it is not recommended to finish a dish completely, as this is a sign to the host that they have not made enough effort and ordered too little. This often results in them ordering more dishes. Therefore, it is better to leave some food on the plate.

Chopsticks are used, which often poses a challenge for guests, but it is also a common topic of conversation and a way to break the ice. There are numerous rules regarding the use of chopsticks, including not sticking them into rice, not

[46] "Negotiations, Chinese Style", https://www.chinabusinessreview.com/negotiations-chinese-style/ (accessed: 14.02.2024).

[47] China Internet Information Center, "The History of Chinese Imperial Food", http://www.china.org.cn/english/imperial/25995.htm (accessed: 14.02.2024).

[48] *China – Things to Know Before You Go*, http://chinese4.eu/china-things-to-know/ (accessed: 14.02.2024).

pointing at someone with chopsticks, and not spearing food with them.[49] However, dropping chopsticks on the floor is considered a good omen.[50]

Except for the etiquette regarding the use of chopsticks, there are no other specific rules at a Chinese table, especially in the eyes of Europeans. Chinese people slurp, burp, spit out bones and bits onto the table, smoke cigarettes, and call and snap their fingers at waiters. Waiters at the table are invisible. They do not expect foreigners to speak Chinese and they themselves do not speak English, so all matters should be directed to the host. The meal lasts for several hours. Chinese people will not leave the venue while the guest is still at the table; so it is advisable for the invited guest to leave the restaurant shortly after the meal.[51] The inviting Chinese person – usually the company owner or a high-ranking manager – will pay for the entire meal without suggesting splitting the bill or including it in the guest's trip expenses.

Another gesture that is optional elsewhere but obligatory in China, is the exchange of gifts. This is socially expected behaviour that serves to strengthen relationships and to show respect.[52] The word for gift in Chinese is 礼物 (*lǐwù*), where the first character 礼 is the same as in the title of Confucius' book and means „ritual" or „manners," while 物 simply means „thing" or „item." The gift should be presented with both hands and a bowed head, and it should be received in the same manner. It should not be opened in front of the giver to avoid showing disappointment if the gift is not to one's liking and to save the giver from losing face.[53]

Chinese people enjoy giving products of their own culture such as tea, silk scarves, gold-plated bookmarks, and jewellery made of pearls or jade. They also appreciate receiving local products such as chocolates, ceramics, or cosmetics. The reciprocal exchange of gifts was classified as the third mode of trade in China as early as 1989, alongside the state redistributive economy and the commodity economy. Gift-giving was particularly significant during the centrally planned economy era. It is believed that gift-giving and commodity trading complement each other, as gifts lend a social, bonding aspect to trade interactions.[54]

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49 *Ibidem*, p. 22.

50 J. Strzelecki, „Jak robić interesy w Chinach. Etykieta", part 5: „Chiński bankiet", https://www.rynki24.pl/jak-robi263-interesy-w-chinach-etykieta-5-chi324ski-bankiet.html (accessed: 14.02.2024).

51 "China", http://www.ediplomat.com/np/cultural_etiquette/ce_cn.htm (accessed: 14.02.2024).

52 Y. Luo, *Guanxi and business*…, p. 31.

53 *The LÎ KÎ. A collection of treatises on the rules of propriety or ceremonial usage*, Book 1: *Khü Lî*, http://www.sacred-texts.com/cfu/liki/liki01.htm (accessed: 14.02.2024).

54 Y. Luo, *Guanxi and business*…, p. 27.

5. Conclusions

Business etiquette is a crucial element of trade negotiations, and trade negotiations with Chinese people are deeply rooted in Chinese culture, which in turn is heavily influenced by Confucianism. The policy of isolationism, repeatedly implemented by China, has become a central cultural factor shaping Chinese business etiquette. In business, China embodies a culture that values partnership, ceremonialism, polychronicity, and restraint.

In Chinese business, there is a strong emphasis on mutual trust. In China, a collectivist culture based on *guanxi*, shaped by the spirit of Confucius, who believed that 礼 (rituals) were more important than laws, conventions and ceremonies still play a significant role in Chinese society, and it is essential to understand these before venturing to „conquer China" on the other side of the world. Equally important in business interactions is the concept of *mianzi*, which is closely related to saving face and refers to one's social status, reputation, or dignity.

During trade negotiations, which involve three main phases (exchanging information, bargaining, and closing), the following elements are crucial: establishing cooperation, managing visits and delegations, and other elements of business etiquette. In the first one, language and hierarchy are of primary importance; in the second one, greeting, proper negotiations; taboo topics should be taken into account; while in other elements, for example, lunches and gift-giving practices are key. Face-to-face meetings are remarkably important in the first phase of negotiations with the Chinese. During these negotiations, building long-term relationships takes precedence over immediate profit, especially during visits and delegations. Taboo topics primarily revolve around politics. At the closing stage of negotiations, other elements of business etiquette become significant. For instance, banquets and lunches are important, as Chinese people love lavish, long, group meals that serve to strengthen relationships. Besides the etiquette regarding the use of chopsticks, there are no other specific rules at a Chinese table. Regarding gifts, they should be presented with both hands and a bowed head, and they should be received in the same manner.

To sum up, in negotiations with Chinese people, prioritizing the establishment of a long-term relationship based on respect for the business etiquette derived from Chinese cultural heritage is more crucial than immediate profit.

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SUMMARY

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BUSINESS ETIQUETTE: THE HERITAGE OF CHINESE CULTURE IN TRADE NEGOTIATIONS

Chinese history and cultural traditions play a very important role in contemporary trade negotiations. The aim of this article is to present the cultural determinants of Chinese business etiquette and the most important elements of cultural heritage in Chinese business etiquette during trade negotiations. Assuming that negotiations consist of three main phases – exchanging information, bargaining, and closing - particular attention is paid in this paper to establishing cooperation (language, hierarchy), visits and delegations (greeting, proper negotiations, taboo topics), and other elements of business etiquette such as banquets and lunches, and gift-giving practices. The following thesis is formulated in this paper: in negotiations with Chinese people more important than immediate profit is the process of building a long-term relationship based on taking into account the business etiquette resulting from the heritage of Chinese culture.

Keywords: business etiquette, China, culture, heritage, trade negotiations

STRESZCZENIE

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ETYKIETA BIZNESOWA: DZIEDZICTWO CHIŃSKIEJ KULTURY W NEGOCJACJACH HANDLOWYCH

Historia oraz tradycje kulturowe Chin odgrywają bardzo ważną rolę we współczesnych negocjacjach handlowych. Celem niniejszego artykułu jest przedstawienie kulturowych uwarunkowań chińskiej etykiety biznesowej oraz najważniejszych elementów dziedzictwa kultury w chińskiej etykiecie biznesowej podczas negocjacji handlowych. Zakładając, że negocjacje składają się z trzech głównych faz: wymiany informacji, targowania się i zamykania, szczególną uwagę poświęcono nawiązywaniu współpracy (język, hierarchia), wizytom i delegacjom (powitania, odpowiednie negocjacje, tematy tabu) oraz innym elementom etykiety biznesowej, takim jak bankiety i lunche oraz praktyki wręczania prezentów. W artykule sformułowano następującą tezę: w negocjacjach z Chińczykami ważniejsze od natychmiastowego zysku jest budowanie długoterminowej relacji opartej na uwzględnianiu etykiety biznesowej wynikającej z dziedzictwa chińskiej kultury.

Słowa kluczowe: etykieta biznesowa, Chiny, kultura, dziedzictwo, negocjacje handlowe

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SPEAKING OF THE DEAD: HUMAN REMAINS AS HERITAGE IN THE SINGAPORE CONTEXT

Human remains are undoubtedly a unique form of heritage. Because they originate from human persons who were once alive, they are regarded by many as having a special, even metaphysical, nature. To some indigenous people such as the Māori, "the concept of possession of the deceased is troubling (…) in light of the sacredness in which they view the life and death continuum."[1] Indigenous people from Australia and New Zealand have sought for the purpose of burial the return of human remains which were taken during colonial times and are now in museums and other institutions in countries such as the United Kingdom.

In earlier times, courts in several common-law jurisdictions recoiled against treating human remains as property in their judgments. Nonetheless, the issue of whether human remains may have such a legal status arises because other questions hinge on it. These range from whether body parts can be the subject of theft to whether compensation can be sought for negligent damage caused to human tissue samples. The issue arguably also arises when human remains are found during archaeological investigations, or are preserved in institutional collections.

In present-day Singapore, it has been noted that "[i]t is extremely rare to find any human remains from pre-modern archaeological sites in Singapore,"[2] possibly because the country's tropical environment does not provide amenable conditions for preserving organic matter. It appears that an excavation of the bank of the

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[1] Law Commission (New Zealand), "Resolving the Conflicts" in *Coroners* (NZLC R62), Law Commission, Wellington 2000, para. 217. For this reason, the Law Commission of New Zealand, which was reviewing the coronial system, recommended use of the terminology of "control" over a deceased person's body and body parts by a coroner rather than "possession" (para. 218).

[2] C.S. Lim, "The Finds and Artefacts" [in:] *idem*, *Preliminary Report on the Archaeological Investigations at the Victoria Concert Hall* (Archaeology Report Series; 9), Archaeology Unit, Nalanda-Sriwijaya Centre, ISEAS-Yusof Ishak Institute, Singapore 2019, p. 72.

Singapore River at Empress Place in 1998 turned up part of a human skull, though it was not possible to determine how old it was. In 2010 during the excavation of a site at the Victoria Concert Hall prior to its renovation, at least 45 adult teeth were found scattered throughout the site, together with pieces of other materials which suggested that they all dated from the fourteenth century. Other bone fragments were also found, but it was not known whether they were of human or animal origin.[3] Human remains are more likely to be found when cemeteries are exhumed, which occurs fairly frequently due to the need for reuse of land, particularly for public housing. However, there are also small quantities of human remains in institutional collections, which means that having policies for the sensitive treatment of these artefacts are essential.

Part 1 of this article considers the status of unburied remains. These might be in the form of a deceased person's corpse that has not been interred; or preserved remains, possibly in a museum or a private collection. Part 2 turns to an examination of the legal status of buried human remains, grave goods, and funerary monuments in cemeteries. Finally, Part 3 considers guidelines concerning the proper treatment of remains in a museum setting.

At the outset, it should be noted that most of the issues to be discussed in this article have not been brought before the Singapore courts. In such a situation, given the common-law legal system which Singapore inherited from the time it was a British colony, the courts would consider the common law – that is, legal rules laid down as precedents in court judgments – of England and Wales, and of other common-law jurisdictions such as those in Australia, Canada, Hong Kong, and New Zealand. However, the courts are not bound to follow such rules in developing Singapore's own common law, and they would always ensure that any new legal rules articulated would be in line with the Constitution, statute law, and existing common law rules (unless it is felt that the latter need to be revised).

1. The legal status of unburied human remains

1.1. Nineteenth- and twentieth-century cases

We begin by considering whether property exists in the remains of deceased human beings which are not yet buried, or have never been buried but have been preserved in some manner and, for example, enter the collection of a museum or a private collection. At the start, we may observe that at common law a living person is regarded as incapable of possessing their own body or any part of it, for "[o]ne cannot

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3 *Ibidem.*

possess something which is not separate and distinct from oneself."[4] In line with this, there are some cases asserting that remains of deceased persons also cannot be considered as property,[5] but it has been suggested that these cases are unsatisfactory.[6]

For example, *Williams v. Williams* involved a person who specified in his will that after his death his body should be given to a friend, W, to be dealt with as he had directed her to do so in a letter, and that his executors should pay W's expenses. The testator had asked W to cremate his body and place the ashes in an urn, which W could then deal with as she deemed fit. However, the executors ignored the direction and buried the testator in a London cemetery. W, under the pretence that she wished to relocate the remains to another cemetery, obtained permission from the authorities to exhume the body, but then she took it to Italy and had it cremated. She then claimed the expenses for doing this from the testator's executors and residuary beneficiaries.

W's claim failed. One of the court's reasons was that the testator's direction was void, for if a deceased person has personal representatives it is their exclusive legal duty to dispose of the deceased's body, and W was not one of the testator's personal representatives. Moreover, since such a legal duty existed, a testator could not dispose of their own body by a will.[7] To justify the latter point, the judge also said "the law of this country recognises no property in a corpse."[8] The view has been taken that this statement was unnecessary for the conclusion reached by the judge, and thus *obiter*.[9]

It is submitted that the statement was also somewhat inconsistent with the conclusion, since the judge clearly recognized that the testator's personal representatives did have limited possessory rights over his remains for the purpose of properly disposing of them, which might be regarded as a form of property interest. An American decision is apposite here: in *Polhemus v. Daly*, the Missouri Court of Appeals held that "while there is no right of private property in a dead body in the

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4 *R. v. Bentham* [2005] UKHL 18, [2005] 1 WLR 1057, p. 1061, para. 8 (House of Lords, United Kingdom) (defendant who positioned his hand inside a garment to make it appear as if he had a firearm during a robbery did not have in his possession an imitation firearm within the meaning of the Firearms Act 1968 (1968 c. 27; U.K., s. 17 subs. 2), applied in *Yearworth v. North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1, p. 13, para. 30 (Court of Appeal, England and Wales).

5 *Exelby v. Handyside* (also known as *Dr Handyside's Case*) (1749) 2 East PC 652; *Williams v. Williams* (1882) 20 Ch D 659, pp. 662–664 (High Court (Chancery Division), England and Wales).

6 P. Matthews, "Whose Body? People as Property", *Current Legal Problems* 1983, vol. 36, no. 1, pp. 208–214; on the fascinating research carried out by the author to debunk the precedential value of *Handyside*, see: pp. 208–209.

7 *Williams v. Williams*, p. 665, summarized in: P. Matthews, "Whose Body?…", pp. 210–212.

8 *Williams v. Williams*, p. 664, citing *R. v. Sharpe* (1857) Dears & Bell 160, 169 ER 959 (High Court, England and Wales), which, however, involved buried human remains.

9 P. Matthews, "Whose Body?...", p. 212.

ordinary sense of the word, it is regarded as property so far as to entitle the next-of-kin to legal protection from unnecessary disturbance and violation or invasion of its place of burial."[10] In *Smith v. Tamworth City Council*,[11] the Supreme Court of New South Wales said that the latter statement represented the law in the state.

The High Court of Australia's decision in *Doodeward v. Spence*[12] is arguably more significant than *Williams v. Williams*, as it has been applied in numerous other cases.[13] A doctor had obtained the body of a stillborn baby with two heads from its mother, and had preserved it with spirits in a bottle. Upon the doctor's death his property was sold by auction and the human remains purchased by the appellant's father and given to the appellant, a showman. The appellant began exhibiting the human remains for a fee, but was prosecuted for an indecent exhibition. The remains were confiscated by the police and given to a university museum, while the bottle and spirits were returned to the appellant. The appellant successfully sued the policeman for the return of the remains. Chief Justice Samuel Griffith accepted that "[a]n unburied corpse awaiting burial is *nullius in rebus* [a thing of no one's]."[14] However, he went on: "But it does not follow from the fact that an object is at one time *nullius in rebus* that it is incapable of becoming the subject of ownership. (...) [A] human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, *when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial*, but subject, of course, to any positive law which forbids its retention under the particular circumstances."[15]

If this view is to be accepted, it would mean that an unburied human body, or parts of it, even if originally not property, can gain the status of property if some

10 *Polhemus v. Daly* 296 SW 442 (1927), p. 444 (Court of Appeals, Missouri). See also: *Pierce v. Proprietors of Swan Point Cemetery* 10 RI 227, pp. 242–243; 14 Am Rep 667, p. 681 (1872) (Supreme Court in Equity, Rhode Island).

11 *Smith v. Tamworth City Council* (1997) 41 NSWLR 680, p. 691 (Supreme Court, Equity Division, New South Wales), citing both *Pierce v. Proprietors of Swan Point Cemetery* and *Polhemus v. Daly*.

12 *Doodeward v. Spence* (1908) 6 CLR 406 (High Court, Australia).

13 See, for example, *Dobson v. North Tyneside Health Authority* [1996] EWCA Civ 1301, [1997] 1 WLR 596, pp. 600–602 (Court of Appeal, England and Wales); and *R. v. Kelly* [1998] EWCA Crim 1578, [1999] QB 621, pp. 630–631 (Court of Appeal, England and Wales). The judgment is binding on Australian state courts and so has been applied in *Re Edwards* [2011] NSWSC 478, (2011) 81 NSWLR 198 (Supreme Court, New South Wales); *Bazley v. Wesley Monash IVF Pty Ltd* [2011] 2 Qd R 207 (Supreme Court, Queensland); *Re H, AE (No. 2)* [2012] SASC 177 (Supreme Court, South Australia) and other cases.

14 *Doodeward v. Spence*, p. 411.

15 *Ibidem*, pp. 411–414. Italics added.

"lawful exercise of work or skill" is practised on it, such as some preservation treatment. In addition, the human remains become the property of the person who exercised the work or skill on them. This has been criticized. For one thing, in general if a person does unauthorized work on another person's chattel, that does not give the first person any property interest in the chattel.[16]

Indeed, whether any work is done on the remains is irrelevant. At common law the right to possession of a chattel is relative – a person in possession of a chattel is entitled to retain it, so long as no one with a better right to possession comes along. In the case of unburied human remains, as we have seen, the courts recognize that the personal representatives of a deceased person have a legal right to possess the person's remains for the purpose of properly disposing of them. In *Doodeward* Chief Justice Griffith noted that that the "work or skill exception" to the general "no property in a corpse" rule would be subject to the right of a person "entitled to have it [the remains] delivered to him for the purpose of burial."[17] But if they do not object to another person having possession of the remains, or are unidentified, then the person who has current possession has a right to protect that possession.[18]

It is worth noting Stephen Gallagher's point that the *Doodeward* exception can only apply to human remains which a person lawfully possesses. Remains obtained by "theft from graves or in other dubious circumstances can never be property subject to this exception, as it is trite law to state *nemo dat quot non habet* (no one may give what he does not have)."[19]

1.2. Recent developments

In recent times, courts have declined to rely on the *Doodeward* work or skill exception as a sound basis for developing the common law. In *Yearworth v. North Bristol NHS Trust*,[20] the claimants were men who had undergone chemotherapy at one of the defendant's hospitals. Before they did so, they were invited by the hospital's clinicians to provide semen samples for storage by the hospital in case their fertility was affected by the treatment. The semen samples were frozen by the hospital for storage, but the liquid nitrogen used to keep the samples in this state fell below the required level, causing the semen to thaw. The claimants alleged that the hospital

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16 See, for example, *Falcke v. Scottish Imperial Insurance Co* (1886) 34 Ch D 234 (Court of Appeal, England and Wales); *Greenwood v. Bennett* [1973] QB 195, pp. 202–203 (Court of Appeal, England and Wales).

17 *Doodeward v. Spence*, p. 414.

18 P. Matthews, "Whose Body?...", pp. 219–220.

19 S. Gallagher, "Museums and the Return of Human Remains: An Equitable Solution?", *International Journal of Cultural Property* 2010, vol. 17, p. 72.

20 *Yearworth v. North Bristol*, p. 13. See also the earlier case *Roche v. Douglas* (2000) 22 WAR 331, especially p. 335, para. 14, and pp. 338–339, para. 24 (Supreme Court, Western Australia).

had acted negligently in storing the semen samples. Among the issues in the case was whether the samples were the claimants' property, thus entitling them to claim for damage to the samples.

The Court of Appeal of England and Wales noted that developments in medical science required a re-analysis of how the common law approaches the ownership of parts or products of a living human body.[21] Although the court could have simply applied the *Doodeward* work or skill exception to find that the claimants had a property interest in their sperm samples, the court was "not content to see the common law in this area founded upon the principle in the *Doodeward* case (...), which was devised as an exception to a principle, itself of an exceptional character, relating to the ownership of a human corpse. Such ancestry does not commend it as a solid foundation."[22] The exception was problematic – for example, it did not make sense for a surgeon who had carelessly damaged a finger accidentally amputated from a factory worker and intended to be reattached to escape liability simply because no work or skill had been applied to the finger.[23]

The court thus held that the claimants did own their semen samples but on a "broader basis."[24] The semen had been produced by and from their bodies, for the sole purpose of potentially enabling them to father children through *in vitro* fertilization later on. Although the Human Fertilisation and Embryology Act 1990 (1990 c. 37; U.K.). limited what the claimants could do with the stored semen samples, other laws existed for public policy reasons to limit what people could do with their chattels (for instance, a pharmacist's ability to sell medicines) without destroying their property interest in the chattels. Significantly, the Act preserved the claimants' right to direct how the semen should *not* be used, and gave no other person such a right.[25]

Kate Falconer has termed this modern approach to establishing whether human tissue may be the subject of property "guided discretion."[26] A court's discretion on the issue is said to be guided by three elements:

(1) Has the human tissue been detached from the source individual, such that it can be possessed, transferred, and used?[27]

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21 *Yearworth v. North Bristol*, p. 19, para. 45(a).

22 *Ibidem*, p. 20, para. 45(d). The court's holding in *Yearworth v. North Bristol* was followed in *Re Lee* [2017] NZHC 3263, [2018] 2 NZLR 731, paras. 82–83 (High Court, New Zealand).

23 *Yearworth v. North Bristol*, p. 20, para. 45(d).

24 *Ibidem*, p. 20, para. 45(e).

25 *Ibidem* pp. 20–21, para. 45(f).

26 K. Falconer, "Dismantling *Doodeward*: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material", *University of New South Wales Law Journal* 2019, vol. 42, no. 3, p. 900.

27 *Ibidem*, pp. 906–909.

(2) What are the practical results if the human tissue is regarded as property?[28] For example, in *Yearworth* the finding that the semen samples were the claimants' property enabled the court to find that they could claim damages against the defendant for improperly storing them.

(3) Related to the second element, what is the factual and legal context of the dispute?[29] Again, *Yearworth* demonstrates that there may be strong legal reasons for a finding that human tissue should be regarded as property. However, depending on the context and concerns about the commodification of the human body, it may be the case that human tissue should be regarded as property in some situations but not in others.[30] A court may not, for instance, wish to recognize any property interest in human blood, gametes, organs, or other tissue that have been contracted for sale for valuable consideration when such a contract or arrangement is void under Singapore statutes such as the Human Organ Transplant Act 1987 (s. 13 subs. 1), the Human Cloning and Other Prohibited Practices Act 2004 (s. 13 subss. 1 and 2), and the Human Biomedical Research Act 2015 (s. 32 subs. 1), and constitutes a criminal offence.[31] I do not, however, express a concluded view on this matter as it is beyond the scope of the article.

The *Yearworth* case involved the legal status of human tissue which had been obtained from living persons. Nonetheless, it is submitted that the guided discretion approach adopted in them is appropriately applied to cases involving buried and unburied human remains of heritage value, and that the Singapore courts should apply a similar approach should the issue arise before them.

As regards the first element set out above, in the case of part of a human body detachment from the source individual would clearly have occurred. Even if the remains are more or less in the form of an intact body – for instance, a mummified corpse or a skeleton – Falconer has suggested that the remains can be regarded as having been "conceptually detached" from the source individual: "the human biological material has so altered in perceptible form as to be conceptually distinct from the source."[32]

Where the second and third elements are concerned, the practical results and the factual and legal context also point towards recognition of human remains of heritage value being treated as property. Doing so would mean that human remains in the collection of the National Museum of Singapore (which is a collective name

[28] *Ibidem*, pp. 909–910.

[29] *Ibidem*, pp. 910–912.

[30] *Ibidem*, p. 911.

[31] Human Organ Transplant Act, s. 13 subss. 2–3; Human Cloning and Other Prohibited Practices Act, s. 18; Human Biomedical Research Act 2015, s. 32 subss. 2–3.

[32] K Falconer, "Dismantling *Doodeward*…", p. 919 (emphasis omitted).

for all government-managed museums in Singapore)[33] are "objects" within the meaning of s. 2 of the National Heritage Board Act 1993,[34] and thus vested in the National Heritage Board (ss. 13–14), the government agency in charge of such museums. The Board is empowered by the Act to lend (s. 16 subss. 1–3) and dispose of (s. 15 subss. 3–6)[35] objects which it owns, as well as to acquire and borrow (s. 16 subs. 4) other objects.

It would also enable civil claims and criminal proceedings to be brought if such remains are removed from archaeological sites or museums without authorization. In addition, human remains would be safeguarded by international treaties, as they would be regarded as "cultural property" within the meaning of the 1954 Hague Convention[36] and the 1970 UNESCO Convention,[37] and "cultural objects" under the 1995 UNIDROIT Convention.[38] Although Singapore is not currently a state party to these conventions, as the NHB is a member of the International Council of Museums (ICOM), the museums under its purview are required to comply with the *ICOM Code of Ethics for Museums*, which sets minimum standards of professional practice and performance for museums and includes provisions relating specifically to the acquisition and management of cultural objects.[39] Clause 7.2 of the Code requires that museum policy acknowledge relevant international conventions,

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[33] National Heritage Board Act 1993, s. 11 subs. 3.

[34] An "object" is defined as including "any work of art and any artefact"; *ibidem*, s. 2.

[35] An object of significant national or historical value may not be disposed of unless it is "(a) a duplicate of another object the property in which is so vested [in the Board] and which is so comprised [in the Board's collections]; or (b) in the Board's opinion unsuitable for retention in its collections, and the disposal is done with the prior approval of the Minister [for Culture, Community and Youth] and by way of sale, exchange or gift" (*ibidem*, s. 15 subs. 3). Objects which have "become useless for the purposes of its [*i.e.*, the Board's] collections by reason of damage, physical deterioration or infestation by destructive organisms" may be disposed of by any means, including destruction (s. 15 subs. 4).

[36] Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted in Hague on 14 May 1954, together with its implementing regulations; the Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The human remains would arguably be "movable (...) property of great importance to the cultural heritage of every people, such as (...) objects of (...) historical or archaeological interest" within the meaning of art. 1(a).

[37] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in Paris on 14 November 1970. The human remains would arguably be "specimens of (...) anatomy, and objects of palaeontological interest", "products of archaeological excavations (...) or of archaeological discoveries", and/or "objects of ethnological interest" within the meaning of arts. 1(a), (c) and (f).

[38] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, adopted in Rome on 24 June 1995, art. 2 read with the Annex, paras. (a), (c) and (f); the latter are identically worded to the 1970 UNESCO Convention, arts. 1(a), (c) and (f).

[39] *ICOM Code of Ethics for Museums*, International Council of Museums, Paris 2017, https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf (accessed: 15.05. 2023).

including the 1954 Hague Convention and its two protocols, the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention.

As a member country of the Association of Southeast Asian Nations (ASEAN), Singapore is also a party to two cultural heritage declarations, the ASEAN Declaration on Cultural Heritage, adopted on 25 July 2000 (hereinafter: 2000 ASEAN Declaration) and the Vientiane Declaration on Reinforcing Cultural Heritage Cooperation in ASEAN, adopted on 6 September 2016 (hereinafter: 2016 Vientiane Declaration). While these declarations are not legally binding, they establish a framework for protecting cultural heritage, including movable heritage. "Cultural heritage" is defined in art. 1(b) of the ASEAN 2000 Declaration to include "artefacts (...) that are of a historical, aesthetic, or scientific significance," and ASEAN member countries are to "cooperate to return, seek the return, or help facilitate the return, to their rightful owners of cultural property that has been stolen from a museum, site, or similar repositories" and are "urged to take measures to control the acquisition of illicitly traded cultural objects by persons and/or institutions in their respective jurisdictions" (art. 10 of the ASEAN 2000 Declaration). Under art. 1.1 of the 2016 Vientiane Declaration, ASEAN governments agreed to "[c]ontinue to ensure the effectiveness of laws and policies protecting cultural heritage from illicit trade and trafficking," to "[s]trengthen efforts to exchange information on stolen or trafficked cultural artefacts," and to "[c]ooperate to return, seek the return, or help facilitate the return, to their rightful owners of cultural property that have been stolen from a museum, site, or similar repositories." Thus, recognizing human remains as property would enable them to be safeguarded within this regional framework.

1.3. Is commercial trading in human remains of heritage value prohibited?

If human remains of heritage value do have the legal status of property, this raises the question of whether Singapore law prohibits commercial trading of this species of property. Section 32 subs. 1 of the Human Biomedical Research Act 2015 states that "a contract or arrangement under which a person agrees, for valuable consideration, (...) to the sale or supply of any human tissue (...) from the body of another person, whether before or after (...) the death of the other person (...) is void."

Section 2 defines "human tissue" as any human biological material, except those excluded by the First Schedule of the Act. "Human biological material" is "any biological material obtained from the human body that consists of, or includes, human cells." Under the First Schedule to the Act, para. 4(1) excludes from the definition of "human biological material" any material "that is not individually-identifiable and has been processed in such a manner that its functional, structural and biological characteristics are substantially manipulated as compared to the time of collection." Paragraph 4(2) contains a list of processing methods – which does not limit the scope of the term "substantially manipulated" – not deemed to be substantial

manipulation of human biological material; they include cutting, shaping, soaking in antibiotic or antimicrobial solutions, sterilization, and vitrification.

The statutory provisions detailed above appear to have the following implications. First, the remains of individually identifiable persons fall under the prohibition. However, even if human remains are not individually identifiable, if the "functional, structural and biological characteristics" have not been "substantially manipulated," then the remains also cannot be commercially traded. At present, it is not entirely clear how this provision should be interpreted where heritage objects are concerned. It would appear, though, that commercial trading of naturally mummified or skeletonized remains is disallowed by the Act, because preservation techniques such as soaking the remains in a preservative fluid and sterilization are deemed not to be substantial manipulation. Even more radical treatment – for instance, the severing of a deceased person's head, followed by defleshing and carving ritual designs on the skull[40] – may not amount to substantially manipulating the remains, as this only involves cutting, shaping and preservation.

As the name of the Act indicates, the Human Biomedical Research Act was not passed with human remains having heritage value in mind.[41] Nonetheless, the Minister for Health is empowered by the Act to exempt any human biological material or human tissue, or any class of such material, from the prohibition against commercial trading (s. 57 subss. 1(f) and (g) of the Human Biomedical Research Act). As an illustration, the Minister could grant an exemption to enable a museum to acquire human remains for display or research. On the other hand, if a private owner of human remains wishes to put them up for auction, and this is opposed by an indigenous community seeking the return of the remains for burial – as was the case with a preserved tattooed head or *mokomokai* of a nineteenth-century Māori warrior which an attempt was made to auction in London[42] – it might be

[40] This may have been how the Dayak skull in the collection of the Asian Civilisations Museum was treated: see footnote 75.

[41] There was no mention of the heritage value of human tissue in the parliamentary debates during the Second and Third Readings of the bill which preceded the Act: "Human Biomedical Research Bill", *Singapore Parliamentary Debates, Official Report*, 17–18 August 2015, vol. 93.

[42] In *Estate of Tupuna Maori, Warrior* (unreported, 19 May 1988), the High Court of New Zealand granted letters of administration of the estate of a Maori warrior who had died around 1820 to the President of the New Zealand Maori Council. The deceased's *mokomokai* had come up for auction in London, and the applicant sought to be appointed his personal representative so that legal proceedings could be brought in the United Kingdom to reclaim the remains for, in the words of Grieg J., "a proper burial according to Maori law and custom and to prevent further indignity being visited upon him." Despite the deceased having no assets in his estate, the court granted the application. The applicant then applied for an injunction in the UK to halt the sale of the *mokomokai*. It was subsequently agreed that the *mokomokai* would be returned to New Zealand, where it was buried; see: P.J. O'Keefe, "Maoris Claim Head", *International Journal of Cultural Property* 1992, vol. 1, no. 2, p. 393; see also: *Re Tasmanian Aboriginal Centre* (2007) 16 Tas R 139; [2007] TASSC 5 (Supreme Court, Tasmania), a later case with strikingly similar facts.

appropriate for the Minister to deny the owner's application for an exemption. It is submitted that the Minister should establish an advisory committee including representatives from the National Heritage Board, non-governmental organizations involved with heritage, and academia, whom the Minister can consult before reaching a decision (s. 5 subs. 1 of the Human Biomedical Research Act 2015).[43]

2. The legal status of buried human remains

We next turn to consider the legal status of buried human remains. Such remains might be found by chance while an archaeological excavation is in progress, and would probably also be uncovered during the clearance of a cemetery, or construction work on a religious building the land of which is known to have been used as a burial ground.

2.1. Is there property in buried human remains?

As has been mentioned, a number of English cases claim that at common law a human corpse cannot be the subject of property,[44] though Paul Matthews has pointed out that the assertions were not based on any authority or proper reasoning.[45]

This point is relevant because it is well established that when an object is found attached to land or embedded in land, between the owner or lawful possessor of the land and a finder of the object, the landowner or lawful possessor has a better title to the object. If the object is found unattached on the surface of the land, the landowner or lawful possessor only has a better title if they exercised "such manifest control over the land as to indicate an intention to control the land and anything that might be found on it."[46] If evidence of such manifest control is absent, the finder has a better title to the object, subject to the finder's obligation to take reasonable steps to locate the true owner of the object and to care for it in the meantime.[47]

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43 The Minister may consult any advisory committee, but is not bound by the consultation: Human Biomedical Research Act, s. 57 subs. 2.

44 See also: *R. v. Sharpe* Dears & Bell at 169, 169 ER at 960 *per* Erle J. (*obiter dictum*); *Foster v. Dodd* (1867) LR 3 QB 67, 77 *per* Byles J. (High Court (Exchequer Chamber), England and Wales) (*obiter dictum*); *R. v. Price* (1884) 12 QBD 247, p. 252 (High Court (Queen's Bench Division), England and Wales).

45 P. Matthews, "Whose Body?…", pp. 198–200.

46 *Waverley Borough Council v. Fletcher* [1995] QB 334, pp. 343–344 and 346 (Court of Appeal, England and Wales), applying *Elwes v. Brigg Gas Co* (1886) 33 Ch D 562, p. 568 (High Court (Chancery Division), England and Wales), and *Parker v. British Airways Board* [1982] QB 1004, pp. 1017–1018 (Court of Appeal, England and Wales).

47 *Parker v. British Airways Board*, p. 1017.

The cases which established these rules, often known as the law of finders, involved the finding of a prehistoric boat,[48] a modern gold bracelet,[49] and a medieval gold brooch,[50] not human remains. Nonetheless, if a corpse can be regarded as property, then presumably the law of finders would apply to it.[51] In *Doodeward v. Spence*, the High Court of Australia suggested *obiter* that "after burial a corpse forms part of the land in which it is buried, and the right of possession goes with the land,"[52] while in *Kwan Chun Investments v. Sik Tak Kwong* the High Court of Hong Kong said that "[f]ollowing well-established principles of property law, a corpse which is buried in land becomes part and parcel of the land by reason of the degree of annexation and purpose for which it is annexed."[53]

Arguably, there are good reasons to reject a blanket rule stating that buried human remains can never be the subject of property. For example, if the latter were true, it might not be possible to bring civil proceedings against a person who takes such remains from an archaeological site without consent for the torts of detinue (wrongful detention and refusal to deliver up another person's chattel),[54] trespass to goods (direct and intentional wrongful interference with a chattel in another person's possession),[55] or conversion (wrongful interference with a person's chattel inconsistent with that person's superior possessory title in the chattel).[56] It would also not be possible to charge such a person with theft, which is defined by the Penal Code as the moving of movable property in order to dishonestly take the property out of the possession of any person.[57]

Finally, if buried human remains have disintegrated to the extent that they are no longer distinguishable from earth, it would be reasonable to regard them as no longer capable of being the subject of property. As the defence counsel in *R. v. Jacobson* put it: "A time may come when the bones are not recognisable as human remains, when the bones have become dust and the ground might be built

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48 *Elwes v. Brigg Gas Co.*

49 *Parker v. British Airways Board.*

50 *Waverley Borough Council v. Fletcher.*

51 See: P. Matthews, "Whose Body?...", pp. 203–204.

52 *Doodeward v. Spence*, p. 412.

53 *Kwan Chun Investments v. Sik Tak Kwong* [2021] HKCFI 714, para. 87 (High Court (Court of First Instance), Hong Kong), citing *Elitestone v. Morris* [1997] 1 WLR 687 (House of Lords, U.K.).

54 P.W. Lee, "Interference with Goods" [in:] G.K.Y. Chan, P.W. Lee, *The Law of Torts in Singapore*, 2nd ed., Academy Publishing, Singapore 2016, p. 496.

55 *Ibidem*, pp. 496–497.

56 *Ibidem*, pp. 459–464.

57 Penal Code 1871, s. 378. It is an offence to exhume a corpse without proper authorization under the Environmental Public Health Act 1987, s. 76, but this only applies to corpses buried in cemeteries.

upon. To disturb remains of Druids who had been buried on Salisbury Plain, for instance would not be indictable. This must always be a question of degree (...)."[58]

In this scenario, it would be more apposite to proceed against a person who carries out an unauthorized excavation of a burial site in civil proceedings for trespass to land,[59] or in criminal proceedings for criminal trespass (s. 441 of the Penal Code) or wilfully trespassing on property.[60]

2.2. The legal status of buried human remains and funerary monuments in cemeteries

Given that it is uncommon to find human remains during archaeological excavations in Singapore, I propose to touch on the legal status of buried remains in cemeteries, which form the bulk of human remains dealt with, and as a corollary any goods buried together with human remains, and funerary monuments – grave sculptures, tombstones and the like.

Due to the scarcity of land in Singapore – the island-nation has a land area of 734.3 square kilometres as of December 2022[61] – from the 1950s cremation of the dead was promoted,[62] and in 1964 legislation relating to the compulsory acquisition of land for public purposes[63] was amended[64] to enable the government to compensate landowners for acquired land at below the prevailing market value. Many Chinese burial grounds were then compulsorily acquired and cleared for reuse as public housing estates.[65] In 1978 the government announced in Parliament that as "land in Singapore is scarce and valuable" and that the "needs and pace of development have necessitated the acquisition of private lands (including a number of private cemeteries) for various public projects (...) Over the next few years, all private cemeteries, including Chinese clan or privately owned cemeteries and Muslim cemeteries

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58 *R. v. Jacobson* (1880) 14 Cox CC 522, pp. 526–527 (High Court (Queen's Bench Division), England and Wales).

59 P. Matthews, "Whose Body?...", pp. 204–205.

60 Miscellaneous Offences (Public Order and Nuisance) Act 1906, s. 21 (applicable if nominal or no damage is caused).

61 "Environment", *Department of Statistics Singapore*, 31 January 2023, https://www.singstat.gov.sg/find-data/search-by-theme/society/environment/latest-data (accessed: 15.05.2023).

62 K.Y.L. Tan, "Introduction: The Death of Cemeteries in Singapore" [in:] *Spaces of the Dead: A Case from the Living*, ed. K.Y.L. Tan, Singapore Heritage Society, Ethos Books, Singapore 2011, pp. 16–17.

63 Land Acquisition Ordinance (Cap. 248, 1955 Rev. Ed.), now the Land Acquisition Act 1966.

64 By the Land Acquisition (Amendment) Ordinance 1964 (No. 1 of 1964).

65 K.Y.L. Tan, "Introduction: The Death of Cemeteries…", p. 17.

on wakaff lands,[66] which have been closed for burials, will be acquired as and when required for development."[67]

It is thus believed that today most if not all cemeteries in Singapore are situated on state land. Assuming that is the case, as previously discussed, human remains which are buried in cemeteries and which have not completely disintegrated, and any objects interred with them, would be the property of the government. Similarly, since funerary monuments in cemeteries are affixed to the realty to mark the graves of deceased persons and are not intended to be enjoyed as chattels, they most likely also belong to the government as the landowner.[68]

Defunct cemeteries are regularly exhumed and the land put to other purposes, particularly housing. The government's policy is to issue a public call for the next-of-kin of deceased persons to claim the remains. A claimant may either opt for the remains to be cremated, or reburied in another cemetery if cremation is not permitted by their religious belief. Cremated remains may be placed in a government columbarium at no charge to the claimant, a private columbarium at the claimant's own expense, or scattered at sea. Unclaimed remains are cremated and kept for a few years; if the ashes still remain unclaimed they are scattered at sea.[69] It appears that claimants are free to retain objects found in graves and funerary monuments if they wish to do so.[70] No mention is made about their property status or who owns them.

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66 A *wakaf* is a "permanent dedication by a Muslim of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable" (s. 2 of the Administration of Muslim Law Act 1966).

67 E.W. Barker, "Acquisition of Private Cemeteries (Statement by the Minister for Law, the Environment and Science and Technology)", *Singapore Parliamentary Debates, Official Report*, 7 April 1978, col. 1491.

68 *HSBC Institutional Trust Services (Singapore) Ltd v. Chief Assessor* [2019] SGHC 95, [2020] 3 SLR 510, p. 535, para. 68 (High Court, Singapore), see also: *HSBC Institutional Trust Services (Singapore) Ltd v. Chief Assessor* [2020] SGCA 10, [2020] 1 SLR 621, p. 623, para. 4 (Court of Appeal, Singapore), where the court stated: "The established common law position is that fixtures are part of the land."

69 See, for example, M. Teo-Jacob, "Singapore War Dead under Eviction Orders", *The Australian*, Surry Hills, N.S.W. 19 April 2001, p. 14; "Singapore's History to be Scattered at Sea", *The Sydney Morning Herald*, Sydney, N.S.W. 21 August 2004, https://www.smh.com.au/world/singapores-history-to-be-scattered-at-sea-20040821-gdjlef.html (accessed 01.05.2024), both referring to the clearance of Bidadari Cemetery which was used for burials between 1907 and 1972, then exhumed between 2001 and 2006. See: K.Y.L. Tan, "Introduction: The Death of Cemeteries…", p. 11.

70 See, for example, A. Olesen, "Singapore Digs Up the Dead – 58,000 of Them – to Make Room for the Living", *Associated Press Newswires*, 12 May 2002 (referring to monuments).

3. Care of human remains in museums

Apart from the question of the property status of human remains, the way museums and similar institutions acquire, safeguard and display human remains is a matter of contemporary concern. We have already seen indigenous peoples requesting with increasing frequency the return of the remains of persons from their communities, which are often in the hands of institutions in Western countries. The issue is fraught because these remains were chiefly taken during colonial times "without regard to the feelings of indigenous people who at the time were judged to be less than human."[71]

The quantity of human remains in Singapore museums appears to be small. There are, for example, anatomical specimens used for research in the National University of Singapore's Department of Anatomy Museum; and the Asian Civilisations Museum ("ACM") has a human skull with designs carved on it, originating from the Dayak people of Borneo.[72] It does not appear that there have been calls from Dayaks for this artefact to be returned to its source community.

The National Heritage Board has not made publicly available any guidelines or policies it may have formulated concerning the care and treatment of human remains in the museums it manages. As a member of ICOM, the Board's museums are required to adhere to the *ICOM Code of Ethics for Museums*, including the following broad principles:

> Clause 2.5 (Culturally Sensitive Material): Collections of human remains and material of sacred significance should be acquired only if they can be housed securely and cared for respectfully. This must be accomplished in a manner consistent with professional standards and the interests and beliefs of members of the community, ethnic or religious groups from which the objects originated, where these are known.
>
> Clause 3.7 (Human Remains and Materials of Sacred Significance): Research on human remains and materials of sacred significance must be accomplished in a manner consistent with professional standards and take into account the interests and beliefs of the community, ethnic or religious groups from whom the objects originated, where these are known.

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[71] D. Shariatmadari, "'They're Not Property': The People who Want Their Ancestors back from British Museums", *The Guardian*, 23 April 2019, https://www.theguardian.com/culture/2019/apr/23/theyre-not-property-the-people-who-want-their-ancestors-back-from-british-museums, (accessed: 1.05.2024).

[72] I.Y.K. Tan, "Dignity after Death: Treating Human Remains with Respect", *BeMuse* 2014, vol. 7, no. 4, pp. 4, 6, https://www.academia.edu/24477910/Dignity_After_Death_Treating_Human_Remains_with_Respect_in_Singapore_Museums (accessed: 1.05.2024).

> Clause 4.3 (Exhibition of Sensitive Materials): Human remains and materials of sacred significance must be displayed in a manner consistent with professional standards and, where known, taking into account the interests and beliefs of members of the community, ethnic or religious groups from whom the objects originated. They must be presented with great tact and respect for the feelings of human dignity held by all peoples.
>
> Clause 4.4 (Removal from Public Display): Requests for removal from public display of human remains or material of sacred significance from the originating communities must be addressed expeditiously with respect and sensitivity. Requests for the return of such material should be addressed similarly. Museum policies should clearly define the process for responding to such requests.

Heritage agencies and museums in other jurisdictions have developed detailed policies for dealing with human remains.[73] These are likely to be useful guides for the Board in refining its own policy on the issue.

The Dayak skull in the ACM provides an interesting case in point. In 2008 the skull was featured as one of the artefacts which volunteers from the Singapore Paranormal Investigators, a non-governmental organization of paranormal enthusiasts, "dressed in their spooky best" would "give visitors a thrilling spin" on during a Halloween event called *Fright Night!*.[74] An anonymously written academic essay posted on a personal online blog in 2010 also commented that the ACM's display on Dayak culture, particularly the objects relating to headhunting which included decorated knives, wooden shields and the carved skull, tended to "stereotype the Dayak Natives as a society of primitive people which headhunts and worships Nature." This was accentuated by the commentary given by a docent during a tour of the display, which the author characterized as "playing up the primitivism and ostensible brutality of the Dayaks" which, "[i]nstead of promoting 'awareness and appreciation' of other cultures, as stated in the museum's corporate mission, (…) paradoxically perpetuated the Dayaks being the exotic 'other'."[75]

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[73] See, for example, *Guidance for the Care of Human Remains in Museums*, Department of Culture, Media and Sport, London 2005, https://assets.publishing.service.gov.uk/media/5f291770e90e0732e4bd8b76/GuidanceHumanRemains11Oct.pdf (accessed: 1.05.2024); *Human Remains Policy*, National Museum of Ireland, Dublin 2019, https://www.museum.ie/getmedia/80bd1b97-7ffb-4bac-adf9-c45f71041611/NMI-Human-Remains-Policy-2019-2023-FINAL.pdf (accessed: 1.05.2024).

[74] "Media Advisory: Fright Night Descends on the Asian Civilisations Museum", *Asian Civilisations Museum*, 24 October 2008, https://www.nhb.gov.sg/acm/-/media/acm/document/about-us/media/press-releases/2008-3.ashx (accessed: 1.05.2024).

[75] TXY [pseudonym], "Re-presenting Native Culture", *Artxy*, 10 December 2010, http://www.art-xy.com/2010/12/re-presenting-native-culture.html (accessed: 1.05.2024).

In contrast, Ian Tan has noted that the ACM has "framed its curation of the Dayak human skull within an anthropological understanding of the Dayak tribe" by going to "great lengths to assure visitors that headhunting was not a form of brutal tribal behaviour" but "an honourable means to 'improve the community's well-being' as human heads were 'believed to contain a powerful beneficial spiritual essence'." Such heads were treated as revered artefacts by the Dayaks.[76]

This difference in views highlights the challenge which museums face in ensuring that human remains have been "presented with great tact and respect for the feelings of human dignity held by all peoples" as required by clause 4.3 of the *ICOM Code of Ethics for Museums*. While some curators may have taken pains to present human remains contextually and respectfully, unfortunately this can be undone by well-meaning but improperly briefed staff and volunteers who present the remains as exotic and sensational.

4. Conclusions

Although older common-law cases took the position that a human corpse, whether buried or unburied, could not have the status of property, commentators have noted that this position was not properly justified by precedent or reason. Exceptions to the rule were also formulated, notably the statement in *Doodeward v. Spence* that if a person has exercised work or skill on human remains, the person can assert a property interest in the remains.

More recent cases have declined to apply the *Doodeward* exception as the basis for developing the law, instead applying an approach which has been termed "guided discretion" by Kate Falconer. Although the cases which have used guided discretion did so in the context of human tissue obtained from living human beings, if this issue comes before the Singapore courts it is submitted that this approach should be applied, and that it should be determined that human remains should be regarded as having the status of property. This would, among other things, enable civil and criminal proceedings to be pursued in domestic law if such remains are removed from archaeological sites or museums without authorization, and for international frameworks facilitating the return of illicitly exported cultural objects such as those established by the 1970 UNESCO Convention and the 1995 UNIDROIT Convention to apply.

It would seem that Singapore's Human Biomedical Research Act 2015 prohibits commercial trading in human remains, even those regarded as having heritage value. This may have been an unforeseen consequence of the Act, which aims at

[76] I.Y.H. Tan, "Dignity after Death…", p. 6. At the time the article was written, the author was working with the NHB.

regulating biomedical research involving human tissues. Notwithstanding this, in appropriate cases the Minister for Health might exempt certain human remains from the restriction by exercising a power granted under the Act, and it is suggested that the Minister should appoint an advisory committee to consult on such matters.

Recognizing that buried human remains are property implies that legal title to them is vested in the owner of the land in which they are found. Thus, if remains are found in the course of an archaeological excavation, it is the landowner who owns them. In Singapore, where it is believed that practically all cemeteries are on state land, this means that interred corpses and any objects buried with them, and funerary monuments affixed to the land, belong to the state. Due to the scarcity of land in Singapore, cemeteries are frequently cleared to enable the land to be reused, chiefly for public housing. The government does not publicly assert any property interest in buried remains and monuments in such cemeteries, instead inviting the next-of-kin of deceased persons to claim their relatives' remains and monuments if they wish.

As regards preserved human remains held as part of institutional collections such as museums managed by the National Heritage Board, there are no published policies on how such remains are treated. However, as a member of the International Council of Museums (ICOM), the Board's museums are required to comply with the *ICOM Code of Ethics for Museums*, which generally requires human remains to be treated with great tact and respect. Museums should therefore ensure that all staff and volunteers are aware of the need to treat human remains respectfully and not to exoticize or sensationalize them for the sake of generating public interest.

Provided that the interests and beliefs of the community, ethnic or religious groups from whom human remains originated are considered, it is submitted that research into human remains and their sensitive display in museums are important ways for us to learn more about our origins and ourselves.

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Municipal Ordinance 1896 (Ordinance XV of 1896; Straits Settlements)
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SUMMARY

Jack Tsen-Ta Lee

SPEAKING OF THE DEAD: HUMAN REMAINS AS HERITAGE IN THE SINGAPORE CONTEXT

This article considers, in the Singapore context, the legal status of unburied human remains having heritage value, which might be in the form of a deceased person's corpse that has not been interred; or preserved remains, possibly in a museum or a private collection. It is submitted that, following the guided discretion approach adopted in recent cases concerning human tissue obtained from living human beings, such human remains should be regarded as having the status of property. This would, among other things, enable civil and criminal proceedings to be pursued in domestic law if such remains are removed from archaeological sites or museums without authorization, and for international frameworks facilitating the return of illicitly exported cultural objects to apply. The article also looks at the status of buried human remains, grave goods and funerary monuments, and guidelines concerning the proper treatment of remains in a museum setting. Provided that the interests and beliefs

of the community, ethnic or religious groups from whom human remains originated are considered, research into human remains and their sensitive display in museums are important ways for us to learn more about our origins and ourselves.

Keywords: commercial trading in human remains, human remains as property, Singapore, treatment of human remains in museums

STRESZCZENIE

Jack Tsen-Ta Lee

MÓWIĄC O ZMARŁYCH: SZCZĄTKI LUDZKIE JAKO DZIEDZICTWO W KONTEKŚCIE SINGAPURU

W artykule poddano refleksji, w kontekście Singapuru, status prawny niepochowanych szczątków ludzkich o wartości dziedzictwa. Mogą one mieć postać zwłok osoby zmarłej, która nie została pochowana; lub zachowanych szczątków, ewentualnie znajdujących się w zasobach muzeum lub w prywatnej kolekcji. Twierdzi się, że zgodnie z podejściem opartym na uznaniowości przyjętym w niedawnych sprawach dotyczących tkanek ludzkich uzyskanych od żywych istot ludzkich takie szczątki ludzkie powinny być uważane za mające status własności. Umożliwiłoby to, między innymi, prowadzenie postępowań cywilnych i karnych w prawie krajowym w przypadku usunięcia takich szczątków ze stanowisk archeologicznych lub muzeów bez zezwolenia, a także zastosowanie międzynarodowych ram ułatwiających zwrot nielegalnie wywiezionych dóbr kultury. Analizie poddano również status pochowanych szczątków ludzkich, dóbr grobowych i nagrobków, a także wytyczne dotyczące właściwego traktowania szczątków w warunkach muzealnych. Badania nad ludzkimi szczątkami i ich delikatna ekspozycja w muzeach są ważnymi sposobami, dzięki którym możemy dowiedzieć się więcej o naszym pochodzeniu i nas samych, jednak niezbędnym warunkiem ich wykorzystania jest uwzględnienie interesów i przekonań społeczności, grup etnicznych lub religijnych, z których pochodzą ludzkie szczątki.

Słowa kluczowe: komercyjny obrót szczątkami ludzkimi, Singapur, traktowanie szczątków ludzkich w muzeach, szczątki ludzkie jako własność

DEBARATI PAL*

LEGAL FRAMEWORK ON HERITAGE PROTECTION IN INDIA

1. Introduction

Heritage shows the essence of the past that has been influenced by cultural, social, and political factors, demonstrated through events and spaces. The collective cultural inheritance of a community allows it to preserve its history and identity by conserving the built environment and representative and valued landscapes. This article discusses the legal framework that governs heritage protection and highlights the critical role of the central government in preservation. The Ancient Monuments Preservation Act of 1904 and the Ancient and Historical Monuments and Archaeological Sites and Remains Act of 1958 are the primary laws safeguarding heritage in India. The Treasure Trove Act of 1874 was later revised as the Antiquities and Art Treasures Act of 1972, which regulates movable heritage such as museum collections, artefacts, and manuscripts. Preserving heritage is essential, as it allows future generations to understand and appreciate their cultural roots and helps build a sense of pride and identity.

The article is divided into four parts. The first part deals with the statutory framework of built heritage, the second part focusses on the statutory protection of antiquities and art treasures, and the third part addresses the national framework on Intangible Cultural Heritage.

2. Statutory framework of built heritage

The Archaeological Survey of India (ASI) was established in 1861 during the British colonial era to document and make an inventory of India's ancient architecture. This was the first step towards creating a protection mechanism. Its creation was

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supported by James Fergusson, and Sir Alexander Cunningham became its First Director General.[1] Although Cunningham intended to document ancient structures, he excavated and removed several of them from their original site and took them to British museums.[2] Nevertheless, the surveys conducted under his supervision uncovered many ancient sites spread over a vast area.

Additionally, the Treasure Trove Act of 1878 authorised collectors to acquire treasures on behalf of the Government. Consequently, any property so acquired is deemed to be owned by the Government. The Collector is required to pay the treasure's value to the treasure's owner.[3] Architectural and archaeological heritage were not formally distinguished, and their conservation was initially integrated. Later, heritage conservation developed as a separate discipline with growing consensus and awareness after independence.

British writer Samuel Johnson corresponded with Governor General Warren Hastings in 1774 about formally surveying the remains of ancient towers and ruined cities.[4] Some decades later, in 1861, Cunningham wrote to Lord Canning, urging measures to preserve ancient Indian monuments. The goal was to introduce a Western scholarly understanding of Indian culture to civilise the country. As a result, the Asiatic Society was founded in Calcutta to study Indian arts, architecture, history, language, and literature with the help of European scholars. Though England had a decentralised process in the domain of heritage conservation, the British did not, as colonisers, encourage a similar approach in India.[5]

Two regulations were introduced in Bengal and Madras provinces during the rule of the East India Company. These regulations granted the government the power to penalise individuals for damaging public buildings. They were called Bengal Regulation XIX of 1810 and Madras Regulation VII of 1817, respectively. However, both regulations were later repealed by Act XX of 1863.[6] The new legislation authorised the Government to safeguard and maintain structures recognised for their historic and architectural significance.

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[1] See the historical backdrop of ASI at https://asi.nic.in/HQ/history-view (accessed: 2.04.2024).

[2] I. Sengupta, "Monument preservation and the vexing question of religious structures in colonial India" [in:] *From Plunder to Preservation. Britain and the Heritage of Empire: C.1800–1940*, eds. A. Swenson, P. Mandle, Oxford University Press, Oxford 2013, pp. 171–186; see also: I. Sengupta, "Culture-keeping as state action: Bureaucrats, administrators, and monuments in colonial India", *Past & Present* 2015, vol. 226 (suppl 10), pp. 153–177.

[3] A. Mann, "The Endangered Inheritance: Conservation through Legislation", *Indian Historical Review* 2020, vol. 47, issue 1, https://journals.sagepub.com/doi/full/10.1177/0376983620922408 (accessed: 20.04.2024).

[4] F.R. Allchin, G. Erdosy, *The archaeology of early historic South Asia: the emergence of cities and states*, Cambridge University Press, Cambridge 1995.

[5] F.R. Allchin, "Monument Conservation and Policy in India", *Journal of the Royal Society of Arts* 1978, vol. 126, issue 5268, pp. 746–765.

[6] F.R. Allchin, G. Erdosy, *The archaeology of early historic…*

Incidentally, Governor General Dalhousie founded the Public Works Department in 1855 to construct government buildings, roads, railway communications, and postal networks. In the European Quarter, the Department introduced street axes, building regulations, and traffic rules.[7] Mughal edifices and *havelis* were refurbished to welcome international corporations' reinvestment. The technical staff built neo-gothic buildings, museums, libraries, and public squares.[8]

In the late 1930s, Improvement Trusts were created by legislation to zone the new colonial capital and build community housing, sanitary cordons, and chawls.[9]

After that, in 1904, the Ancient Monuments Preservation Act was enacted to preserve ancient monuments, exercise control over the trafficking of antiquities, and protect and acquire ancient monuments.[10] It differentiates between ancient monuments that are protected and those that are not protected. After inviting and receiving objections, the central government declares a monument protected under the Act. The Central Government, the Collector, the Commissioner and the private owners of buildings or monuments were the recognised stakeholders in the Act. It formalised the earlier intention of acquiring antiquities and architectural heritage.

The Act gave the British Indian state the power to acquire physical custody of listed monuments, giving the Archaeological Department control. This went against the Anti-Scrape Movement in Britain and resulted in monuments being turned into tourist destinations. Even Hindu temples and Islamic mosques were transformed into European-style gardens.

The 1904 Act did not repeal the Bengal Charitable Endowments, Public Buildings and Escheats Regulation, 1810, and the Religious Endowments Act, 1863.[11] Therefore, conflicts between Public Works and temple/mosque committees were resolved by hiring Indian staff in the Archaeological Department. Negotiations with *shebaits*, temple managers, and donors allowed for the coexistence of archaeologists and priests.[12]

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[7] M. Desai, M. Desai, *The Bungalow in Twentieth-Century India: The Cultural Expression of Changing ways of life and aspirations in the domestic architecture of colonial and post-colonial society*, Routledge, London – New York 2016.

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[9] D.E. Haynes, N. Rao, "Beyond the colonial city: Re-evaluating the urban history of India, ca. 1920–1970", *South Asia: Journal of South Asian Studies* 2013, vol. 36, no. 3, pp. 317–335.

[10] See the preamble to the Ancient Monuments Preservation Act, 1904 https://www.indiacode.nic.in/handle/123456789/2339? (accessed: 3.04.2024).

[11] D. Sutton, "Devotion, Antiquity, and Colonial Custody of the Hindu Temple in British India", *Modern Asian Studies* 2013, vol. 47, no. 1, pp. 135–166.

[12] D. Sutton, "Inhabited pasts: monuments, authority, and people in Delhi, 1912–1970s", *The Journal of Asian Studies* 2018, vol. 77, no. 4, pp. 1013–1035.

The 1951, the Ancient and Historical Monuments and Archaeological Sites and Remains Act declared the listed and graded monuments of national importance under the 1904 Act. It added 450 resources from the princely states of Rajasthan, Gujarat, Hyderabad, and Mysore and empowered new states to create their heritage laws for regionally essential monuments.[13]

After independence, the Constitution of India incorporated the provisions of art. 49[14] and art. 51(f)[15] of the Indian Constitution to protect cultural heritage. The right to conserve, protect, and manage cultural heritage is not included in the Fundamental Rights of the Indian Constitution; instead, it is accorded a non-enforceable status. Apart from that, Entry 67 of List I of the Seventh Schedule[16] endorses the jurisdiction of the Ancient and Historical Monuments and records of archaeological sites and remains of national importance, and Entry 12 of List II[17] incorporates the protection of Libraries, Museums, and similar institutions controlled and financed by the State, including historical monuments and records explicitly excluded from List I. Entry 40 of List III[18] incorporates archaeological sites and remains that are not on List I. After the 74th Amendment to the Constitution, Municipal Corporations are empowered to participate in conserving urban heritage.

Subsequently, the 1958 Act repealed the 1951 Act. The Ancient Monuments and Archaeological Sites and Remains Act (AMASR) of 1958 preserves ancient and historical monuments, archaeological sites, and remains of national significance.[19] The Act regulates excavations and protects sculptures and carvings. Ancient monuments are classified as national, state, corporate, or under private ownership.[20] The Act defines reconstruction, repair, and renovation aspects. Regulated areas are defined for the conservation of sites.[21] The Central Government, the Archaeological Survey

[13] G.K. Rao, "Legislation on Conservation of Ancient Monuments and Archaeological Sites and Ruins: A Critical Appraisal", *Journal of the Indian Law Institute* 1980, vol. 22, no. 1, pp. 108–133.

[14] Part IV (Directive Principles of State Policy) of the Indian Constitution.

[15] Part IV-A (Fundamental Duties) of the Indian Constitution.

[16] It is a part of the Union List. Parliament and the Central Government are the sole authority to legislate and execute such matters.

[17] It is a part of the State List. The State Legislature and Government have the sole authority to legislate on such matters.

[18] It is part of the Concurrent List. By virtue of the quasi-federal nature of legislative and executive relations, Parliament and the Central Government are the sole authorities to legislate and execute on such matters.

[19] See the preamble of the 1958 Act, https://www.indiaculture.nic.in/sites/default/files/acts_rules/TheAncientMonumentsandArchaeologicalSitesandRemainsAct1958_12.03.2018.pdf (accessed: 2.04.2024).

[20] D.L. Stein, "To curate in the field: archaeological privatisation and the aesthetic 'legislation' of antiquity in India", *Contemporary South Asia* 2011, vol. 19, no. 1, pp. 25–47.

[21] N. Thakur, "The Critical Role of *New Theory*, *Old Knowledge Systems* and Jurisprudence for *Responsible Protection and Management* for the living heritage of historic places, cities and cultural regions of India" [in:] *Shared Global Experiences: For Protection of Built Heritage*, ed. V. Kawathekar,

of India, and the National Monuments Authority are the executive organs of the Act. Additionally, the 1959 rules allow public-private partnerships to manage graded and listed properties.

The National Commission for Heritage Sites Bill 2009 aimed to incorporate UNESCO World Heritage Convention principles.[22] The Commission recommended policies for managing heritage sites by creating a roster. However, this Bill never came into force. Later, the AMASR Act of 2010 was amended in 2017, introducing regulations for buffer zones around monuments, including prohibited and regulated zones for mining and other development activities. Moreover, the 2014 National Policy for Conservation of Ancient Monuments[23] focuses on creating a management framework that uses public-private partnerships to sustain limited resources in conserving heritage buildings. Furthermore, it encourages local community participation in preserving heritage and regenerating traditional knowledge. The policy details conservation techniques and mitigation strategies for threats and risks, which ASI and NMA will adopt through impact assessment initiatives and collaboration with central and state agencies. The Indian Heritage Cities Network, established in 2006, collaborates with the Ministry of Urban Development, the Government of India, and UNESCO. It aims to establish Heritage Cells within local authorities to safeguard and use heritage resources for sustainable development. It provides policy advice, capacity building, exchange of good practices, awareness raising, technical assistance, and facilitates partnerships. [24]

2.1. Institutions involved in heritage protection

The ASI is responsible for safeguarding India's ancient monuments and archaeological sites of national importance. It operates under the Ministry of Culture, Government of India, through 24 Circles at the State Level. It is also the custodian of India's World Heritage Sites and protects around 5,000 monuments, while the State Department of Archaeology protects an additional 4,000 monuments.[25]

SPA Press, Bhopal, p. 87, https://iclafi.icomos.org/wp-content/uploads/2020/12/India-2015.pdf (accessed: 3.04.2024).

[22] K. Sanyal, "The National Commission for Heritage Sites Bill, *Journal of Indian Law and Society* 2009, vol. 1, p. 167.

[23] The National Conservation Policy available at: https://cag.gov.in/uploads/download_audit_report/2022/Chapter%203-062f0de369640f7.65867174.pdf (accessed: 3.04.2024); https://pib.gov.in/newsite/PrintRelease.aspx?relid=108032 (accessed: 3.04.2024).

[24] See the detailed programme of the Indian Heritage Cities Network: http://ihcn.in/about-ihcnf/ (accessed: 3.04.2024); see also: Support for the creation of the Indian Heritage Cities Network (IHCN), https://whc.unesco.org/en/indian-cities/ (accessed: 3.04.2024).

[25] See the role of the Central Government in protecting monuments at: https://asi.nic.in/monuments/ (accessed: 5.04.2024).

The Central Government is responsible for protecting monuments. It declares a monument of national importance, organises public exhibitions of inscriptions and classifications, and identifies prohibited or regulated areas within the protected monument's perimeter. It specifies how a detailed site plan for each protected monument must be prepared and incorporated into the heritage byelaws. Likewise, the Central Government can acquire a protected monument for public purposes if it shows signs of decay, destruction, defacement, and misuse. The Collector will take custody of the monument, and the owner's rights will be restricted. The owner cannot charge for access to the monument and must facilitate unrestricted access to the public and Archaeological Officers. The owner will also pay for necessary expenses related to the maintenance of the monument.

The Director General of the Department of Archaeology can lease, accept, or inherit a protected monument, take ownership of an ownerless or a privately owned monument, and negotiate with the owner for an agreed-upon amount. The Director General can grant or deny permission for construction within the prohibited area after assessing its impact on the monument's preservation, safety, and security. The Department can excavate inside protected areas containing ruins, relics, and antiquities.

Another executive organ, the National Monuments Authority, advises the Central Government on grading and classifying protected monuments. It also conducts heritage impact assessments of large-scale public development projects in the regulated area.[26]

The Indian Trust for Architectural and Cultural Heritage (INTACH) is a non-governmental organisation that advises the Central Government on built heritage. It was established in 1984 with financial grants from the UK's Charles Wallace Fund and the Indian Government.[27] The organisation aims to identify unprotected built heritage and list undocumented historic buildings and sites.[28] It has over 31 chapters nationwide and resurces of 1 crore rupees. After the Bhuj earthquake, INTACH assessed the damage to historic buildings, conducted surveys, and developed plans to restore and rehabilitate damaged buildings. INTACH helps conserve, restore, renovate, and develop unregulated heritage properties. The organisation streamlines projects suggested by local chapters and forwards them to public or private organisations for financial assistance. It also works with experts to improve the

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[26] See the role and functions of the National Monuments Authority at: https://www.nma.gov.in/show_content.php?lang=1&level=1&ls_id=50&lid=44&nma_type=0 (accessed: 5.04.2024).

[27] N. Piplani, "Training, Research and Capacity Building: INTACH Heritage Academy", *Context* 2015, vol. 11, p. 137.

[28] D. Gupta, "The role of Indian National Trust for Art and Cultural Heritage in heritage conservation in India" [in:] *Heritage Conservation in Postcolonial India*, eds. M. Chalana, A. Krishna, Routledge, London – New York 2020, pp. 41–51; see also: B.K. Thapar, "Reflections: On the Role of INTACH in India's Conservation Movement", *Architecture+ Design*, Nov.–Dec. 1989.

conservation paradigm. INTACH received UN ECOSOC consultative status in 2007. It advises the Indian government on policy and implementation and receives a corpus fund of 100 crores. The INTACH UK Trust was dissolved, and its funds were transferred to INTACH.[29]

The 2004 INTACH Charter aims to conserve architectural heritage sites in India.[30] The Charter combines ideas from the Venice and Burra charters, emphasising the value of indigenous traditions and local craftsmen in conserving living heritage. It also incorporates Shilpa Shastra and suggests creating a Register of Craftspeople to promote local crafts and traditional livelihoods.[31]

2.2. Cultural heritage protection by the states

Apart from the national Acts, the states have also enacted their Ancient Monuments, Archaeological Sites, and Remains Preservation Acts under the aegis of their respective state governments, aiming to preserve the monuments declared of State importance under List II of the Constitution.

In these cases, the owner or the occupier usually agrees with the state government under comparable terms and conditions. The Delhi Ancient and Historical Monuments and Archaeological Sites and Remains Act, 2004,[32] provided for the eviction of unauthorised occupants and modified the compensation principles in the event of losses incurred during authorised excavation or entry into the site. A Delhi Archaeological Advisory Council has been constituted to guide policy implementation, similar to advisory boards in Gujarat and Maharashtra. Also, the Gujarat Act and the Delhi Act provide for preserving reasonable amenities inside the protected monument in the controlled area.

After Independence, states enacted Town and Country Planning Acts, which empowered Development Authorities to draft plans for transportation, utilities, housing, and historic properties.[33] They collaborate with the Advisory Council and the Town and Country Planning Board and enact building bylaws. They also enforce building restrictions for Heritage Buildings before the Heritage Boards or Heritage Commissions implement them.[34]

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[29] A.G.K. Menon, "Heritage conservation and urban development: Beyond the monument" [in:] *Heritage Conservation and Urban Development*, ed. R. Tandon, INTACH, New Delhi 2005, pp. 1–7.

[30] See the functions of INTACH at: http://intach.org/about-charter.php (accessed: 5.04.2024).

[31] See: ICOMOS Burra Charter and the 1994 Nara Document on Authenticity.

[32] See the provisions of the 2004 Act at https://prsindia.org/files/bills_acts/acts_states/delhi/2005/2005Delhi9.pdf (accessed: 2.04.2024).

[33] K. Banerjee, S. Mal, *Role of Urban Development Authorities in Local Governance*, Insta Publishing, New Delhi 2022, pp. 13, 21–23.

[34] E.F.N. Ribeiro, "The Existing and Emerging Framework for Heritage Conservation in India: The Legal, Managerial and Training Aspects", *Third World Planning Review* 1990, vol. 12, no. 4,

The Municipal Corporations hold significant authority in heritage conservation, established under the Municipal Corporation Acts of respective districts.[35] The Municipal and Development Authorities form the district executive authority responsible for implementing development schemes. Some Municipal Corporations have a Heritage Conservation Committee, but functional overlaps and discretionary lapses have arisen since the establishment of the Heritage Commissions.[36] The Development Authority, Municipal Corporation, and Heritage Commission coordinate with state archaeological departments to ensure meticulous Transferable Development Rights implementation to reap the benefits of the protection mechanism and conservation interface.[37] Usually, Grade I and Grade II heritage properties get tax concessions and exemptions, provided there are no modifications to the physical fabric of the heritage property. Tax exemptions do not apply for commercial heritage buildings or institutional or residential heritage buildings with commercial activities. The state government bears the cost of building repairs if the owner/occupier agrees with them.

Indian states have enacted statutes to conserve their cultural heritage sites. The Arunachal Pradesh Heritage Act of 2015 established a Heritage Authority that regulates the conservation, protection, and management of heritage sites. The Jammu and Kashmir Heritage Conservation and Preservation Act of 2010 established the Heritage Conservation and Preservation Authority, while the Telangana Heritage (Protection, Preservation, Conservation, and Maintenance) Act of 2017 established the Telangana State Heritage Authority and various committees. Finally, the Punjab Ancient, Historical Monuments, Archaeological Sites, and Cultural Heritage Maintenance Board Act of 2013 introduced a cultural cess, which is collected from Public-Private Partnerships in Development Projects and is divested into the Cultural Heritage Maintenance and Development Fund to maintain heritage buildings valued more than 50 crores.[38]

Various organisations have contributed to community building and heritage restoration. The Horniman Circle Association helped construct a Banking District in Mumbai; CRUTA raised 50 lakhs for heritage protection in Ahmedabad; the Friends

p. 338; see also: R.P. Singh, R.S. Singh, "Urban heritage in India: Towards Orientation to planning" [in:] *Strategies in Development Planning"*, eds. A.K. Singh, V.K. Rai, A.P. Mishra, Deep & Deep Publications, New Delhi 1997, pp. 289–304.

35 R.P. Singh, R.S. Singh, "Urban heritage in India…"

36 See the Policy of Urban Heritage Conservation by NITI Aayog: Working Group Report on Improving Heritage Management in India, https://www.niti.gov.in/sites/default/files/2020-06/Improving-HeritageManagement-in-India.pdf (accessed: 2.04.2024).

37 R.P. Singh, R.S. Singh, "Urban heritage in India…"

38 See the functions of the state heritage commissions: The Punjab Ancient, Historical Monuments, Archaeological Sites and Cultural Heritage Maintenance Board Act, Act 29 of 2013, https://prsindia.org/files/bills_acts/acts_states/punjab/2013/2013PB29.pdf (accessed: 2.04.2024).

of Pondicherry Heritage provided professional expertise and financial assistance for the restoration of settlements in Pondicherry; and the Aga Khan Trust for Culture, along with the Dorabji Tata Trust, restored Luytens' Delhi. DRONAH restored Jaipur's urban façade, illuminations, and other physical infrastructure.[39]

2.3. Judicial decisions

The Supreme Court's protection framework dichotomy can be traced through various decisions. In the Central Vista project,[40] the court allowed the construction of a new Parliament building despite compromising the integrity of heritage structures. However, in the Mahakal Temple[41] and Taj Trapezium Case,[42] the court proactively removed encroachments and imposed an embargo on granting clearances to heavy industries near the Taj Corridor. The court also mandated more accountability and democracy in the clearance process. The Supreme Court ordered removing unlawful construction and occupation in the Fort Tughlaqabad area,[43] a protected monument of national importance.

3. Antiquities and art treasures

The Antiquities and Art Treasures Act of 1972 (hereafter: the 1972 Act), along the lines of the 1970 UNESCO Convention, significantly clarified the definition of an antiquity, particularly concerning antiquities and art treasures, crystallising the provisions laid down in the 1904 Ancient Monuments Preservation Act.[44] Previously, it was defined as a moveable object of historical or archaeological association, but the 1972 Act introduced categories of antiquities and art treasures. The Act is to be read along with the Customs Act of 1962 and the Export and Import Control Act of 1947, which addresses concerns about exporting prohibited items.[45] The Central Government regulates the export and registration of antiquities and art

[39] K. Bose, "Incentivizing Urban Conservation in Kolkata: The Role of Participation, Economics and Regulation in Planning for Historic Neighbourhoods in Indian Cities", 27.01.2014, p. 24, https://www.semanticscholar.org/paper/Incentivizing-Urban-Conservation-In-Kolkata%3A-The-Of-Bose/54f4c9ae812f458472598fb89e70f521eefb21dc (accessed: 18.05.2024).

[40] *Rajeev Suri vs Union of India* SC 2021.

[41] *Sarika vs. Administrator, Mahakaleshwar Mandir Committee*, Ujjain MP SC 2020.

[42] *M.C. Mehta vs. Union of India (UOI) and Ors* SC 2019.

[43] *S.N. Bhardwaj vs. Archaeological Survey of India and Ors* SC 2016.

[44] See the 1972 Act: https://www.indiaculture.gov.in/sites/default/files/acts_rules/TheAntiquitiesandArtTreasuresAct1972_12.03.2018.pdf (accessed: 23.04.2024).

[45] V.K. Gupta, "Retrieval of Indian Antiquities: Issues and Challenges", *Art Antiquity & Law* 2019, vol. 24, p. 101.

treasures.[46] It appoints authorities to issue licenses and acts as a custodian for those kept in government-managed institutions.[47] It can acquire antiquities compulsorily and appoint an arbitrator to resolve disputes. The Director General of the Archaeological Survey of India determines what is an antiquity or an art treasure. However, with the advent of cyberspace and the illegal sale of antiquities over the Internet, the 1972 Act ought to incorporate harmonious provisions enumerated in the Information Technology Act of 2000.[48]

ASI issues temporary permits for the exhibition of antiquities outside India for up to six months. Long-term loans are permitted for up to three years and are extendable for two years. ASI inspects returned antiquities and issues a 'No Objection Certificate.' Suspected antiquities are referred to the ASI Director General for confirmation. However, there is no mechanism to differentiate between legal and illegal imports.[49]

4. Intangible cultural heritage

Though the earliest notion of built heritage developed as the architectural manifestations of religion, the sub-textual connotation of traditions and cultures brought intangible infusions into the cultural landscapes. It was also reinforced in the collective perception of Janapada,[50] where memory, information and imagination harmoniously coexist, weaving a holistic metaphysical connotation through the various lyrical and literary aspects of religious texts. Those ancient routes were dotted with traditional practices and rituals of ancient doctrines, preservation of ancient religious manuals, and associative memory, trickling down to knowledge, pride, and identity. Cultural Heritage protection covers the conservation of intangible values from spiritual belief systems to aesthetic principles. Defining this as

[46] S.S. Biswas, "Protection of cultural property vis-à-vis Indian antiquarian legislation and global concern" [in:] *Estrategias relativas al patrimonio cultural mundial. La salvaguarda en un mundo globalizado. Principios, practicas y perspectivas. 13th ICOMOS General Assembly and Scientific Symposium. Actas*, Comité Nacional Español del ICOMOS, Madrid 2002, pp. 1–4, https://openarchive.icomos.org/id/eprint/541/ (accessed: 27.04.2024).

[47] S.K. Pachauri, "Plunder of cultural and art treasures–the Indian experience" [in:] *Illicit Antiquities. The Theft of Culture and the Extinction of Archaeology*, eds. N. Brodie, K. Walker Tubb, Routledge, London – New York2003, pp. 280–291.

[48] See: D. Pal, "Illicit trafficking of antiquities", *Chanakya National Law University Journal* 2018–2019, vol. 8, https://cnlu.ac.in/storage/2022/08/Volume-8-2019.pdf (accessed: 27.04.2024).

[49] V.K. Gupta, "Retrieval of Indian Antiquities…", p. 101.

[50] R.P. Singh, "Appraising the Indian cultural landscape: Envisioning ecological cosmology in the 21st Century", *North Eastern Geographer* 2017, vol. 39, no. 1–2, pp. 3–28.

cultural heritage was challenging until the NARA Document on Authenticity and the ICOMOS Burra Charter.[51]

Bharatvarsha was defined as a part of the mesocosm where communities (a part of the microcosm) communicate with space: Viswabhramanda (the macrocosm) woven into a common thread of sacred sites from Varanasi to Prayagraj, from Chitrakoot to Kailash, blended into locations of symbolic coupling of the mesocosm and microcosm, and immortalised through myths, practices, pilgrimages and traditions.[52] We also witness this blend in Sabarmati[53] and Shantiniketan. While Shantiniketan envisioned intangible literary formalisms through folklore and graphic art instead of urban functionalism, the Sabarmati Ashram combined swadeshi and Sarvodaya ideals with radical elements of socialist architecture and sentimental aestheticism.[54]

The indigenous traditions of India suggest cyclical renovations and minimal intervention in historic buildings, unlike Eurocentric practices. Binumol Tom highlights the significance of Vaastu Shashtra and Jirrnodharana in this regard.[55]

The Sangeet Natak Akademi coordinates India's nominations for cultural heritage lists and maintains the National Inventory of Intangible Cultural Heritage.[56] Founded in 1952, it preserves and promotes performing arts, including classical dance, music, theatre, puppetry, crafts, and folk arts. It is an autonomous body with acclaimed cultural and artistic personalities serving on its General Council.

The Akademi collaborates with Indian governments and art academies, provides grants for performing arts research, maintains a reference library, advises the Indian government on cultural heritage policies, and lists 46 elements (15 inscribed) in the national inventory of India's Intangible Cultural Heritage.

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[51] R.A. Engelhardt, P.R. Rogers, *Hoi An protocols for best conservation practice in Asia. Professional Guidelines for Assuring and Preserving the Authenticity of Heritage Sites in the Context of the Cultures of Asia*, UNESCO, Bangkok 2009, pp. 25–38.

[52] R.P. Singh, "Appraising the Indian cultural landscape…", pp. 3–28.

[53] B.T. Diyora, *History of Education and Gandhi: A Case Study of Ashram System in Gujarat*, Doctoral dissertation, Maharaja Sayajirao University of Baroda, India, 2021.

[54] N.P. Ahuja, "Creating the Sensibility of the Modern Indian Artist-Craftsman: Santiniketan & the Arts and Crafts Movement" [in:] *idem*, *The Making of a Modern Indian Artist-Craftsman Devi Prasad*, Routledge, New Delhi 2012, pp. 10–63.

[55] T. Binumol, *Traditional Conservation of timber architecture*, INTACH UK Trust, New Delhi 2007.

[56] See: Intangible Cultural Heritage of India, https://www.sangeetnatak.gov.in/sections/ICH (accessed: 16.04.2024).

5. Conclusions

Heritage conservation, a process that goes back centuries, has recently been recognised as a valuable cultural resource. While cultural resources have always held economic, cultural, or societal value, there have been conscious efforts in the past decades to value them objectively. However, sometimes, the intangible aspects of heritage are so fleeting that they go unnoticed; thus, their origin is lost. Therefore, traditional communities are crucial in preserving traditions and their intangible linkages.

Despite all efforts, legislation has not eliminated the imperial motive of compulsory acquisition of monuments and their custodianship. Lack of owner/stakeholder consent causes conflicts in heritage conservation. Domestic laws explore participatory paradigms but confirm the state's importance as a dominant stakeholder.

In conclusion, while the central government is the sole authority responsible for protecting antiquities and art treasures, the Sangeet Natak Akademi has documented and inventoried the events leading to conserving intangible cultural heritage. It has collated justifications and opinions from all community stakeholders who played a role in conservation, whether active or passive. This documentation helps to preserve the intangible cultural heritage that is often overlooked and can be lost if not given the attention it deserves. The intangible cultural heritage is a vital link to our past, and its preservation is crucial for future generations to understand and appreciate their cultural roots.

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S.N. Bhardwaj vs. Archaeological Survey of India and Ors SC 2016

SUMMARY

Debarati Pal

LEGAL FRAMEWORK ON HERITAGE PROTECTION IN INDIA

The article describes the national and municipal legislations on built and living heritage, antiquities and art treasures and explores the national framework for conserving Intangible Cultural Heritage in India. It maps the transcendence from the pre-independence Acts to the post-independence legislation and amendments. The roles and responsibilities of the stakeholders, including the community were examined.

The text serves as a comprehensive guide to the constitutional background of the Ancient Monuments and Archaeological Sites and Remains Act 1904, the Ancient Monuments and Archaeological Sites and Remains Act 1958, and the National Policy for Conservation of the Ancient Monuments, Archaeological Sites and Remains, 2014. The text also examines the roles and responsibilities of various bodies, such as State Heritage Boards, Heritage Development Authorities and Councils, in conserving ancient monuments, archaeological sites, and remains. It also highlights the functional interface of these bodies with the Municipal Development Authority and Municipal Corporation under the Town and Country Planning Acts, which play a crucial role in implementing these policies. Moreover, the text delves into the impact of the Supreme Court's judicial decisions on the legislative framework, providing a real-world context and making the text more engaging by illustrating how the law is applied in practice.

Alternatively, in the executive domain, the role of the Central Government, National Monuments Authority, Archaeological Survey of India (ASI) and Indian Trust for Architectural and Cultural Heritage (INTACH) is discussed to calibrate the notions of inclusivity and community participation. Under the tangible category, the movable heritage properties posited under the Antiquities and Art Treasures Act of 1972 are also examined.

In the realm of Intangible cultural heritage, the article explores the role of the Sangeet Natak Akademi in granting protection and inventorising the Intangible Cultural Heritage of India.

Keywords: heritage protection, India, judicial decision

STRESZCZENIE

Debarati Pal

RAMY PRAWNE OCHRONY DZIEDZICTWA W INDIACH

W artykule opisano krajowe i miejskie przepisy dotyczące dziedzictwa stworzonego przez człowieka i naturalnego, zabytków i skarbów sztuki oraz zbadano krajowe ramy ochrony niematerialnego dziedzictwa kultury w Indiach. Przedstawiono rozwój prawodawstwa, począwszy od ustaw sprzed uzyskania niepodległości do ustawodawstwa i poprawek wprowadzonych po uzyskaniu niepodległości. Przeanalizowano rolę i obowiązki interesariuszy, w tym społeczności.

Artykuł zawiera kompleksowe omówienie konstytucyjnego tła ustawy z 1904 r. o starożytnych zabytkach i stanowiskach archeologicznych oraz pozostałościach, ustawy z 1958 r. o starożytnych zabytkach i stanowiskach archeologicznych oraz ustawy z 2014 r. o krajowej polityce ochrony starożytnych zabytków, stanowisk archeologicznych i pozostałości. Poddano analizie również obowiązki różnych organów, takich jak Państwowe Rady Dziedzictwa, Organy Rozwoju Dziedzictwa i Rady, pod kątem ochrony starożytnych zabytków, stanowisk archeologicznych i pozostałości. Podkreślono przy tym funkcjonalną współpracę tych organów z Urzędem Rozwoju Miejskiego i Korporacją Miejską na mocy ustaw o planowaniu przestrzennym, które odgrywają kluczową rolę we wdrażaniu tych polityk. Ponadto zwrócono uwagę na wpływ orzecznictwa Sądu Najwyższego na ramy prawne, by zilustrować zastosowanie prawa w praktyce.

Alternatywnie, w domenie wykonawczej omówiono rolę rządu centralnego, National Monuments Authority, Archaeological Survey of India (ASI) oraz Indian Trust for Architectural and Cultural Heritage (INTACH) w celu zobrazowania pojęć inkluzywności i uczestnictwa społeczności. W ramach kategorii materialnej badane są również ruchome obiekty dziedzictwa kultury określone w ustawie z 1972 r. o zabytkach i skarbach sztuki.

W dziedzinie niematerialnego dziedzictwa kultury zbadano rolę Sangeet Natak Akademi w ochronie niematerialnego dziedzictwa kultury Indii.

Słowa kluczowe: ochrona dziedzictwa, Indie, orzecznictwo sądowe

KATARZYNA GRZYBCZYK*

INDIAN CUISINE AND INTELLECTUAL PROPERTY LAW

1. Introduction – Indian cuisine

Indian culture can be explored through food because, as it has been written, modern Indian cuisine is the result of the flavorful adventure that India has gone through, and in this adventure one can trace an interaction between personal and social choices, divine and worldly responsibilities, and karma and its consequences.[1] Although most, if not all, regional or national cuisines have changed over time due to external circumstances, Indian gastronomy seems to be unique not only because of the country's size and population, but also because of its deep entanglement with various factors, such as culture, religion, ethnicity, wealth, social class and access to raw materials. The incredible diversity of society still matters and influences Indian cuisine, which is not homogeneous as the collective name might suggest. It can be assumed that our European, and especially Polish, image of Indian dishes does not reflect what they really are, because first, the Indian diaspora in Poland is small, and second, the food has been adapted to the palate of Europeans who are not accustomed to spicy and spiced dishes.[2]

The first written records of food in the Indus Valley come from the Vedic period,[3] when many texts on medicine, yoga, literature, religion, etc., analysed

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DOI: 10.4467/23538724GS.24.010.19872

1 V. Antani, S. Mahapatra, „Evolution of Indian cuisine: a socio-historical review", *Journal of Ethnic Food* 2022, no. 9, https://journalofethnicfoods.biomedcentral.com/articles/10.1186/s42779-022-00129 -4 (accessed: 15.05.2024).

2 An example of which is the most popular Indian dish in Europe – chicken tikka masala. See point 7 of the article.

3 The Vedic Period (or Vedic Age), from c. 1500 to c. 500 BC, is the period in Indian history during which the Vedas, the oldest sacred texts of Hinduism, were composed; "Vedic Period", *New World Encyclopedia*, https://www.newworldencyclopedia.org/entry/Vedic_Period (accessed: 15.05.2024).

food and its effect on the human body.[4] The Vedas[5] emphasized the connection between spirituality and the choice of food, food was considered a gift from God and a source of strength.

The second significant factor that shaped Indian cuisine was the arrival of the Afghans and then the Mughals in the 16th century.[6] They both left their mark also on the Indian diet, bringing with them new recipes and dishes, such as naan bread and kofta, which are particularly associated with India today.[7] The subsequent dietary changes were related to the times of European colonization by the Portuguese, who took over Goa in 1510, and were the ones who introduced various types of cheese and cottage cheese to Indian cuisine on a larger scale. Mainly thanks to trade, they introduced previously unknown vegetables such as potatoes, chili, pineapples, papaya, cashews, peanuts and corn.[8] Similarly, tomatoes, one of the basic ingredients of Indian dishes, were imported as part of trade by the Spanish.

The last accent related to colonization comes from the British, whose influence is visible primarily in drinks – from tonic, through tea (chai in the Indian version) to coffee.[9]

In addition, it is necessary to point out the circumstances that are particularly conducive to culinary diversity, such as the terrain and the different climatic zones, which allow for a variety of crops. Thanks to the Himalayas in the north, whose melting snows and seasonal rains feed India's river systems, it is possible to grow wheat on the fertile plains. Sugarcane is grown in the well-watered region of Punjab. Dry and desert lands support plants that require less water, such as millet and corn. Finally, rice is grown in monsoon areas with heavy rainfall.[10] Similarly, climate and weather conditions influence the abundance of legumes, fruits and vegetables, important for the region's gastronomy.

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4 V. Antani, S. Mahapatra, „Evolution of Indian cuisine..."

5 The Vedas (Devanagari वेद) are a large collection of the oldest biblical texts of Hinduism, originating from ancient India. Their creation probably began in the second millennium BC, but they were initially transmitted orally before being compiled, organized, and written down; see: "Vedas", *New World Encyclopedia*, https://www.newworldencyclopedia.org/entry/Vedas (accessed: 15.05.2024).

6 T. Srinivas, „Exploring Indian Culture through Food", *Education about Asia* 2011, vol. 16, no. 3, pp. 38–41.

7 See extensively on this subject: V. Antani, S. Mahapatra, „Evolution of Indian cuisine..."

8 E. Nadkarni, „An analysis of Portuguese influence on Goan cuisine", *The Expression: An International Mulitidisciplinary e-Journal* 2017, vol. 3, issue 4, pp. 320–322

9 N. Arora, „Chai as a Colonial Creation: The British Empire's Cultivation of Tea as a Popular Taste and Habit Among South Asians", *Oregon Undergraduate Research Journal* 2022, vol. 21, issue 1, pp. 9–20.

10 S.P. Raikar, „Indian cuisine", *Encyclopedia Britannica*, 20.02.2024, https://www.britannica.com/topic/Indian-cuisine (accessed: 30.04.2024).

Mention should also be made of the religious diversity. Although it is common to talk about India as the cradle of Hinduism (which is not a religion as such, but a religious and philosophical system),[11] large communities of Christians and Muslims live there.[12] Religious orders or prohibitions regarding food or the way of serving dishes have always influenced Indian cuisine and it remains so to this day.

As indicated earlier, Indian dishes are available all over the world thanks to population migrations – although for various reasons Indians have been leaving the country for a long time, currently the scale of migration is huge.[13]

Due to the great popularity and recognition of Indian cuisine and its centuries-old history, the question arises about its legal status and possible protection. Until recently, the legal issues of the culinary were considered mainly in the context of food and nutrition safety, but with the change in the approach to food (at least in Europe), ways of protecting various elements of gastronomy began to be sought.[14] The motivation for these activities is two-fold: on the one hand, it is to guarantee exclusivity (which is not always possible in the case of the culinary) and, on the other, it is to preserve traditional methods and ways of producing food products. In both cases, these issues are regulated by intellectual property law.

2. Copyright protection

It seems that the most intuitive area of law that could apply to culinary protection is copyright, which protects the results of human creative activity. India acceded to both

[11] J.J. Mark, „Hinduism", *World History Encyclopedia* , 8.06.2020, https://www.worldhistory.org/hinduism/ (accessed: 30.04.2024).

[12] India has been at the center of many spiritual currents for centuries. It is there that the oldest religions in the world were born, such as Hinduism, Jainism, Buddhism, as well as the relatively young Sikhism. Other religions have also found their place on the Indian subcontinent: Islam, Christianity, Judaism, Zoroastrianism and Baha'iism. We should also mention Indian tribal beliefs such as Sarnaism. S. Tokarski, „Ethnic groups and religious minorities in India. Unity of multiplicity in conflict and cooperation", *Krakowskie Studia Międzynarodowe* 2011, no. 1, pp. 9–26, https://www.ceeol.com/search/article-detail?id=750453 (accessed: 30.04.2024).

[13] According to a UN report, India has the largest diaspora population in the world – in 2020, 18 million of its citizens will live outside their country. Since India does not allow dual citizenship, accepting citizenship of another country will invalidate your Indian citizenship. The main reason people migrate is economic prosperity. "Why Indians don't want to be Indian citizens anymore", *The Economic Times*, 1.07.2023, https://economictimes.indiatimes.com/nri/migrate/why-indians-dont-want-to-be-indian-citizens-anymore/articleshow/101418122.cms (accessed: 30.04.2024).

[14] See: P. Ślęzak, *Kulinaria w polskim prawie własności intelektualnej* [Culinaria in Polish intellectual property law], Wolters Kluwer, Warszawa 2022; K. Grzybczyk, *Rozrywki XXI wieku a prawo własności intelektualnej* [21st century entertainment and intellectual property law], Wolters Kluwer, Warszawa 2020, pp. 239–267.

the Berne Convention for the Protection of Literary and Artistic Works of 1886[15] and TRIPS,[16] and its domestic law was regulated in The Copyright Act of 1957.[17] Pursuant to art. 13 of that Act, original works and works recorded on a material medium are protected, but ideas are not protected. The concept of originality is not explained in the Act, its interpretation is left to the case law, which followed the path of most countries, stating that an original work is one that owes its origin to the creator – a natural person, was created thanks to the skills and work of the author and cannot be a copy of any other work.[18] Interestingly, while Polish literature on the subject emphasizes that cooking/preparing dishes is not considered a creative activity but rather a craft activity,[19] in the opinions of Indian lawyers, another argument seems to prevail in favor of not granting protection to recipes. They point out that copyright protection may cover an expressed recipe (e.g. in a cookbook) treated as a verbal work, but not the idea/concept of a dish itself. Therefore, if the recipe is described differently, it can also be protected by copyright.[20] Despite this, there are people who can plagiarize a recipe or even a cookbook – in 2017, Rajkumar Saxena, a former head of the Institute of Hotel Management in Mumbai, stated on social media that fragments of his book Dastarkhwan-e-Awadh, about the cuisine of the region Awadh, had been plagiarized by Sunil Soni, a seasoned chef, in his new book titled Jashn-e-Oudh: Romance of the Cuisine.[21] The copying was to cover 42 regulations, 24 explanations and 12 chapter notes.[22]

Therefore, an infringement may occur only in the case of exact copying of a culinary recipe, but not in the case of changing the form of its expression, nor in

[15] Berne Notification No. 59. Berne Convention for the Protection of Literary and Artistic Works Ratification by the Republic of India of the Paris Act (1971) (with the exception of art. 1 to art. 21 and the Appendix).

[16] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), signed in Marrakesh, Morocco on 15 April 1994, https://commerce.gov.in/international-trade/india--and-world-trade-organization-wto/the-agreement-on-trade-related-aspects-of-intellectual-property-rights-trips/ (accessed: 30.04.2024).

[17] The Copyright Act, 1957, Act No. 14 of 1957, came into force on 21 January 1958, SRO, No. 269, 21 January 1958, Gazette of India, Extraordinary, Part II, s. 3, p. 167, https://copyright.gov.in/documents/copyrightrules1957.pdf (accessed: 30.04.2024).

[18] See: *A Hand Book Of Copyright Law* by Government of India, Department For Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, https://copyright.gov.in/documents/handbook.html (accessed: 30.04.2024).

[19] Which is not convincing to me.

[20] V. Bagdai, „Can recipes be copyrighted: all one needs to know", 14.09.2021, https://blog.ipleaders.in/can-recipes-copyrighted-one-needs-know/ (accessed: 30.04.2024).

[21] Ch. Khurana, „Plagiarism is rampant in Indian food writing – but finally, bloggers have a way to fight it", 4.07.2017, https://scroll.in/magazine/837273/plagiarism-is-rampant-in-indian-food -writing-but-finally-bloggers-have-a-way-to-fight-it (accessed: 30.04.2024).

[22] The lawsuit was filed in court, but the outcome of the case is unknown.

the case of preparing dishes based on the recipe. Unlike, for example, a stage work, the performance of which requires the author's consent, cooking based on someone else's recipes is not subject to such an obligation.

The second element of the culinary industry at risk of infringement are photos of dishes, which can also be protected by copyright if they meet general statutory requirements. This means that they must have a minimum degree of originality, which is not always obvious from ordinary photos of homemade naan bread. It turns out, however, that despite the little effort required to take a photo of a dish, the phenomenon of plagiarism is common, at least in India,[23] and mainly concerns the culinary blogosphere. An expression of frustration related to this is Rhea-Mitra Dalal, the founder of the Facebook group Food Bloggers' Hall of Shame, trying to fight dishonest bloggers.[24]

However, I have not come across any analyses regarding the protection of the taste of a dish under Indian copyright law, although the conclusions would probably be identical to those reached by the Court of Justice of the European Union in a judgment announced on 13 November 2018.[25] According to the Court, at the current stage of development, the precise and objective science identifying the taste of a food product, which allows it to be distinguished from the taste of other products of this type, is not possible by technical means. Therefore, the taste of a food product cannot be classified as a "work" and cannot enjoy copyright protection.

3. Patenting

Interestingly, unlike Western literature, more attention is paid to the possible patent protection of culinary products. The reason for this interest may be that Indian

[23] Perhaps this is due to such a large population, which means a large number of Internet users, and the belief that the risk of plagiarism being discovered is low.

[24] https://www.facebook.com/groups/125551834271375/ (accessed: 30.04.2024).The founder points out that the cause of plagiarism in the blogosphere is the laziness of copyists and advertising agencies, but also the consent or indifference of consumers who do not care where the content comes from, as long as they have access to it. This is what plagiarists are counting on – that they will receive likes and views, even though it is known that their content is stolen. Similarly, many brands working with bloggers do not worry about ethics if a blogger has a wide reach and enough followers. A. Verma, "This blogger is leading the fight against plagiarism in food writing and photography", *Hindustan Times*, 27.07.2017, https://www.hindustantimes.com/more-lifestyle/this-blogger-is-leading-the-fight-against-plagiarism-in-food-writing-and-photography-in-india/story-zOj2JJAG6YwrCOCcnLZsDJ.html (accessed: 30.04.2024).

[25] See: Judgment of the Court (Grand Chamber) of 13 November 2018 (request for a preliminary ruling from the Gerechtshof Arnhem-Leeuwarden – Netherlands) – Levola Hengelo BV / Smilde Foods BV (Case C-310/17), https ://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:62017CA0310&from=NL (accessed: 30.04.2024).

patent offices[26] have already granted patents related to food production: for example, in 2020, housewife Shubhangi Patil obtained a patent for a recipe for ragi soup with walnuts (application no. 201621034764).[27]

Patenting food is difficult and non-obvious: primarily because the invention, i.e. the intangible good that is subject to patenting, is a technical solution – new, non-obvious (having an appropriate inventive level) and possible for industrial use.[28] The current Patent Act of 1970[29] was amended in 2005, extending the possibility of patenting inventions covering food, drugs, chemicals and microorganisms.[30] However, it is not easy for food products (or rather for the technological process leading to their production) to meet the indicated conditions. The regulation on food-related inventions can be found in s. 3(a–e) of the Patents Act, under which patents are not granted for substances "obtained by a simple combination of ingredients, the result of which is only the sum of the properties of their ingredients or a process for producing such a substance." Therefore, the interaction between the ingredients covered by the invention should achieve a cumulative effect that is different from the sum of the effects of the individual substances (an unforeseen synergistic effect and not a simple additive effect).[31] In the case of the said ragi soup with walnuts,

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26 In India, there are four branches of the patent office where you can apply for a food formulation patent: in Mumbai, in Chennai, in New Delhi and in Kolkata. S. Joshi, Y. Bhindiya, „Protecting recipes: Gaps in Indian laws", *The Leaflet*, 30.11.2022, https://theleaflet.in/protecting-recipes-gaps-in-indian-laws/ (accessed: 30.04.2024).

27 The mixture contains ragi (finger millet) and walnuts, creating a nutrient-rich substitute for non-vegetarian food containing calcium and Omega-3 and Omega-6 fatty acids, which can be used to treat vitamin B12 deficiency. According to the patent owner's statements, she invented the soup out of necessity, due to her husband's health condition, which required the consumption of protein-rich foods such as eggs and meat, while he preferred an exclusively vegetarian diet. A. Samal, "The Section 3(e) Soup: What Makes for a Synergistic Effect?", 23.12.2023, https://spicyip.com/2020/12/the-section-3e-soup-what-makes-for-synergistic-effect.html (accessed: 30.04.2024).

28 These are grounds commonly found in patent law legislation.

29 The Patents Act, 1970, Act No. 39 of 1970 (19 September 1970), came into force in 1972, https://ipindia.gov.in/writereaddata/Portal/IPOAct/1_31_1_patent-act-1970-11march2015.pdf (accessed: 30.04.2024). The Act came into force in 1972, amending the Patents and Designs Act of 1911. The history of patent law in India dates back to 1856, when Act VI was adopted, based on British patent law. Act VI granted inventors certain privileges for a period of 14 years. "History of Indian Patent System", https://ipindia.gov.in/history-of-indian-patent-system.htm (accessed: 30.04.2024).

30 S. Deb, "Section 3(d) of Indian Patents Act 1970: significance and interpretation", 7.02.2014, https://www.lexology.com/library/detail.aspx?g=3f92413f-107c-4886-aca7-24633a341e22 (accessed: 30.04.2024).

31 This is a challenge for food-related inventions because usually food products are simply the expected sum of their individual ingredients. It is indicated that perhaps the new rice cooking method has not been used before, but if it provides the nutritional value expected from such

the applicant tried to demonstrate to the Patent Office (apparently successfully) that the soup had increased health benefits and had high nutritional values that were not a simple sum of the ingredients used.[32]

This regulation also includes general conditions that constitute patentability, which are difficult to assess in the case of culinary products. It is not easy to come up with a new or previously unknown process of preparing food for consumption, because activities such as frying, cooking and grilling have been associated with humans for a long time. Inventions that involve a technological process that extends the shelf life or provides increased nutritional benefits (as in the case indicated above) have a greater chance of obtaining a patent.[33] However, it should be noted – in the context of this study – that an invention relating to a production process does not necessarily mean that a new foodstuff (new taste) will be produced.

The second condition – having an appropriate inventive step – is similarly difficult, which means that a specific invention is not obvious to an expert in the state of the art. In the past, Indian courts were guided by the criterion set out in the Halsbury Laws of England, under which an invention does not constitute an appropriate inventive step if a specialist would use the solution reported as an invention to achieve a specific purpose, taking into account the state of knowledge at that time.[34] In other words, one should ask whether an average specialist in a given field, and not a "non-inventive mind", would think about such a solution. If so, the invention cannot be said to be non-obvious.[35]

Currently, the doctrine links the inventive level with technical progress or the economic importance of the invention and with the lack of obviousness of

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a method or using the selected ingredients, then it does not show anything more than an additive effect. A. Samal, "The Section 3(e) Soup: What Makes for Synergistic Effect?" 23.12.2023, https://spicyip.com/2020/12/the-section-3e-soup-what-makes-for-synergistic-effect.html (accessed: 30.04.2024).

[32] See reply: To The Controller of Patents, Dr. Sharana Gouda, 9.09.2020, https://spicyip.com/wp-content/uploads/2020/12/Ragi-walnut-FER-Reply.pdf (accessed: 30.04.2024).

[33] For example, the procedure of preserving food products to neutralize microorganisms in food products by allowing the presence of an edible phenolic compound in the food, and the result is subjected to high pressure conditions. L. Avala, „India: Patenting Food Recipes In India", 31.03.2022, https://www.mondaq.com/india/patent/1177702/patenting-food-recipes-in-india (accessed: 30.04.2024).

[34] M.R. Mathews, „Patentability", https://www.legalservicesindia.com/article/197/Patentability.html (accessed: 30.04.2024): "was it for practical purposes obvious to the skilled worker, in the field concerned, in the state of knowledge existing at the date of the patent to be found in the literature then available to him, that he should or would make the invention the subject of the claim concerned."

[35] See the case of *Enercon (India) Limited v. Alloys Wobben (England)*, Intellectual Property Appellate Board, 19.07.2013, https://www.casemine.com/judgement/in/574990ccadd7b016e0f04960 (accessed: 30.04.2024).

the solution for a specialist in a specific field.[36] In the case of food, this specialist is a food technologist or chef, and the assessment should concern the product/process as a whole, not only its individual elements.[37] Despite these difficulties, the Indian Patent Office granted patents for: a wheat chocolate bar providing long-lasting energy release (IN 229291),[38] a fermentation process for producing delicate coconut wine (IN 209015)[39] and a process for producing fried masala banana chips (IN 198069).[40]

4. Trade secrets

Although know-how, trade secrets or trade secrets are not included in the list of intangible goods protected by industrial property law, much less copyright law, they are often mentioned in the context of culinary protection. This does not mean, however, that protection on this basis, e.g. a recipe, is fully effective, although there are spectacular (but non-Indian) examples of keeping the composition secret, e.g. Coca-Cola.

According to the World Intellectual Property Organization (WIPO), trade secrets are intellectual property rights relating to confidential information that may be sold or licensed.[41]

One of the elements of a trade secret is the knowledge and experience acquired by the entrepreneur (although an employee's know-how can also be protected). These are intangible goods, practical information resulting from experience and research, not subject to patents and not protected by copyright, and must be classified/identified/determined, relevant and useful from the point of view of producing products. No formalities are required to obtain trade secret protection, including recipes and culinary recipes – it arises when information of specific economic

[36] See more on this topic: J. Sunday, "India: getting a better understanding", 16.03.2014, https://ipkitten.blogspot.com/2014/03/inventive-step-in-india-getting-better.html (accessed: 30.04.2024).

[37] S.P. Barooah, „Guest Post: Of Recipes and Patents", 23.01.2015, https://spicyip.com/2015/01/guest-post-of-recipes-and-patents.html (accessed: 30.04.2024).

[38] A Wheat Chocolate Bar For Sustained Energy Release, Indian Patents, https://www.allindianpatents.com/patents/229291-a-wheat-chocolate-bar-for-sustained-energy-release (accessed: 30.04.2024).

[39] Coconut Wine Tender, Indian Patents, https://www.allindianpatents.com/patents/209015 (accessed: 30.04.2024).

[40] The Process Of Making Fried Masala Banana Chips, Indian Patents, https://www.allindianpatents.com/patents/198069-the-process-of-making-fried-masala-banana-chips (accessed: 30.04.2024).

[41] See: Trade secrets, WIPO, https://www.wipo.int/tradesecrets/en/ (accessed: 30.04.2024).

value is made confidential and lasts throughout the period in which the entrepreneur takes steps to keep the recipe secret.

After liberalization in 1991, India became a member of the World Trade Organization (WTO) and subsequently signed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994. Under the TRIPS Agreement, it is the responsibility of all Member States to protect trade secrets/undisclosed information in accordance with art. 39 of the TRIPS Agreement.

India has not yet enacted any specific law for the protection of trade secrets and confidential information, which is based on the principles of equity and common law.[42] It should be noted that, unlike goods protected by intellectual property law, the protection of which is conditional on their novelty, originality or distinctiveness, in the case of trade secrets, confidentiality is protected, which means that the information/knowledge in question cannot be generally known.[43] As a result, chefs should take special precautions to keep the recipe secret. In addition to clearly defining what constitutes secrecy, it is necessary to enter into confidentiality agreements with the staff and anyone who has access to the kitchen.

5. Trademarks

Trademarks play an important role in the catering industry, although in some situations they can be seen as a "lifeline" in the absence of copyright protection. Since,

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42 V.P. Dalmia, A. Mangal, „Protection of Trade Secret in India", 9.10.2023, https://www.lexology.com/library/detail.aspx?g=4f23531b-10a4-4b69-a9fe-b7d3a10de67d (accessed: 30.04.2024).

43 It turns out that in the case of cooking, it is not easy to separate the elements of the process of creating a dish or its ingredients that are secret from those that are commonly known. This is indicated by rulings – mainly of American courts – when confidentiality was denied: in the case of *Buffets, Inc. v. Klinke*, 73 F.3d 656 (9th Cir. 1996), the court refused to declare trade secret recipes for "American staples" such as grilled chicken and macaroni and cheese, finding that they were well known and others were easy to discover; in Li v. Shuman, 2016 WL 7217855 (WD Va. 2016), where a chef sued his former business partner for revealing a "novelty" process for preparing typical Asian dishes, the court found that the recipes were not subject to trade secret protection because nothing new or proprietary was shown in the preparation of dishes commonly known in the industry; in the case of *Vraiment Hospitality, LLC v. Todd Binkowski*, 2012 WL 1493737 (M.D. Fla. 2012), relating to declaring a recipe for a salted caramel brownie a trade secret, the court did not agree with the claim that one of the ingredients was a unique and secret one because it could be found in other available recipes for such cookies. Finally, in the case of *Mallet & Co. Inc. v. Laxayo*, 16 F.4th 364 (3d Cir. 2021), the court held that the plaintiff company failed to define the trade secret "in sufficient detail to separate it from matters generally known in the industry." See: J.A. Gordon, H.G. Lieberman, "Committee Reports. Secret Ingredients: How to Protect Recipes," June 2022, https://www.nycbar.org/reports/secret-ingredients-how--to-protect-recipes/ (accessed: 30.04.2024).

as indicated earlier, the protection of a culinary recipe as such is not possible under copyright law, restaurant owners, chefs and food producers try to obtain exclusive rights to other intangible goods related to gastronomy and thus stand out on the market. You can register the name of a dish, name, logo or appearance of a restaurant, culinary program or cooking workshop if they meet the general conditions required for distinctive signs.

In India, marks are regulated under the Trade Marks Act, 1999.[44] A mark may be a device, design, brand, letterhead, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging and color combination, if applicable, presented graphically and it enables the goods or services covered by them to be distinguished from the goods or services of other entities (s. 2. Definitions and interpretation).[45] It should be noted that there is no obligation to register a mark – unregistered marks are protected in India under common law, of course, after meeting certain conditions.[46]

The indicated regulation is similar to the European one, but a certain difference that may be important for foreign entrepreneurs is worth pointing out. It concerns the special status of well-known trademarks, which seem to have the highest status and the broadest protection in Indian legislation.[47] The definition contained in art. 2 s. 1 letter of the Trade Marks Act, 1999 provides that "A well-known mark in relation to any goods or services means a mark that is known to a significant group of

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[44] The Trade Marks Act, 1999, Act No. 47 of 1999, dated 30 December 1999, https://www.indiacode.nic.in/handle/123456789/1993?sam_handle=123456789/1362 (accessed: 30.04.2024).

[45] The following are not recorded under TMA: non-distinctive trademarks that do not distinguish the goods or services of one person from the goods or services of others; descriptive trademarks that indicate the type, quality, quantity, intended purpose, geographical origin or other characteristics of the goods or services claimed; trademarks customarily accepted in the current language and established trade practices; signs that may mislead the public or cause confusion; signs likely to hurt the religious sensibilities of any class or group of Indian citizens; signs containing scandalous or obscene content; marks the use of which is prohibited under the Emblems and Names (Prevention of Misuse) Act 1950; marks consisting of shapes: resulting from the nature of the goods themselves; necessary to obtain a technical result or which give the goods significant value.

[46] The trademark rights can be established through passing-off actions by substantiating the trademark's use in India. Indian courts consider the following factors in passing-off actions: 1) the unregistered trademark's prior use, goodwill, reputation, acquired distinctiveness and exclusivity; 2) misrepresentation of the origin of the goods and services caused by the conflicting trademark and the likelihood of consumer confusion; and 3) any injury suffered or likelihood of injury to the unregistered trademark's owner as a result of the misrepresentation. See: A. Narayanan, B. Komath, S. Krishna, "At a glance: trademark registration and use in India", 27.09.2023, https://www.lexology.com/library/detail.aspx?g=a805a4b7-550b-463c-84e3-427a68eda512 (accessed: 30.04.2024).

[47] This category of marks is also known to Polish law (although they almost do not appear in business transactions) and is characterized by widespread recognition and a lack of registration in the Patent Office.

consumers who use such goods or services and the use of such a mark in relation to other goods or services could be construed as an indication link in the course of trade or the provision of services between those goods or services and the persons using the mark in relation to the goods or services mentioned first." The Act also lists factors that should be taken into account when assessing whether a given mark qualifies as a "well-known mark".[48]

From the European perspective, an interesting solution is to create a register of such marks. Article 124 s. 1 of the Trade Marks Act, 1999 introduced a procedure for the establishment/registration of a well-known trademark in the Trademarks Rules, 2017: "(1) Any person may, by means of an application in Form TM-M and upon payment of a fee in accordance with the First Schedule, apply to Registrar to recognize the trademark as generally known. Such a request shall be accompanied by a justification together with all the evidence and documents referred to by the applicant in support of his request.[49] Entry into the list of marks is decided by the Registrar of Trade Marks[50] or higher courts.[51]

One of the most high-profile trademark cases in the Indian food service industry is that of the Bukhara mark. ITC Limited[52] launched the Bukhara restaurant in the late 1970s, registering the logo and wordmarks as a trademark in 1985. The

[48] Article 11(1) 6 The Trade Marks Act, 1999:
„(i) knowledge or recognition of the trade mark in the relevant section of the public, including knowledge in India acquired as a result of the promotion of the trade mark;
(ii) the duration, scope and geographical area of any use of the trademark;
(iii) the duration, extent and geographical area of any promotion of the trademark, including advertising or publicity and presentation, at fairs or exhibitions of goods or services to which the trademark relates;
(iv) the duration and geographical area of the registration or application for registration of that trade mark under this Act to the extent that they reflect the use or recognition of the trade mark;
(v) the history of successful enforcement of the trademark, in particular the extent to which the trademark has been recognized as a well-known trademark by any court or registrar pursuant to that register." https://www.indiacode.nic.in/handle/123456789/1993?sam_handle=123456789/1362 (accessed: 30.04.2024).

[49] TM-Rules-2017, https://www.ipindia.gov.in/TM-Rules-2017.htm (accessed: 30.04.2024).

[50] The Trademark Registry was established in India in 1940 and is now operated under The Trade Marks Act, 1999. It acts as a resource, information center and intermediary on Trademark related matters in the country. The main task of the Register is to register trademarks that meet statutory and regulatory requirements. http://www.ip.finance/2013/04/piracy-good-thing-for--value-game-of.html

[51] Seelistof well-knownmarks:https://www.ipindia.gov.in/IPIndiaAdmin/writereaddata/Portal/Images/pdf/List_of_Well-Known_Trade_Marks_as_of_18.03.2024.pdf (accessed: 26.05.2024.

[52] Founded in 1910, ITC Limited is an Indian conglomerate headquartered in Kolkata, operating in the areas of hospitality, software, packaging, cardboard, specialty papers and agribusiness. About ITC, https://www.itcportal.com/about-itc/profile/index.aspx, https://www.itcportal.com/ (accessed: 26.05.2024).

restaurant features an interesting decor, wooden menu and specially designed staff uniforms and is consistently recognized as one of the best restaurants in the world and one of the most profitable in Delhi.[53] It serves mainly dishes from the North Western Frontier region, but the unique black lentil dish Dal Bukhara,[54] with which chef Madan Jaiswal attracts celebrities and state leaders, is considered unique.[55]

In the 1980s, ITC Limited opened two branches of this restaurant in the United States, which were closed a few years later. The three former employees then opened two restaurants in New York called Bukhara Grill and Bukhara II. Although several elements of the original restaurant were changed (logo, decor, staff uniforms, menu made of wooden boards),[56] the case went to court and ended with ITC's victory.[57] However, it soon turned out that this was not the only violation: Central Park Estates, established a restaurant called Balkh Bukhara, adopting several elements of the characteristic Bukhara ITC restaurant. As a result, Central Park lost the trademark infringement case. Interestingly, based on the evidence presented by the ITC, the High Court in Delhi classified the sign "BUKHARA" as a well-known trademark and asked the Registrar of Trademarks to add it to the list of such signs.[58]

6. Geographical indications

Another intangible asset that should appear in the context of food is geographical indication (GI). These markings refer to a country or a place within it as the place of origin of a specific food product and are a guarantee of its quality and uniqueness, primarily attributed to the geographical origin of the product.[59] India, as a member

[53] S. Kothari, „Dal Bukhara – a brief history & recipe", LinkedIn, 29.08.2017, https://www.linkedin.com/pulse/dal-bukhara-brief-history-recipe-shivam-kothari-/ (accessed: 30.04.2024).

[54] The dish itself is a richer and more refined version of the home-made Punjabi dish Dal Makhni or Maa Ki Dal. See: *ibidem*.

[55] "Restaurants and well-known trademarks: the case of Bukhara," 30.11.2022, https://www.bananaip.com/ip-news-center/restaurants-and-well-known-trademarks-the-case-of-bukhara/ (accessed: 30.04.2024).

[56] R. Khera, "'Food, glorious food': cooking up trademark rights in India", *WTR*, 10.11.2022, https://www.worldtrademarkreview.com/article/food-glorious-food-cooking-trademark-rights-in-india (accessed: 30.04.2024).

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[58] "Restaurants and well known trademarks…", https://www.bananaip.com/ip-news-center/restaurants-and-well-known-trademarks-the-case-of-bukhara/ (accessed: 30.04.2024).

[59] Pursuant to art. 1 s. 2 and art. 10 of the Paris Convention for the Protection of Industrial Property, adopted in Paris on 20 March 1883, geographical indications are covered by intellectual property rights. They are also covered by art. 22–24 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which formed part of the agreements concluding the GATT Uruguay Round negotiations.

of the World Trade Organization (WTO), passed the Geographical Indications of Goods (Registration & Protection) Act, 1999, which came into force on 15 September 2003.[60] The first Indian product to receive the GI mark was Darjeeling tea.[61] Currently, over 500 goods can use this marking, including craft products.

The most interesting case of a geographical indication entangled in politics, the discussion of which would exceed the scope of this article, is basmati rice, a variety of long-grain, aromatic rice traditionally grown in India, Pakistan and Nepal. In 2008, India and Pakistan decided to submit a joint application to register basmati as a geographical indication in the European Union, but relations between the countries deteriorated. The Indian Authority for the Development of Exports of Agricultural and Processed Food Products obtained national protection under the Geographical Indications Act in 2016, and two years later India submitted an application for Protected Geographical Indication status for basmati to the EU Council on Quality Schemes for Agricultural Products and Foodstuffs. Then Pakistan, the second largest exporter of basmati, filed an objection in late 2020.[62] The European Commission asked India and Pakistan to find a solution through talks, but no agreement was reached. Moreover, in the same year, Nepal surprised everyone by opposing the registration.[63] Nevertheless, it was the fight over rice that forced all three countries to develop national systems for the protection of geographical indications and the appreciation of intellectual property.

7. The most famous Indian dish – chicken tikka masala

Finally, it is necessary to mention the most famous, at least in Europe, "Indian" dish, chicken tikka masala, consisting of marinated pieces of boneless meat, traditionally cooked in a tandoor oven and served in a delicately spiced tomato and cream

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[60] Geographical Indications of Goods (Registration and Protection) Act, 1999, No. 48 of 1999 (30 December 1999), https://ipindia.gov.in/act-1999.htm (accessed: 30.04.2024).

[61] S. Chavan, „Geographic Indicator Foods of India", *Journal of Food and Nutrition* 2022, vol. 1, issue 1, https://mediresonline.org/article/geographic-indicator-foods-of-india (accessed: 30.04.2024). This designation has also become the subject of many disputes, as the name Darjeeling was used by many non-Indian entrepreneurs. See more broadly: S.C. Srivastava, "Protecting the Geographical Indication for Darjeeling Tea. Managing The Challenges of WTO Participation: Case Study 16", World Trade Organization, https://www.wto.org/english/res_e/booksp_e/casestudies_e/case16_e.htm (accessed: 30.04.2024).

[62] P. Febin, „Basmati Rice: The Tug of War", 9.05.2023, www.intepat.com/blog/basmati-rice-the-tug-of-war/ (accessed: 30.04.2024).

[63] See more on Nepal: P.N. Upreti, „The Battle for Geographical Indication Protection of Basmati Rice: A View from Nepal", *International Review of Intellectual Property and Competition Law* 2023, vol. 54, pp. 710–731, https:// link.springer.com/article/10.1007/s40319-023-01323-w#Sec4 (accessed: 30.04.2024).

sauce.[64] The dish is interesting because of its origin – despite its definitely Indian associations, the recipe was probably invented in Great Britain.[65] Some sources point to South Asian communities that settled on the Isles,[66] others to Glasgow, where Ali Ahmed Aslam is said to have created the dish in his Shish Mahal restaurant.[67] The prototype of chicken tikka masala is said to be butter chicken, truly Indian, while its British version was created somewhat by accident when a customer complained that his chicken dish was dry. The cook then poured condensed tomato soup with spices into the dish, softening its taste with cream.[68]

In 2001, British Foreign Secretary Robin Cook gave a speech in which he called the dish a symbol of modern multicultural Britain and even offered his own, simplified explanation of the evolution of the main dish: "Chicken tikka is an Indian dish. Masala sauce was added to satisfy the British desire for meat to be served in sauce."[69]

It is therefore not surprising that an attempt has been made to protect the dish and register it as a protected designation of origin. On 16 July 2009, Labor MP Mohammad Sarwar, with the support of the City Council, presented a motion to the House of Commons asking for Glasgow to be designated as the place of origin of chicken. The motion was signed by 19 Members of Parliament, but it was never acted upon.[70]

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[64] L. Siciliano-Rosen, „Chicken tikka masala", *Encyclopedia Britannica*, 22.01.2024, https://www.britannica.com/topic/chicken-tikka-masala (accessed: 30.04.2024).

[65] E. Taylor, „Most people have no clue chicken tikka masala isn't an Indian dish, according to a top Indian chef", *Business Insider*, 27.11.2019, https://www.businessinsider.com/chicken-tikka--masala- not-indian-dishoom-chef-naved-nasir-2019-11?IR=T (accessed: 30.04.2024).

[66] The first Indian restaurant in Britain was the Hindustani Coffee House, opened in 1809 by Deen Mahomed, an Indian who married an Irish woman. However, the restaurant was closed after a few years, probably due to low customer interest. G. Bedell, „It's curry, but not as we know it", *The Guardian*, 12.05.2022, https://www.theguardian.com/lifeandstyle/2002/may/12/foodanddrink.shopping2 (accessed: 30.04.2024).

[67] T. Chalmers, „A Brief History of Chicken Tikka Masala", 16.04.2018, https://theculturetrip.com/europe/united-kingdom/scotland/articles/a-brief-history-of-chicken-tikka-masala (accessed: 30.04.2024).

[68] P. Sonwalkar, „Food trail: Made in UK, sold to the world", *Khaleej Times*, 18.11.2021, https://www.khaleejtimes.com/long-reads/food-trail-made-in-uk-sold-to-the-world (accessed: 30.04.2024). However, ethnic food historians Colleen and Peter Grove point to Balbir Singh's recipe for Shahi Masala Chicken, which was published in 1961 in Indian Cookery. *Cf.* C. Grove, P. Grove, "Is it or isn't it? (The Chicken Tikka Masala Story)", https://web.archive.org/web/20161127225804/http://www.menumagazine.co.uk/book/tikkamasala.html (accessed: 30.04.2024).

[69] L. Siciliano-Rosen, „Chicken…"

[70] The motion asked the House of Commons to express its appreciation for the culinary masterpiece that is chicken tikka masala, highlighting that it is the most popular curry in the UK. It was indicated that it was invented in the city of Glasgow by Ali Ahmed Aslam, owner of

However, if protection could be obtained, the next city in the queue would be Birmingham, which would claim to be the place of origin of another Indian-Pakistani dish, balti, whose history is even more confusing. Balti is not actually a dish, but a way of preparing and serving curry.[71] The name comes from the thin wok-type vessel in which the food is cooked and served, rather than from any specific ingredient or cooking method.[72] Although food historian Pat Chapman indicates that the word "balti" may have originated in Balistan, an area in northern Pakistan where woks known as these were used, he has failed to demonstrate that this is where balti-style curry was invented.[73] Meanwhile, almost all sources point to Birmingham as the place where Balti curry was invented in the 1970s and where the famous Balti Triangle exists, an area with over 30 authentic (whatever that means) Balti houses.[74]

On 23 October 2013, the British government submitted an application to the European Union for a Traditional Specialty Guaranteed status,[75] which was rejected because "Some different varieties of balti are allowed; those varieties are not definitively identified. The color of the dish changes (either lighter brown or more reddish) depending on which ingredients are added. The additional ingredients and spices may but not have to be added. It is therefore not possible to determine what the final recipe to be followed is."[76]

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the Shish Mahal restaurant in the West End of Glasgow in the 1970s. It was also recalled that Glasgow is a three-time winner of the British Curry Capital award and supports the campaign to award the city of this most popular dish with an EU Protected Designation of Origin. See: "Glasgow Chicken Tikka Masala", *EDM (Early Day Motion)* 1911, 16.07.2009, https://edm.parliament.uk/early-day-motion/39136/glasgow-chicken-tikka-masala (accessed: 30.04.2024).

71 Definition of ‚balti' see: https://www.collinsdictionary.com/dictionary/english/balti (accessed: 30.04.2024).

72 „The History of Pakistani Balti Curry", 4.05.2015, https://royalnawaab.com/the-history--of-pakistani-balti-curry/ (accessed: 30.04.2024). Various sources have been proposed for this word: the name of the region between India and Pakistan or a dialectical word meaning bucket. C. Palmer, "It's curry, but not as we know it", *The Guardian*, https://www.theguardian.com/lifeandstyle/2002/may/12/foodanddrink.shopping2 (accessed: 30.04.2024).

73 "The History of Pakistani Balti Curry…"

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75 The ‚Traditional Specialty Guaranteed' (TSG) label highlights the traditional aspects of a product, such as its production method and composition, without any link to a specific geographical area. Registering a product name as GTS protects it against counterfeiting and abuse. See: "Geographical indications and quality schemes explained", https://agriculture.ec.europa.eu/farming/geographical-indications-and-quality-schemes/geographical-indications-and-quality-schemes-explained_en (accessed: 30.04.2024).

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8. Conclusions

According to the Indian scriptures, Vedas and Upanishads from which Indian culture originates, hospitality is a sacred and joyful activity that should always be undertaken with passion, compassion, sentiment and care, and is seen as a religious duty towards the visitor/stranger or guest.[77] It results directly from the concept of Atithi Devo Bhava, which means "the guest is God", and an important element of this practice is feeding the visitor.[78] Consequently, meticulous attention is paid to preparing and eating food in India – it has become one of the elements of the government's "Amazing India" campaign, promoting the country and encouraging tourists to visit it.[79]

With the growing awareness of the popularity of Indian cuisine and its role in creating India's reputation, questions arise about how to protect Indian dishes and their uniqueness. One of the possibilities, perhaps even the most important, is protection under intellectual property law.

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SUMMARY

Katarzyna Grzybczyk

INDIAN CUISINE AND INTELLECTUAL PROPERTY LAW

The article concerns the issue of protection of broadly understood Indian cuisine on the basis of intellectual property law. As a rule, the culinary is not covered by such protection because, contrary to the often used term "culinary art", preparing dishes is not considered

a creative activity. However, this does not discourage chefs or restaurateurs from looking for opportunities to ensure exclusivity of at least some elements of gastronomy. This problem also applies to Indian cuisine – one of the most popular and liked in the world. In the article, I present the possibilities of protection under Indian intellectual property regulations.

Keywords: recipes, trademarks, geographical indications, culinary, trade secret

STRESZCZENIE

Katarzyna Grzybczyk

KUCHNIA INDYJSKA I PRAWO WŁASNOŚCI INTELEKTUALNEJ

Artykuł dotyczy problematyki ochrony szeroko pojętej kuchni indyjskiej na podstawie przepisów prawa własności intelektualnej. Co do zasady, kulinaria nie są objęte taką ochroną, gdyż wbrew często używanemu określeniu „sztuka kulinarna" przygotowywanie potraw nie jest uznawane za działalność twórczą. Nie zniechęca to jednak kucharzy czy restauratorów do poszukiwania możliwości zapewnienia sobie wyłączności na przynajmniej niektóre elementy gastronomii. Problem ten dotyczy także kuchni indyjskiej – jednej z najpopularniejszych i najbardziej lubianych na świecie. W artykule przedstawiam możliwości ochrony na podstawie indyjskich regulacji dotyczących własności intelektualnej.

Słowa kluczowe: przepisy kulinarne, znaki towarowe, oznaczenie geograficzne, kulinaria, tajemnice handlowe

KAROL GREGORCZUK[*]

LEGAL PROTECTION OF TRADITIONAL MEDICINE IN INDIA

In medicine, or the astronomy and metaphysics, the Hindus have kept pace with the most enlightened nations of the world: and that they attained as thorough a proficiency in medicine and surgery as any people whose acquisitions are recorded.

Horace Hayman Wilson[1]

1. Introduction

A famous specialist in the field of Indian medicine, French scholar Jean Filliozat, notes that ancient Indian science had a fundamental influence on the development of knowledge in Tibet, Indochina, Indonesia, Central Asia, and in certain Chinese and Japanese circles. The role of Indian medicine in Asian countries is comparable to the role of Greek medicine in the Western world. It is noteworthy that classical Indian medicine emerged as a system at the same time as Greek science had its golden age; similar intellectual transformations took place simultaneously in both regions of the world.[2] Both in theory and in the practice of treating diseases, local religions on the Indian subcontinent, especially Hinduism and Buddhism, have made their distinct mark. Religious norms that support and promote values such as kindness, charity, or compassion influence the practice of daily life, including care for health. From a religious perspective, a human being constitutes a material-spiritual unity, and his/her life is deeply embedded in the harmony of the entire

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[1] Quot. Anonymous, *Eminent Orientalists Indian, European, American*, Asian Educational Services, New Delhi – Madras 1991, p. 77.

[2] J. Filliozat, *The Classical Doctrine of Indian Medicine. Its origins and its Greek Parallels*, trans. D.R. Chanana, Munshiram Manoharial, Delhi 1964, p. XVII.

universe. The appearance of disease is perceived here as a disruption of this balance; hence appropriate medical measures are taken to restore it.

Traditional Indian medicine is not a homogeneous system, but is divided into several subsystems, namely Ayurveda, Siddha (Tamil medicine), Unani (Persian-Arabic medicine), and Sowa-Rigpa (Tibetan medicine). While in ancient times, the medical knowledge of India as its intangible cultural heritage reached only neighbouring states and regions, nowadays it has global importance. The increasing use of natural healing methods, such as herbal medicine, cleansing, and diet, serves as an alternative to Western allopathic medicine. Yoga and homeopathy also find contemporary medical applications. Although the adaptation of traditional Indian practice in other cultures has caused them to lose some of their religious character, it nonetheless indicates their universal dimension. In this context, caring for one's health is perceived as a conscious effort of the individual, part of their lifestyle, and self-improvement. Modern Western medicine largely is based on a Cartesian, dualistic vision of humans as dual beings composed of mind (*res cogitans*) and matter (*res extensa*), causing the human body to lose its special ontological character and to be perceived as a complex mechanism operating according to fixed, predictable rules. However, analysis of the history of Western medical knowledge also makes it possible to advance the thesis that there were connections between Indian medicine and Western medicine (e.g., Hippocrates' theory of humours or the idea of the human microcosm formulated by Hildegard of Bingen).

Traditional Indian medicine is part of an intangible heritage that is subject to legal protection. According to art. 2 para. 1 of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage adopted in Paris by the UNESCO General Conference on 17 October 2003 (hereinafter: the 2003 UNESCO Convention), intangible cultural heritage refers to the practices, representations, expressions, knowledge, and skills – as well as the instruments, objects, artefacts and cultural spaces associated with these – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This heritage includes: oral traditions and expressions, including language as a vehicle for the intangible cultural heritage; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship (art. 2 para. 2 of the 2003 UNESCO Convention). The medical knowledge and traditional healing methods that have developed over several millennia in India, being an essential part of its national identity, can certainly be regarded as part of its intangible cultural heritage. The aim of this article is to analyze the instruments of legal protection for traditional Indian medicine, and to discuss whether the current model of legal protection is adequate in the context of the challenges posed by contemporary biomedicine. To achieve this goal, the author uses formal-dogmatic and comparative legal research methods, and resorts to the historical method as an auxiliary method.

2. The heritage of traditional Indian medicine

India's cultural richness and diversity have made possible that culture's preservation and further development throughout the millennia until modern times. The origins of Ayurveda have disappeared in the darkness of the past, and it is now recognized as one of the oldest systems of medicine in the world. The word "Ayurveda" is the combination of two Sanskrit words: *ayur* (life) and *veda* (knowledge); this indicates that is the science of life and longevity. According to ancient beliefs, medical knowledge was transmitted by Brahma, the creator of the universe, and then passed through successive divine beings to the sage (*rishi*) Dhanvantari, who taught it to the physician Susruta and others.[3] Ayurvedic medicine is based on two complementary treatises of the Atharva Veda: the *Charaka Samhita*, mainly dealing with medicine, and the *Sushruta Samhita*, which focuses on surgery. Similar to Chinese medicine, various vital points on the human body, called *marmas*, were identified, which were important parts of Ayurvedic anatomy. Ancient Hindu physicians excelled in the field of surgery, performing tasks such as cauterization, suturing wounds, draining fluids, treating cataracts, removing bladder and kidney stones, and even performing rhinoplasty and earlobe reconstructions.[4]

The Ayurvedic system is holistic in nature. Its premise is that the human body constitutes an inseparable whole. Therefore, effective treatment should aim to restore harmony to the entire organism, not just its individual components. The human body consists of seven basic types of tissues: *rasa* (lymph, plasma), *rakta* (blood), *mamsa* (muscles), *meda* (fat), *asthi* (bones), *majja* (bone marrow), and *shukra* (egg cell, sperm). An important Ayurvedic principle is the concept of the five elements that make up everything in the world (ether, air, fire, water, and earth), and the three basic types of energy, the so-called doshas (*vata*, *pitta*, *kapha*). It is crucial for individuals to maintain the necessary balance between these elements and *doshas* to maintain their health. Various types of preparations, based on plant, animal products, minerals, and metals, are used in the treatment process.[5] Cleansing the body of toxic substances and enjoying a proper diet also play important roles. To achieve this, practices such as baths, enemas, and the use of essential oils are recommended. It is crucial to note that therapeutic activities should be tailored to the

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[3] H. Iyer, A.J. D'Ambrosio, "Web Representation and Interpretation of Culture: The Case of a Holistic Healing System" [in:] *Annual Review of Cultural Heritage Informatics 2012–2013*, ed. S.K. Hastings, Rowman&Littlefield, Lanham 2014, p. 47.

[4] N. Duin, J. Sutcliffe, *A History of Medicine: From Prehistory to The Year 2020*, Simon&Schuster, London 1992, p. 17.

[5] A. Máthé, I.A. Khan, "Introduction to Medicinal and Aromatic Plants in India" [in:] *Medicinal and Aromatic Plants of* India, vol. 1, eds. A. Máthé, I.A. Khan, Springer, Cham (Switzerland) 2022, p. 17.

specific patient, thus requiring a detailed interview beforehand, including gathering information about the patient's lifestyle and diet.

Similarly, the medical system of Indian Siddha, has an ancient origin. In it natural preparations are also commonly used. It developed mainly in the southern part of the India (Tamil Nadu), and it is a part of the local Tamil culture. The term *Siddha* means perfection or attainment, and it is associated with the practice of holy figures called Siddhars, who imparted medical knowledge. The medical concepts are very similar to those found in Ayurveda, namely the perception of the human body as a complementary whole and the need to maintain balance between the three types of energy. Furthermore, there are 96 main components of the human being, with physical, physiological, moral, and intellectual characteristics, which should be harmonized with each other, as otherwise the result may be disease. Siddha relates to iatrochemistry, utilizing minerals, metals, and herbal preparations for therapeutic purposes.[6] The fundamental difference between Siddha and Ayurveda seems to be that while the former recognizes the same influence of *vata*, *pitta*, and *kapha* in childhood, adulthood, and old age, the latter distinguishes this based on age: *kapha* predominates in childhood, *pitta* in adulthood, and *vata* in old age.[7]

On the other hand, the third medical system, known as Unani, referring to ancient medical knowledge from China, Egypt, India, Iraq, Persia, and Syria, originated in different historical circumstances. Its roots can be traced back to ancient Greece, and it was then developed by the Arabs; hence Unani is referred to as Greco-Arabic medicine. Medical practice focuses on the application of regimental therapy (venesection, cupping, diaphoresis, diuresis, Turkish bath, massage, cauterization, purgation, emesis, exercises, and leeches), dietary therapy, as well as pharmacotherapy (natural drugs of plant and animal origin, minerals). Diseases are treated as natural phenomena, and the symptoms of illness constitute the body's appropriate response; so the doctor's role is to support rather than replace the patient's natural forces. Significant importance is attached to the healing properties of nature itself (*vis medicatrix naturae*). Unani is based on the humoral theory, assuming that there are four elements in the human body – *Dam* (blood), *Balgham* (phlegm), *Safra* (yellow bile), and *Sauda* (black bile) – which should be balanced with each other.[8]

Cultural influences from India also penetrated neighboring Tibet, giving rise to the development of the Tibetan medical system known as Sowa-Rigpa. The fundamental medical treatise in the Sowa-Rigpa system is the "Four Tantras," which are divided into the following parts: root tantra, explanatory tantra, instructional tantra,

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6 *Ibidem*, pp. 18–19.

7 *Cf.* S. Amruthesh, "Dentistry and Ayurveda – IV: Classification and management of common oral diseases", *Indian Journal of Dental Research* 2008, vol. 19, no. 1, pp. 52–61.

8 *Cf.* P.K. Mukherjee, A. Wahile, "Integrated approaches towards drug development from Ayurveda and other Indian system of medicines", *Journal of Ethnopharmacology* 2006, vol. 103, no. 1, p. 25–35.

and subsequent tantra. The medical recommendations described here are associated with traditional Tibetan knowledge as well as Indian, Chinese, and Greco-Arabic influences. Although the foundations of this medical system are recorded in the "Four Tantras," oral transmission of knowledge about health still plays a significant role. During a patient's treatment, various techniques are used, such as pulse analysis, urine analysis, dietary changes, and natural remedies. Key emphasis is placed on nutrition and dietary therapy, where the diet is considered the most important method of treatment. Proper nutrition, dietary restrictions, and appropriate food intake have a significant impact on our health.[9]

3. Basic legal regulations regarding traditional Indian medicine

The Indian pharmaceutical industry is the third largest in the world, primarily focusing on the production of generic drugs.[10] The primary legal framework regulating the import, production, and distribution of drugs in India is the 1940 Drugs and Cosmetics Act, enacted by the Central Legislative Assembly[11]. In 1945, the Drugs and Cosmetics Rules[12] were adopted, containing provisions regarding the classification of drugs according to specific schedules, as well as guidelines for storage, sale, dispensing, and prescribing of each schedule. In 1964, amendments were made to the 1940 Drugs and Cosmetics Act, introducing provisions for the first time regarding Ayurvedic, Siddha, and Unani drugs.

In order to ensure optimal development and promotion of traditional medical knowledge, the Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy (AYUSH) was established in 2014. Previously, it operated as the Department of Indian Systems of Medicine and Homeopathy, created in 1995, and later renamed in 2003 as the Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy. The ministry collaborates with the Indian Council of Medical Research (ICMR) and the Council of Scientific and Industrial Research (CSIR) in the development of safe and effective medical products. AYUSH is responsible for quality control of drugs and setting pharmacopeial standards, and

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[9] *Nomination form Asia/Pacific Memory of the World Register (revised October 2016)*, MOWCAP UNESCO Memory of the World Regional Committee for Asia/Pacific, p. 13, www.mowcapunesco.org (accessed: 9.04.2024).

[10] "India produces over 60,000 generic drugs, highlights MoS Bhagwant Khuba", *The Economic Times*, 25.07.2023, https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/india-produces-over-60000-generic-drugs-highlights-mos-bhagwant-khuba/articleshow/102106352.cms (accessed: 13.04.2024).

[11] The 1940 The Drugs Bill was passed by the Central Legislative Assembly of India on 5 April, and received the assent of the Governor General on 10 April 1940.

[12] The Drugs Comsetics Rules were published in the Official Gazette in 21 December 1945.

oversees the operation of the Indian Pharmacopoeial Drugs Laboratory (in conjunction with the Quality Council of India) and the functioning of the Indian Medicines Pharmaceutical Corporation Limited (IMPCL).[13]

The attempt to standardize traditional medicine drugs does not have a simple solution due to the complex nature of such drugs.[14] According to Indian regulations, Ayurvedic, Siddha, or Unani medicine includes all drugs intended for internal or external use for or in the diagnosis, treatment, mitigation, or prevention of disease or disorder in human beings or animals, and manufactured exclusively in accordance with the formulae described in the authoritative books of Ayurvedic, Siddha, and Unani Tibb systems of medicine (s. 3A of the 1940 Drugs and Cosmetics Act). Ayurvedic drugs are divided into two groups: traditional and patentable. The former are manufactured according to classical formulae described in fifty-six Ayurvedic texts, while the latter contain combinations of ingredients listed in any formula in any official Ayurvedic text. In the case of patented drugs, the method of their production is reserved for a specific manufacturer; however, these medicines do not need to be standardized or tested for efficacy or toxicity.[15] It can be assumed that such an approach complicates procedures and the specificity of assessing the quality of herbal products, but, on the other hand, it avoids administrative rigors and additional costs. Ayurvedic, Siddha, or Unani drugs certainly have a longer history than conventional medicines, but this does not mean that they should not be analyzed according to production quality guidelines.

Three aspects of the risks of widespread use of traditional Indian medicine can be identified. The first is that although many herbal drugs are not harmful, especially where the absorption of active substances is low, potential side effects of their use are not well known. The second is that positive associations with Ayurvedic medicine should not result in an uncritical approach by consumers towards such products available on the market. The third is that the commercial use of Ayurvedic drugs, containing natural ingredients, is often criticized for "commodifying" patients' health, in ways that are similar to conventional, allopathic medicine.[16] On the other hand, the global significance of the Indian pharmaceutical market prompts the government to make efforts towards standardizing traditional medicine products. This would promote indigenous medicine while effectively competing with conventional medicine products. Research on drugs containing natural substances follows

[13] T.A. Oyedepo, S. Palai, "Herbal remedies, toxicity and regulations" [in:] *Preparation of Phytopharmaceuticals for the Management of Disorders: The Development of Nutraceuticals and Traditional Medicine*, eds. A.P. Mishra, Ch. Egbuna, M.R. Goyal, Elsevier, London 2021, pp. 115–116.

[14] Mr. Mahajan, A.V. Dasture, "Standarisation of Ayurveda Drugs" [in:] *Compendia Of Ayurveda (Ayurveda Samhita)*, vol. 9, ed. P.H. Kulkarni, Deerghayu International 2022, p. 36.

[15] M. Nichter, M. Nichter, *Anthropology and International Health: Asian Case Studies*, Routledge, London – New York 2003, p. 315.

[16] *Ibidem*, p. 297.

a different methodology compared to that involved in the production of synthetic drugs, and there are no uniform research methods applicable to all traditional medicine drugs.

To prevent negative market practices concerning the export, production, and distribution of Ayurvedic, Siddha, and Unani drugs, the Indian legislature introduced the following three categories: misbranded drugs, adulterated drugs, and spurious drugs. The label and packaging of the drug should display a list of all herbal ingredients used to manufacture the preparation, along with the quantity of each ingredient contained in it and a reference to the method of its preparation (s. 161 subs. 1 of the 1945 Drugs and Cosmetics Rules). The legislature specifies detailed information that should be included on the label and packaging: the name of the drug, a correct statement of net content in terms of weight and measure in the metric system, the name and address of the manufacturer, a license number, a distinct batch number, date of manufacture, the designations "Ayurvedic medicine," "Siddha medicine," or "Unani medicine," depending on the type of medicine (s. 161 subs. 3 of the 1945 Drugs and Cosmetics Rules). Ayurvedic, Siddha, or Unani drugs are deemed to be misbranded: if colored, coated, powdered, or polished to conceal damage or made to appear have a better therapeutic value than the medicine really has; if it is not labeled in the specified manner; if it is not labeled in the prescribed manner; or if the label or container or anything accompanying the drug bears any statement, design, or device which may make a false claim for the drug, or which is false or misleading in any particular (s. 33E of the 1940 Drugs and Cosmetics Act). The external characteristics of the medicine and the information describing the medicine should be consistent with reality and should not suggest therapeutic action other than that resulting from the typical properties of the drugs.

An Ayurvedic, Siddha, or Unani drug available on the market is deemed to be adulterated: if it consists, in whole or in part, of any filthy, putrid, or decomposed material; if prepared, packed, or stored under insanitary conditions; if its container contains any poisonous or if its container is composed of any poisonous or deleterious substance which may render the contents injurious to health; if it bears or contains, for purpose of colouring, a colour other than the prescribed one; if it contains any harmful or toxic substance which may render it injurious to health; if any substance is mixed with it to reduce its quality or strength (s. 33EE of the 1940 Drugs and Cosmetics Act). In this case, the internal characteristics of the medicinal product (apart from the packaging) are of primary importance, that is, defects inherent in the drug itself. A different situation occurs when a drug has been spurious: if it is sold or offered or exhibited under another name; if it is an imitation of, or is a substitute for, another drug or resembles another drug in a manner likely to deceive, or bears upon it or upon its label or container the name of another drug, unless it is plainly and conspicuously marked so as to reveal its true character and its lack of identity with the other such drug; if the label or container bears the name of

an individual or company which is fictitious or does not exist; if it has been replaced wholly or in part by any other drug or substance; if it purports to be the product of a manufacturer of whom it is not truly a product (s. 33EEA of the 1940 Drugs and Cosmetics Act). The action of spurious drugs is limited, negligible, or has no health effect; so the verification of original traditional medicine drugs is important, especially since standardization in their case still has limited scope.

The trade in Indian traditional medicine drugs is subject to legal regulation, although there are still difficulties associated with the standardization of these medical products. No person shall manufacture for sale or distribution any ASU drug except in accordance with such standards, if any, as may be prescribed in relation to that drug (s. 33EEB of the 1940 Drugs and Cosmetics Act). The manufacture of misbranded drugs, adulterated drugs, spurious drugs, and unlicensed products for sale or distribution is prohibited and is punishable by appropriate legal sanctions. If the central government is satisfied, on the basis of any evidence or other material available to it, that the use of any Ayurvedic, Siddha, or Unani drug may involve any risk to humans or animals or that any such drug does not have therapeutic value, and if it is necessary or expedient in the public interest to do so, it may prohibit the manufacture, sale, or distribution of such a drug (s. 33EED of the 1940 Drugs and Cosmetics Act).

A license is not required for the sale of traditional drugs, but it is necessary for the production of such drugs, which is a licensed activity. The legislature provides for two main types of licenses for the manufacture of traditional drugs: an own manufacturing license and a loan license. In the first case, an application for the grant or renewal of a license to manufacture for sale of any Ayurvedic, Siddha, or Unani drugs is submitted on a prescribed form to the appropriate authority along with a fee of one thousand rupees (s. 153 of the 1945 Drugs and Cosmetics Rules). The license is issued by the authority after consultation with an expert in the field of traditional medicine systems, as is applicable, whose appointment may be approved on behalf of the state government (s. 154 subs. 2 of the 1945 Drugs and Cosmetics Rules). In the case of a loan license, the application is also submitted on a prescribed form to the appropriate authority, with a fee of six hundred rupees. The grant of the license requires consultation with a medical expert and verification that the manufacturing unit has adequate equipment, staff, and capacity for manufacture and facilities for testing (s. 154A subs. 3 of the 1945 Drugs and Cosmetics Rules).

The Indian government establishes the Ayurveda Siddha Unani Drugs Technical Advisory Board (ASUDTAB) to provide technical advice to the central government and state governments on technical matters related to traditional medicine drugs (s. 33C subs. 1 of the 1940 Drugs and Cosmetics Act). The Board consists of a total of twenty members, both *ex-officio* and nominated. The central government appoints a member of the Board as its chairman. Board members serve for three years but may be re-nominated (s. 33C subs. 3–4 of the 1940 Drugs and Cosmetics

Act). The central government may establish an advisory committee called the Ayurvedic, Siddha, and Unani Drugs Consultative Committee (ASUDCC) to advise the central government, state governments, and the Technical Advisory Board. Its task is to secure uniform application of the legal provisions concerning Ayurvedic, Siddha, or Unani drugs (s. 33D subs. 1 of the 1940 Drugs and Cosmetics Act). The committee consists of two persons appointed by the central government as representatives of that government and no more than one representative from each state appointed by the state government (s. 33D subs. 2 of the 1940 Drugs and Cosmetics Act).

The central government or state government can appoint individuals deemed appropriate and with the prescribed qualification as government analysts and inspectors for matters concerning the proper production of traditional medicine drugs. Samples for testing or analysis are sent by the inspector to the analyst, who then undertakes the appropriate procedures. The duty of the inspector authorized to control the production of Ayurvedic, Siddha, or Unani drugs includes conducting inspections no less than twice a year at all facilities licensed to manufacture drugs, sending a detailed report to the controlling authority after each inspection, collecting samples of drugs produced on the premises for testing or analysis, and initiating legal proceedings in connection with violations of the act and other regulations (s. 162 of the 1945 Drugs and Cosmetics Rules).

4. Case law regarding traditional Indian medicine

Analysis of case law in India helps to demonstrate how legal protection is provided for traditional medicine, including Ayurveda, Siddha, and Unani medicine. The Indian judiciary system has a unified character and includes the Supreme Court, High Courts, state high courts, as well as administrative tribunals and special courts.[17] The Indian legal system is mixed, combining elements of civil law and common law. Interpretation of the law by the Supreme Court has a universally binding force and must be taken into account by all courts throughout India (art. 141 of the Constitution of India). High Courts are bound by the judgments of the Supreme Court, while the judgments of High Courts are binding for lower courts. The judgments of individual High Courts do not have a precedential effect on each other, although they may have persuasive significance in the adjudication of specific cases.[18] Analysis of court cases concerning legal issues related to the practice of traditional medicine reveals four main problematic issues: medical practice,

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[17] Cf. art. 124, 214, 241 i 323A Constitution of India, adopted by the Constituent Assembly on 26 November 1949.

[18] Ch.S. Bagadi, *Jurisprudence (Legal Theory)*, Shashwat Publication, Ram das Nagar 2023, p. 118.

regulation and safety of traditional medicine drugs, advertising and marketing, and intellectual property rights.

In a sense, a milestone in the jurisprudential practice regarding Indian traditional medicine was the judgment of the Supreme Court dated 8 October 1998, in the case of *Dr. Mukhtiar Chand & Ors vs The State Of Punjab & Ors*. The subject of the case was to determine whether practitioners of Ayurveda, Unani, or Siddha medicine are authorized to prescribe allopathic drugs to patients. According to the position adopted, allopathic drugs may be sold or supplied by a pharmacist only on the basis of a prescription issued by a "registered medical practitioner," i.e., a person listed in the State Medical Register. A person listed in the State Register of Indian Medicine or the Central Register of Indian Medicine does not have the ability to practice modern scientific medicine. However, it is not excluded for individual state governments to issue permits for the prescription of allopathic drugs by practitioners of traditional medicine, applicable in the territory of a specific state.[19]

The High Court of Delhi's ruling on 8 April 2016 is of significant importance in interpreting the provisions concerning the healthcare system in India. It stated that practitioners of Ayurveda, Siddha, Unani medicine and Homeopathy generally do not have the authority to practice allopathic medicine. Even if a person holds qualifications in Indian medicine, such as a diploma in integrated medicine, they cannot be registered as allopathic medical practitioners based on those qualifications alone. "Indian medicine" as per the law governing the Central Council of Indian Medicine refers to the system of Indian medicine commonly known as Ashtang Ayurveda, Siddha, or Unani Tibb, supplemented or not with modern advances in the modern scientific system of medicine in all its branches, including surgery and obstetrics. On the other hand, "integrated medicine" refers to conjoint, concurrent study, training, and practice in Ayurved/Siddha/Unani Tibb and the Modern Scientific System of Medicine in all its branches including surgery and obstetrics. A person registered in the State Register of Indian Medicine or the Central Register of Indian Medicine does not have the right to practice modern scientific medicine unless they are also registered in the State Medical Register.[20] These definitions may *prima facie* suggest the existence of an integrated healthcare system in India, where the same practitioners have the right to practice both traditional and allopathic medicine. However, such an interpretation is not justified as both medical subsystems are distinct and employ different treatment methods.

The other issue considered by jurisprudence was the safety of drugs, including traditional medicine. In the case of *Laxmikant vs Union of India* in 1997, the question

[19] Supreme Court of India, *Dr. Mukhtiar Chand & Ors vs The State Of Punjab & Ors* on 8 October 1998, https://indiankanoon.org/doc/484509/ (accessed: 21.04.2024).

[20] Delhi High Court, *Delhi Medical Association vs Principal Secretary (Health) & Ors.* on 8 April 2016, No. 7865/2010, https://indiankanoon.org/doc/95645241/ (accessed: 18.04.2024); s. 2(b), (h) and (k) The Delhi Bharatiya Chikitsa Parishad Act, 1998 (Delhi Act No. 4 of 1999).

arose as to whether Ayurvedic drugs could contain tobacco. Several years earlier, the Central Government had issued a ban on using tobacco in the production and sale of all Ayurvedic drugs, including tooth powder and toothpaste. According to the petitioner, the use of at least 50% tobacco in the preparation of Ayurvedic drugs, including powders and toothpaste, was prohibited. If the petitioner used only 4% tobacco in the production of drugs, then his/her activity should not be subject to the ban. In the assessment of the Supreme Court, the position adopted by the Government of India regarding the total ban on the use of tobacco in the production of tooth powder and toothpaste is well justified, considering that scientific research shows the harmful effects of tobacco on human health, e.g. an increased susceptibility to cancer.[21] It is worth noting that Ayurvedic medicine is based on the use of plant, animal, and mineral ingredients, which does not mean that when used in excessive doses, they offer health benefits. In this case, the issue was not about the harmfulness of Ayurveda *per se*, but rather the use of tobacco in the production of drugs.

Moreover, Indian jurisprudence has also considered the issue of classifying a particular substance as a product of Ayurvedic medicine. In the case of *Sidi Pharmacy Pvt. Ltd. vs Union of India*, the Supreme Court examined whether the government could refuse a license for the production of Ayurvedic injection preparations. It was necessary to determine whether these injections could be classified as products of traditional medicine. According to the expert committee, Ayurvedic injections were not described in Ayurvedic texts, and there was no data confirming the efficacy and safety of these preparations; so they should be banned. Ultimately, the Court declined to decide whether to grant a license for Ayurvedic injections, leaning towards the view that it is a political decision requiring serious consideration and deliberation on public health and treatment methods. Adjudicating on such issues falls within the scope of judicial review and the jurisdiction of this Court, but it may be further addressed by the government of India.[22]

Products of traditional Indian medicine are promoted by their advocates as natural remedies with specific healing properties, based on ancient medical knowledge. This information often appears in advertisements for these drugs, which are presented as an alternative to conventional medicine. In the case of *Anand Mohan Chapparwal vs State of Maharashtra*, the Bombay High Court examined the compliance of one Ayurvedic medicine advertisement with advertising regulations. According to the regulations, advertising for a medicine is prohibited if it suggests that its use

[21] Supreme Court of India, *Laxmikant vs Union of India*, Appeal No. 3000 of 1997 on 11 April 1997, https://www.tobaccocontrollaws.org/litigation/decisions/laxmikant-v-union-of-india (accessed: 21.04.2024).

[22] Supreme Court of India, *Sidi Pharmacy Pvt. Ltd. vs Union of India* on 24 July 2004, (13) SCC 780, https://www.casemine.com/judgement/in/581180c92713e179479ce866 (accessed: 21.04.2024).

helps, among other things, to maintain or improve of the capacity human beings for sexual pleasure.[23] The disputed advertisement stated that the drug involved is intended exclusively for men to enhance their vigor and vitality. The Court noted that the regulation uses the phrase "the maintenance or improvement of the capacity human beings for sexual pleasure," while the advertisement refers to "improving vigor and vitality" without mentioning sexual aspects. Because of these differences, it is impossible to conclude that the advertiser intended to attribute properties other than those described in the content of the advertisement; so the case should be decided in favor of the defendant.[24]

The use of natural medical preparations in the market raises the issue of their patent protection. There are doubts about whether certain products containing herbal ingredients, known in Indian medicine for hundreds of years, have patentability at all. For example, turmeric root (*Curcuma longa*) has medicinal properties and is used in traditional Ayurvedic medicine to treat conditions such as anemia, asthma, conjunctivitis, dental problems, and diabetes. In 1995, two Indian scientists from the University of Mississippi Medical Center, Suma K. Das and Hari Har P. Choly, obtained a U.S. patent for a method of using turmeric to treat wounds. The Council of Scientific and Industrial Research (CSIR) based in New Delhi challenged the decision to grant the patent. Referring to Ayurvedic texts, CSIR pointed out that turmeric has been used for thousands of years to heal wounds and skin rashes; therefore, it lacks novelty and cannot be patented. Ultimately, the U.S. Patent Office considered the position of this Indian institution, and in 1997, invalidated the patent on turmeric. This story is considered the first known case of challenging biopiracy.[25]

5. Conclusions

Traditional Indian healing methods and medicinal preparations used in Ayurveda, Siddha, and Unani have gained popularity not only in India and Asia but also globally. Indian medicine is part of the intangible cultural heritage of the country; hence it is subject to special legal protection. The legal landscape regarding the protection of natural medicine is complex, accompanied by some tension between allopathic and traditional medicine. In this context, judicial decisions hold significant

[23] S. 3B of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 30th April 1954 (21 OF 1954).

[24] Bombay High Court, *Anand Mohan Chapparwal vs State of Maharashtra* on 3 August 1995, 1996 CR LJ 596.

[25] P. Schuler, *Biopiracy and Commercialization of Ethnobotanical Knowledge* [in:] *Poor People's Knowledge Promoting Intellectual Property in Developing Countries*, eds. J. Finger, P. Schuler, World Bank & Oxford University Press, Washington 2004, pp. 166–167.

importance, as Supreme Court rulings set precedents within the Indian judicial system. Analysis of national legal regulations and judicial practices helps identify the basic principles of legal protection for traditional medicine in India. The production and distribution of traditional Indian drugs are regulated by regulatory bodies at both the national and state levels, with a special role played by the Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy (AYUSH). The production of Ayurveda, Siddha, and Unani drugs for sale requires prior license. Prohibited practices, such as the manufacture of misbranded drugs, adulterated drugs, and spurious drugs, or producing unlicensed products for sale or distribution are prohibited. Furthermore, legal mechanisms have been introduced to protect traditional Indian medicine from biopiracy.

Certainly, India's cultural richness has had a significant impact on various aspects of human life, including medical practice. One could metaphorically say that contemporary India has two lungs – traditional medicine and allopathic medicine – which, based on different assumptions, have the same goal of protecting human life and health. *De lege ferenda*, it is proposed to introduce legal solutions that would allow for better integration of traditional medicine with the allopathic medicine, for example, expanding the scope of services provided by qualified practitioners. It is also worth considering the regulation of scientific research programs on the safety and efficacy of Ayurveda, Siddha, and Unani drugs, including providing funding opportunities to research institutions, universities, and pharmaceutical companies. In order to prevent biopiracy, it is necessary to introduce adequate legal measures that would protect traditional Indian medical knowledge from appropriation by foreign corporations. A good solution would be to intensify international cooperation and establish a special international registry for natural medicine products.

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SUMMARY

Karol Gregorczuk

LEGAL PROTECTION OF TRADITIONAL MEDICINE IN INDIA

Specialized medical knowledge began to develop on the Indian subcontinent in ancient times. It is associated with information, skills, and practices based on theories, beliefs, and experiences of different generations. Traditional medicine in India is not a uniform system but is divided into several subsystems, i.e. Ayurveda, Siddha (Tamil medicine), Unani (Persian-Arabic medicine), and Sowa-Rigpa (Tibetan medicine). A wide range of natural healing methods is used, including herbal medicine, cleansing of toxins, and diet. This cultural heritage of medical thought requires the adoption of adequate legal protection nowadays. In the second half of the twentieth century India initiated efforts to introduce legal regulations concerning the use of natural medicine. Institutionalization of this issue was carried out by establishing the Central Council of Indian Medicine in the Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha Medicine, and Homeopathy (AYUSH). The government supports scientific research and undertakes educational initiatives in the field of traditional Indian medicine. The aim of this article is to reconstruct the model of regulation of natural medicine in India as part of its cultural heritage, in the context of the development of modern technologies.

Keywords: Ayurveda, drugs, Indian medicine, intangible cultural heritage, legal protection, traditional medicine

STRESZCZENIE

Karol Gregorczuk

OCHRONA PRAWNA TRADYCYJNEJ MEDYCYNY INDYJSKIEJ

Specjalistyczna wiedza medyczna zaczęła się rozwijać na obszarze subkontynentu indyjskiego już w czasach starożytnych. Obejmuje ona wiedzę, umiejętności i praktyki oparte na teoriach, przekonaniach i doświadczeniach kolejnych pokoleń, ukształtowanych w trakcie rozwoju historycznego. Tradycyjna medycyna indyjska nie jest jednolitym systemem, lecz dzieli się na kilka podsystemów, tj. Ayurveda, Siddha (medycyna tamilska), Unani (medycyna persko-arabska), Sowa-Rigpa (medycyna tybetańska). W tym przypadku wykorzystuje się w szerokim zakresie naturalne metody leczenia, takie jak m.in. ziołolecznictwo, oczyszczanie z toksyn i dietę. Ten szczególny dorobek dawnej myśli medycznej wymaga współcześnie przyjęcia adekwatnych instrumentów ochrony prawnej. Indie zainicjowały w drugiej połowie XX wieku działania mające na celu wprowadzenie regulacji prawnych dotyczących stosowania medycyny naturalnej. Dokonano instytucjonalizacji tej problematyki, powołując Centralną Radę Medycyny Indyjskiej w Departamencie ds. Ayurvedy, Jogi i Naturopatii, Unani, Siddha Medicine i Homeopatii (AYUSH). Rząd wspiera badania naukowe i podejmuje

inicjatywy edukacyjne w obszarze tradycyjnej medycyny indyjskiej. Celem artykułu jest zrekonstruowanie modelu regulacji medycyny naturalnej w Indiach jako jej niematerialnego dziedzictwa kultury w kontekście rozwoju nowoczesnych technologii.

Słowa kluczowe: Ayurveda, leki, medycyna indyjska, niematerialne dziedzictwo kultury, ochrona prawna, medycyna tradycyjna

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PROTECTION AND PRESERVATION OF CULTURAL HERITAGE DURING ARMED CONFLICT: UNDERSTANDING THE ACCOUNTABILITY OF A STATE UNDER INTERNATIONAL HUMANITARIAN LAW

1. Introduction

The year 2022 did not unfold as anticipated, as on 24 February 2022, the long-standing and well-established custom of prohibiting the use of force was transgressed when Russia declared war in a special military operation against Ukraine. This operation arose from the context of the Russian-Ukrainian conflict, which had been developing since 2014 following Russia's annexation of the Crimea, a series of naval incidents, political tensions, and the war in Donbass. The international community, as well as Ukraine itself, had long accused Russia of clandestinely supporting separatists opposed to the Ukrainian government in the Donbass region prior to 2014.[1] Although the conflict was not new, the world did not expect it to escalate into a full-scale war. Ostensibly, the invasion was triggered by Ukraine's aspirations to join NATO, which Putin viewed as a ploy by the United States to move NATO's borders closer to Russia.[2] This incursion is an ongoing affair, resulting in substantial destruction for Ukrainians as well as for the entire international community. The Ukrainian ethnic legacy is in peril. The physical remnants of times gone by are vanishing quickly, particularly in the aftermath of war and terrorism,

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[1] For more on this, see: A. Krishna, "Root cause of Ukraine-Russia conflict", *The Economic Times*, 4.03.2022, https://economictimes.indiatimes.com/news/defence/view-the-root-cause-of-the-ukraine-conflict/articleshow/89807225.cms?from=mdr (accessed: 10.03.2022).

[2] *Ibidem*.

robbery and pillage, and climatic disruption. Combat exacerbates the annihilation of essential heritage, as it can lead to the destruction of archaeological relics for the purpose of demoralising the general population or drawing attention from abroad. Additionally, the illegal antiques marketplace can be used to the aggressor's benefit or to finance additional warfare.

Despite war being an unpalatable reality, the international community has established a robust framework for overseeing all aspects of warfare, from the commencement of hostilities to the rehabilitation of a defeated state. However, the interplay between the established norm of respecting state sovereignty in internal affairs and the application of international law presents significant challenges. To enforce strict compliance with laws, international bodies along with nations have developed a strong and powerful regime of International Human Rights Law (IHRL) that safeguards the rights of individuals during peacetime. The International Humanitarian Laws (IHL), also known as the Laws of Armed Conflict (LOAC), serve to protect the rights of both civilians and combatants during times of war. IHL (or LOAC) is a comprehensive set of rules that aim to limit the impact of war, protect those who are participating in hostilities or are no longer involved in them, and constrain the means and methods of warfare (ICRC, 2022). Additionally, the Convention Relative to the Protection of Civilian Persons in Time of War, signed at Geneva on 12 August 1949 (hereinafter: the 1949 Geneva Conventions) are the major and essential instruments for LOAC, by which states are obligated to adhere to the rules enshrined there, either by ratification or as per the law of *Jus Cogens* or customary international law.

The distinction principle, which forms the foundation of IHL, allows attacks solely on military objects, such as an enemy's facilities, ammunition, and personnel. It also grants exhaustive protection to civilians by forbidding all attacks on civilians, civilian facilities, and civilian objects; such protection is widely accepted.

Cultural property faces various threats and are at significant risk during an armed conflict. Such property may suffer unintentional damage as collateral damage, or become intentionally targeted, or may be looted by civilians. States which are attacked can also be held responsible for neglecting their cultural properties and providing them without adequate protection during an armed conflict. Established international legal norms place the obligation to protect archaeological sites on parties to an armed conflict. The United Nations Educational, Scientific and Cultural Organization (UNESCO) has made efforts at the international level to recognize and prevent war crimes by enacting three conventions after World War II to prosecute the perpetrators of such crimes. Unfortunately, these conventions, such as the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 May 1954 (hereinafter: the 1954 Hague Convention), the UNESCO Convention concerning the Means of Prohibiting and

Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by UNESCO in Paris on 16 November 1970 (hereinafter: the 1970 UNESCO Convention), and the Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on 16 November 1972 (hereinafter: the 1972 UNESCO Convention), are not adequately implemented, rendering them inefficient as reliable deterrents or modes of prosecution.[3]

The deficiencies of the extant international conventions necessitated the creation of the Additional Protocol II to the 1954 Hague Convention, which entered into force in 1999 (hereinafter: AP II). The AP II was established upon earlier legal precedents, notably the Lieber Code of 1863, which mandated in art. 35 that „classical works of art, libraries, scientific collections, or precious instruments ... must be secured against all avoidable injury". Similarly, the International Declaration concerning the Laws and Customs of War, adopted by the Conference of Brussels on 27 August 1874 stated that „all seizure or destruction of, or wilful damage to, institutions of this character..." could not be carried out without legal justification (art. 8 of the 1954 Hague Convention).

The Hague Convention (II) with respect to the Laws and Customs of War on Land (29 July 1899) and the Hague Convention (IV) respecting the Laws and Customs of War on Land (18 October 1907) expanded the responsibility to respect the laws of war to belligerents, providing that whoever damages any institution of historical significance or art work with the intent of vandalising such objects will be prosecuted (art. 56 of the 1954 Hague Convention). Furthermore, art. 27 of the 1907 Hague Convention obligated the besieged state to identify the presence of such buildings that come under its protection, while forbidding attacking states to attack cultural property.

Additionally, the International Tribunal for the Former Yugoslavia (ICTY) has successfully prosecuted multiple cases relating to cultural property crimes during armed conflicts, setting a high standard of accountability for the violating party. Following legal precedents paved the way for the 2nd Protocol and the Rome Statute of the International Criminal Court (hereinafter: ICC) to impose collaboration in enhancing the protection of cultural property on a global level.

2. Arguments

There are two essential principles in this regard. The first is the notion of irreversibility. Such a theory holds that safeguarding individuals and safeguarding cultural treasures are closely intertwined. The concept of Universalism indicates that every

[3] J. Kastenberg, "The Legal Regime for Protecting Cultural Property during Armed Conflict", *Air Force Law Review* 1997, vol. 42, pp. 277–288.

individual's ethnic legacy is a component of humanity's collective legacy. In today's rapidly changing world, the significance of protecting cultural heritage during armed conflict cannot be understated. However, opponents argue that when lives are at stake, it is morally repugnant, if not downright dreadful, to devote resources to maintaining crumbling monuments. This sentiment resonates widely. According to the *Guardian* art expert Jonathan Jones, the worth of a single human life surpasses the significance of even the most valuable work of art in human history.[4] Nonetheless, a different criticism emphasises personal priorities in moral matters and focuses on the allocation of moral and emotional involvement. The people who put the monuments' preservation above human lives, it suggests, are the real cause for concern, not the monuments themselves.

3. Legal framework

The vast ethnic plunder that occurred during World War II prompted the 1954 Hague Convention, but it was limited to safeguarding material culture exclusively during warfare. It neglected to tackle the theft, smuggling, and destruction of historical objects during times of peace. The illicit trading of antiques and cultural artefacts was very common before 1970. As a result, a number of sovereign governments adopted the 1970 UNESCO Convention, starting the process of preserving major historical and cultural artefacts.

The 1970 UNESCO Convention made it possible to protect cultural property during times of peace. The 1970 UNESCO Convention's definition of "cultural property" and the 1954 Hague Convention's definition are identical. The term "cultural property" has also been described as "items which are used as means of expressions, evincing human creation and evolution of nature for historical, artistic, scientific or technical value and interest" in the UNESCO Recommendation Concerning the International Exchange of Cultural Property, adopted by the General Conference on 26 November 1976. The description mentioned above provides an expanded view of cultural property, including a larger range of items.

1996 saw the establishment of the Blue Shield by the "Founding Four" organisations. Dutch legislation establishes it as a worldwide non-governmental organisation as follows: it is "Committed to safeguarding of the world's cultural property and is concerned with the protection of cultural and natural heritage, tangible and intangible, in the event of armed conflict, natural- or human-made disaster."[5]

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[4] J. Jones, "'I felt like some kind of monster'", *The Guardian*, 14.10.2008, https://www.theguardian.com/artanddesign/2008/oct/14/art-socialexclusion (accessed: 10.03.2022).

[5] The Blue Shield, Governance and Structure, https://theblueshield.org/about-us/governance-and-structure/ (accessed: 24.03.2023).

Currently, the Blue Shield has about thirty national committees, and that number is constantly rising. It also has a multinational arm called Blue Shield International (BSI), that is made up of a small administration (one full-time employee and one part-time employee, currently based at and funded by Newcastle University in the United Kingdom) and a governing body appointed by the national committees and the Founding Four. The Blue Shield is a non-profit organisation dedicated to cooperative action, autonomy, impartiality, integrity, and honouring traditional uniqueness.

International humanitarian law, including the 1954 Hague Convention and its two protocols (1954 and 1999), serves as the main legal framework for the Blue Shield. Additionally, it functions broadly within the framework of the cultural conventions and broader cultural conservation strategy of the UN and UNESCO. International programmes like the Sendai Framework for Disaster Risk Reduction,[6] which address both natural and man-made disasters, additionally reinforce it. As stated in art. 1 of the 1954 Hague Convention, the organization's mandate has been expanded to include the recognition that all ethnic property – tangible and intangible, cultural and natural – is an essential component of human communities. Previously, the organization's primary responsibility was to safeguard tangible cultural property during armed conflict.

In light of this, the BSI establishes the structure and regulates the tasks of the national committees as well as its own operations with six focal points of activity: policy creation, cooperation with different organisations as well as within the Blue Shield, risk prevention and safeguarding, training, instruction, and capacity building, crisis management, and permanent and post-disaster restoration operations.

It makes six arguments as to why the military and aid industries value CPP. First, people are important. Protecting cultural property is about the people who live nearby and whom any uniformed deployment affects, as well as the individuals who are the primary concern of humanitarian organisations. As previously mentioned, the defence of individuals is intrinsically linked to the defence of their cultural property and is recognised as a military duty under the broader LOAC/IHL. Second, there is an ethical need to fulfil legal obligations. Any armed forces or humanitarian mission has to be completely mindful of its legal obligations regarding the preservation of historical and artistic assets according to: international humanitarian law (IHL), including the 1954 Hague Convention and the 1977 Additional Protocols to the 1949 Geneva Conventions; international human rights law (specifically, the 1998 Rome Statute of the International Criminal Court, in which the former UN special rapporteur on cultural rights suggests making accessible heritage a universal human

[6] United Nations Office for Disaster Risk Reduction, Implementing the Sendai Framework, https://www.undrr.org/implementing-sendai-framework/what-sendai-framework (accessed: 22.03.2023).

right); international customary law; and, in some cases, international criminal law. Recognising the intersections among broader „mainstream" IHL and the legislation protecting cultural property is an important, albeit comparatively recent, humanitarian requirement.

Third, army chiefs and relief organisations must be cognizant of the tactical requirement of comprehending and predicting the abuse of traditional heritage. Fourth, since stealing surely goes towards supporting military nonstate actors, cultural property security is crucial in the military and humanitarian spheres. Although looting has probably always existed since wars were first fought, it is commonly asserted that it has grown more systematic and significant in contemporary warfare. Fifth, the loss of cultural property might jeopardise a nation's efforts to rebuild its economy. Once a military unit wins a battle, it often has to make sure the post-conflict state is stable and economically sustainable before it can leave; the victor(s) must also win the peace.

The sixth tactic is the use of cultural property preservation as soft power. When charitable funds are used to renovate sacred structures, communities may be motivated to take responsibility for what lies ahead and express appreciation. Unfortunately, there have been several current incidents where NATO troops have not been able to implement CPP successfully, which has unduly agitated the citizens of the region; in some cases this has resulted in a worsening of hostilities and increased losses. One feature common to many wars is intentional abuse of religious relics owned by the warring nations.

4. Current legal regime

Following the conflicts in Iraq (2003) and Syria (2011) the protection of cultural property has once again become a pressing concern.[7] The international community was deeply troubled by reports of intentional destruction of cultural property with significant symbolic, traditional, and religious value. Deliberate attacks on mausoleums of saints and mosques galvanized the international community to address this issue in a practical manner.

The landmark Al Mahdi case in 2016 found the accused guilty of intentionally vandalising religious and historic buildings in Timbuktu. The ICC gave a verdict that any intentional attack on cultural property would be treated as a war crime, setting a precedent.[8] The Al Mahdi case sent a strong and unmistakable message to the

[7] Report on Cultural Property: Protection of Iraqi and Syrian Antiquities, August 2016, The Government of United States of America.

[8] A. Jakubowski, "Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case", *Chinese Journal of International Law* 2017, vol. 4, no. 16, pp. 695–721.

international community that intentional attacks on cultural property of significance would be regarded as serious crimes and dealt with under the international criminal law regime. The recent Russia-Ukraine war which has seen multiple IHL violations, including destruction of numerous Ukrainian Cultural Property sites demands an understanding of the concept of cultural property and current international law relating to it.

5. Meaning of cultural property

In legal terms, the definition of „cultural property" was formally established and expanded upon in art. 1 of the 1954 Hague Convention. It is defined as:

"(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) 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 sub-paragraph (a);

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'."

6. International laws and statutes

The adoption of the "Convention on the Protection of Cultural Property during Armed Conflict" by UNESCO in 1954 was a ground-breaking achievement. This was succeeded by the 1972 UNESCO Convention and the 1970 UNESCO Convention, together establishing a comprehensive and robust legal framework for safeguarding cultural property during times of armed conflict.

The adoption of the Hague Convention in 1954 marked a significant milestone in the recognition and protection of cultural property during armed conflict. Article 1 of the Convention provided a comprehensive definition of cultural property, which was lacking in previous international conventions. The Convention imposed obligations on state parties to safeguard cultural property during war, as affirmed in

art. 3. This obligation extended to the respect of cultural property not only within but also outside their territories.

In addition, the 1954 Hague Convention provides a thorough and detailed explanation of the concept of cultural property. This was the first time that such comprehensive definition of cultural property was set out. The definition encompasses property that holds significant cultural value to the people and the state, and sees movable and immovable properties as qualified for protection during an armed conflict.

In accordance with the 1954 Hague Convention, art. 4 prohibits any use of cultural property that may lead to its destruction or damage during an armed conflict. This provision also shields cultural property from any form of hostile activity, including pillage, misappropriation, and theft. The 1954 Hague Convention was a significant contribution to the protection of cultural property. It was the first treaty that comprehensively addressed the need to safeguard property of cultural importance during peacetime and anticipated the potential impact of armed conflicts while calling for necessary measures to address relevant issues. Furthermore, the Convention extended the protection of cultural property beyond the territorial boundaries of a state. Interestingly, while the Convention offers a comprehensive definition of cultural property, it does not include religious buildings as cultural property. However, these buildings can still be protected when they are recognized as „monuments of architecture, art, or history."

The 1954 Hague Convention imposes on states the duty to identify and mark cultural properties for easy recognition, along with their protection and preservation. The protective symbol, „The blue shield" emblem, which is the equivalent of the Red Cross emblem, was introduced in art. 6 of the Convention and declared mandatory for states to use in order to gain protection for the relevant property. Article 17 provides detailed guidelines on the use of the emblem, including identification and transportation of cultural property, as outlined in art. 12 and 13, respectively.

In addition, the 1954 Hague Convention stipulates that the blue shield emblem is exclusively for the identification and protection of cultural property, and any unauthorized use of it is strictly prohibited. Moreover, the use of the emblem necessitates prior authorization from the designated authority, stipulated in art. 17. The Convention also recognizes that harm to cultural property is tantamount to harm to the cultural heritage of humanity at large, highlighting the intrinsic value of cultural property beyond mere material worth.

In spite of the extensive provisions of the 1954 Hague Convention regarding the safeguarding of cultural property, art. 4(2) of the same Convention complicates the issue by allowing the targeting, damaging, or destruction of cultural property in the interest of military necessity. This provision allows states to waive their obligations in case of „imperative military necessity," which is subject to subjective

interpretation, rendering the implementation of IHL rules more challenging and perplexing. Although the issue was later addressed in Additional Protocol II of the 1954 Hague Convention, this has left many complexities in the implementation of the rules.[9]

7. Additional Protocol II

AP II introduced the concept of „enhanced protection," which offers some level of safeguarding for cultural property and subjects parties to scrutiny and accountability. Article 6 of AP II marks a significant step in the protection of cultural property by ensuring that the destruction of any protected property cannot be justified by the principle of military necessity. Article 6 also outlines the circumstances in which military necessity may be „imperatively required," namely that the cultural property has been turned into a military target and when there is no viable alternative to achieve a similar military advantage without targeting it. AP II provides further measures for the protection of cultural property by establishing a committee to ensure compliance with its provisions and imposing sanctions for any violations. The Committee is made up of twelve executive members and has the authority to scrutinize proposed properties for cultural protection. Article 11 of AP II outlines the procedure for states to apply for enhanced protection of their cultural property.

This protocol has paved the way for further legal regimes, including the role of the ICC in enforcing these protections.

8. ICC's role in cultural protection

The incorporation of cultural protection in International Criminal law is not a recent development and has its roots in the Hague Regulations of 1907. Article 3(d) of the Statute of the International Criminal Tribunal of Yugoslavia (ICTY) specifies the violation of the laws of war if action includes the seizure, destruction, or intentional damage of buildings used for religious, educational, or charitable purposes.[10] This article protects the cultural heritage of conflicting parties. The protection of cultural property in time of conflict has gained more attention in international forums, as is seen in the drafting of the Rome Statute.

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[9] C. Forrest, "The Doctrine of Military Necessity and The Protection of Cultural Property During Armed Conflict", *California Western International Law Journal* 2007, vol. 37, pp. 177–219.

[10] D. Shraga, Z. Ralph, "The International Criminal Tribunal for the Former Yugoslavia", *European Journal om International Law* 1994, vol. 5, pp. 360–380.

The Rome Statute, which was adopted in July 1998, grants the ICC the authority and jurisdiction to address crimes against cultural property or those that impact it (as outlined in art. 8 para. 2 subpara.b point ix, art. 8 para. 2 subpara. e point iv of the Rome Statute). The importance of culture as a means of uniting people with a „common bond" is also recognized in the preamble to the Statute.

Article 8 of the Rome Statute designates any deliberate attack on buildings of cultural or religious significance, including those dedicated to education, religion, art, history, or charity, as a war crime, since these are not military objectives. This article also grants the ICC jurisdiction over both international and non-international armed conflicts at the national level.

The ICC's supplementary jurisdiction only applies when a state is incapable of prosecuting alleged crimes and requires states to enact laws allowing them to prosecute such crimes.[11] Taken together, these treaties, conventions, regulations, and statutes establish minimum standards for protecting cultural property during armed conflicts, as well as limitations on states' actions during such conflicts. However, for these legal frameworks to be fully applicable and enforced, they must be ratified by states. Therefore, it is crucial for these treaties to be widely adopted and generally accepted to ensure effective compliance mechanisms.

9. Analysis

Upon examination of the current regime established for safeguarding cultural property, it is imperative to scrutinize and evaluate the efficacy of relevant treaties and regulations in addressing the challenges posed by armed conflicts. To comprehend the distinctive challenges associated with cultural protection, we give the case of the 2003 invasion of Iraq by coalition forces. Given Iraq's rich cultural and religious history, it serves as a good illustration for the purposes of this article. The lead-up to the attack witnessed one of the most catastrophic instances of damage inflicted on cultural heritage in a matter of days. The Baghdad National Museum was assaulted on 10 April 2003, leading to the disappearance of thousands of objects. Subsequently, the National Library was set ablaze. As reported, numerous volumes and historical documents were destroyed, and several sites were looted. The collapse of the government provided a gateway for many gangs and groups to indulge in these criminal activities. The international community expressed deep worry over the conversion of archaeological sites into military bases by the US-led coalition,

[11] For reference see: International Criminal Court Project's, "The ICC and Cultural Property: Reinforced Legal Enforcement of the Protection of Cultural Property in Armed Conflict", by S.S. Shoamanesh, 22 June 2022, https://www.international-criminal-justice-today.org/arguendo/the-icc-and-cultural-property/ (accessed: 15.03.2023).

such as at Ur, a third-millennium BCE site in southern Iraq, and at Babylon, near Hilla, a second and first-millennium BCE site of great historical significance.[12]

Nonetheless, the establishment of the Iraqi Special Tribunal (IST) following the invasion failed to adequately address the issue of cultural property protection due to the IST statute's failure to explicitly link it with crimes against humanity or war crimes. Subsequently, due to rise of ISIS forces and their occupation of Iraq in 2014, numerous sites such as Hatra were declared endangered by UNESCO.[13] These events demonstrated to the international community that the mere drafting of legislation is insufficient, as its effectiveness is contingent upon its acceptance, recognition, and adoption by states on a broad scale.

As is suggested above, recent times have witnessed the development of more explicit, robust, and structured international law concerning the safeguarding of culturally significant property during armed conflicts. Despite the extensive legal framework relevant to this issue, its effectiveness is undermined by certain shortcomings. One of the primary issues is that cultural property is defined differently in various legal documents, which results in ambiguity and lack of clarity. The Hague Rules, for instance, protect any structures utilized for benevolent, scientific, artistic, or religious purposes, along with significant historical structures and individual artworks, during armed conflicts. In order to provide enhanced protection while considering the subjective nature of terms like „historic" and „artistic," the drafters of the 1954 Hague Convention used the word „Cultural Property." Additionally, UNESCO promulgated two relevant conventions in 1970 and 1972, which differ significantly in their use of terminology. The 1970 UNESCO Convention covers movable objects, including rare specimens and collections of flora, fauna, minerals, and anatomy, while the 1972 UNESCO Convention pertains to cultural heritage of an immovable nature and even embraces landscapes, thus broadening the concept further. UNESCO has also adapted its definitions of cultural property with nine recommendations between 1956 and 1980; each of them defines cultural property differently. The presence of relatively ambiguous definitions can cause omissions, and a more consistent definition is imperative.

An issue of paramount concern pertains to the concept of „imperative military necessity." Given the ambiguous nature of this term, it appears that states may exploit it to justify their actions.[14] Commanders can use this uncertainty to excuse

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12 G. Palumbo, "The State of Iraq's Cultural Heritage in the Aftermath of the 2003 War", *The Brown Journal of World Affairs* 2005, vol. 5, no. 1, pp. 225–238.

13 I. Ralby, "Prosecuting cultural property crimes in Iraq", *Georgetown Journal of International Law* 2005, vol. 37, pp. 165–192.

14 P. Gerstenblith, "The Obligations Contained in International Treaties of Armed Forces to Protect Cultural Heritage in Times of Armed Conflict", *Archaeology, Cultural Property, and the Military*, ed. L. Rush, The Boydell Press, Rochester, NY 2012.

attacks against cultural property instead of limiting their options.[15] While AP II provides a more precise definition of „imperative," there are no established guidelines for rationalizing decision-making. Therefore, it is crucial to investigate and explicate this concept of military necessity in the most coherent, elaborate, and transparent manner, especially in the light of current circumstances.

The workability of these regulations faces another obstacle from the states themselves. According to the 1954 Hague Convention and Protocol II, states hold the authority to determine and designate their cultural property and assign protective emblems to the relevant sites. States must identify the sites and bring them under protection to call for enhanced protection. However, in states where cultural property is a source of conflict, few specific properties will receive protection, while others may be neglected, as in states with significant sectarian differences. The legal framework also imposes an obligation on states to register their sites as cultural property with UNESCO. Failure to register the sites for increased protection may bring legal complications for states in the future.

Furthermore, the existing two-tier system of protection is subject to controversy. Although the 1954 Hague Convention introduced a general and special protection mechanism, the process of requesting special protection is exceptionally stringent, resulting in limited success. The AP II created a new mechanism that offered better and more flexible general protection with greater clarity, yet the procedure's success cannot be guaranteed. Few scholars are of the view that identified properties reduce danger, as identification makes intentional targeting more feasible.[16]

There is no denying that armed conflicts inevitably lead to large-scale destruction, with cultural property being a particularly vulnerable target for damaging an enemy's pride. Thus, it becomes crucial for peacekeeping missions to include the protection of such property in their mandates. To deal with such violations, a coherent framework that can be applied to peacekeeping troops is necessary. However, in practical terms, the United Nations is not authorised to bring peacekeepers under international treaties, as they are multinational, and not all of the relevant instruments have been ratified. The United Nations has made several attempts to address this issue, but it remains unresolved to date.

In the realm of protecting culturally significant property, it is essential to take into account the expenses that come with such protection, which includes identifying and registering property, constructing shelters, and hiring professional services. However, member states of the 1954 Hague Convention and Protocol II face challenges because of a lack of infrastructure and services, which can only be resolved with the help of international organizations. The legal system has set a precedent

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[15] C. Forrest, "The Doctrine of Military Necessity…", pp. 177–219.

[16] S. Van der Auwera, "International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges", *The Journal of Arts Management, Law, and Society* 2013, vol. 43, no. 4, pp. 175–190.

for handling with cultural property's intentional damage through cases such as that of Al Mahdi, which established such actions as a war crime. However, investigating such crimes may be problematic, as accessing evidence and assessing the condition of the property can be difficult.

10. Conclusions

Despite the passage of many decades, states continue to be guilty of the destruction of cultural property during armed conflict, and the legal framework designed to prevent such destruction often goes unheeded. A good contemporary example is Russian aggression against Ukraine, which constitutes an attack on its culture. Putin's policy toward Ukraine and Belarus has consistently demonstrated Russia's rejection of the „artificial" identities attributed to these states. This policy was evident in Russia's annexation of the Crimea in 2014, and has been characterized by many as an „imperial strategy." Russia's history of attacking Syrian hospitals and significant cultural sites indicates a disregard for international norms.

Cultural property disputes are frequently skewed, with both perspectives embodying an ideological position that has been predetermined. The question that emerges after a thorough analysis of nationalism and internationalism is: Are cultural internationalists right to seek the preservation of cultural property? Unquestionably, the concepts of accessibility, safeguarding, and maintenance are significant to some level, but never to the point where they supersede concerns about control, feelings, or ties to the past. Cultural property is essential to human identity and needs to be protected at all costs. The inhabitants of a country should not, however, be denied the privilege of viewing their prized cultural property because of the remote possibility that the cultural property may be destroyed in its homeland state.

The wanton destruction of cultural property, as discussed earlier, underscores the need for international legal instruments that would require states to ratify, implement, and enforce measures aimed at safeguarding such assets, with a view to addressing existing inconsistencies. Although discussions at the international level have often focused on the need for a new instrument, the effectiveness of any such instrument would still depend on the willingness of states to ratify and implement it.

Drawing upon the foregoing discussion, several recommendations can be formulated to offer pragmatic solutions to the intricate complications and challenges associated with the safeguarding of cultural property. Foremost among these is the urgent need for states to pursue robust measures for the protection of civilians and their objects in armed conflicts, which would concomitantly fortify the safeguarding of cultural property. Secondly, states should exercise vigilance and endeavour to secure the protection emblem while registering their properties as cultural property or heritage property. Thirdly, in view of the contemporary conflicts in Syria, Iraq,

and Afghanistan, it is imperative that donors and stakeholders support heritage professionals, incorporate local volunteers, and acknowledge new local networks capable of responding swiftly to frontline changes or emerging requirements. Given that the consequences of failing to protect cultural property are felt long after hostilities have ceased, a dynamic and comprehensive plan for safeguarding such is much needed. At present, cheaper yet influential projects offer the best opportunity to shield Ukrainian heritage from further harm. The „Prince Claus Foundation's Cultural Emergency Response Program" and the „International Alliance for the Protection of Heritage in Conflict Areas" have already responded to the ongoing conflict. However, further donor organizations are necessary, particularly those capable of reaching a local network.

Finally, in view of the force of art. 1 of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, opened for signature at Geneva on 18 May 1977 and entered into force on 5 October 1978, which recognizes damage to cultural property as a serious breach punishable under international criminal law, the ICC can play a pivotal role in prosecuting and penalizing the perpetrators. Additionally, the ICC can address the current gap in the interpretation of the term „military necessity," while establishing clear and concise repercussions for states that intentionally target cultural property.

To implement the existing regime with greater efficacy, it is strongly advised that states optimize the utilization of the regime presently in force by scrupulously adhering to it, evincing heightened participation, enhanced compliance, and by establishing a robust mechanism for ensuring compliance.

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Legal acts

International Declaration concerning the Laws and Customs of War, adopted by the Conference of Brussels on 27 August 1874
Laws and Customs of War on Land (29 July 1899)
Hague Convention (IV) respecting the Laws and Customs of War on Land (18 October 1907)
Convention Relative to the Protection of Civilian Persons in Time of War, signed at Geneva on 12 August 1949
Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 May 1954
the UNESCO Convention concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by UNESCO in Paris on 16 November 1970
Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on 16 November 1972
Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, opened for signature at Geneva on 18 May 1977 and entered into force on 5 October 1978
Additional Protocol II to the 1954 Hague Convention, which entered into force in 1999

SUMMARY

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PROTECTION AND PRESERVATION OF CULTURAL HERITAGE DURING ARMED CONFLICT: UNDERSTANDING THE ACCOUNTABILITY OF A STATE UNDER INTERNATIONAL HUMANITARIAN LAW

In contemporary armed conflicts, the discourse surrounding regulations pertaining to the safeguarding of cultural property under International Humanitarian Law (IHL) has regained

its salience. With the latest advancements in technology and other aspects of warfare, the intricacies associated with the application of legal frameworks in the theatre of war have become increasingly convoluted. Notably, the preservation of cultural property during armed conflict has presented a significant challenge to International Humanitarian Law. Although the United Nations offers a multifaceted prototype for the protection of cultural property held by states, the implementation of these regulations is encumbered by gaps, which impede the complete compliance of the parties involved. This article analyses the legal frameworks pertinent to cultural property, with a particular focus on IHL. Furthermore, it offers several suggestions that can be implemented to preserve cultural property of significance and value, while addressing current lacunae in implementation.

Keywords: cultural property, international humanitarian law, armed conflict, Russia – Ukraine

STRESZCZENIE

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OCHRONA I ZACHOWANIE DZIEDZICTWA KULTUROWEGO PODCZAS KONFLIKTU ZBROJNEGO – ZROZUMIENIE ODPOWIEDZIALNOŚCI PAŃSTWA NA MOCY MIĘDZYNARODOWEGO PRAWA HUMANITARNEGO

We współczesnych konfliktach zbrojnych dyskurs dotyczący przepisów odnoszących się do ochrony dóbr kultury w ramach międzynarodowego prawa humanitarnego (MPH) zyskał na znaczeniu. Wraz z najnowszymi osiągnięciami technologicznymi i innymi aspektami działań wojennych zawiłości związane ze stosowaniem ram prawnych w teatrze wojny stają się coraz bardziej skomplikowane. W szczególności ochrona dóbr kultury podczas konfliktu zbrojnego stanowi poważne wyzwanie dla międzynarodowego prawa humanitarnego. Chociaż Organizacja Narodów Zjednoczonych oferuje wieloaspektowy wzór ochrony dóbr kultury będących w posiadaniu państw, wdrażanie tych przepisów jest obarczone lukami, które utrudniają pełną zgodność zaangażowanych stron. W artykule poddano analizie ramy prawne odnoszące się do dóbr kultury, ze szczególnym uwzględnieniem międzynarodowego prawa humanitarnego. Ponadto przedstawiono w nim kilka sugestii, które można wdrożyć w celu ochrony dóbr kultury o istotnym znaczeniu i wartości, jednocześnie usuwając obecne luki w ich wdrażaniu.

Słowa kluczowe: dobro kultury, międzynarodowe prawo humanitarne, konflikt zbrojny, Rosja – Ukraina

NGUYEN LE UYEN PHUONG*

VIETNAM'S CULTURAL HERITAGE PROTECTION LAWS (1900-2023) AND THEIR PROS & CONS FROM THE POSITION OF VIETNAM'S NEW GENERATION: CASE STUDIES

1. The developing definition of cultural heritage law (CHL)

The development of the definition of cultural heritage in Vietnam has been dominated by three main periods: the Vietnam War (also known as the Vietnam-America War) (1945–1979), the renovation period (1980–2000), and the international integration period (since 2001). Each period has different legal documents.

Table 1. The comparison of legal acts on cultural heritage law

Legal milestones	Legal documents of CHL	Definition keyword	Time	Scope of application	Ownership
Viet Nam War (1945–1979)	Edict 65	_Antiques	1945	All the area within the Vietnamese borders	Not mentioned
	Decree 591	_Real estate _Movable estate (Both have artistic and historical values) _Famous landscapes and beauty spots containing natural scenery	1957	Within the Vietnamese borders. (Including on land and underwater)	_Acceptance of the ownership of an administrative unit, an agency, a union, or a private individual _Government ownership => Under the protection of the government

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Renovation period (1980–1986)	Ordinance 14	_Vestiges (having historical, artistic, and scientific values) _ Famous landscapes and beauty spots (with beautiful scenery or famous ancient and beautiful constructions)	1984	Not mentioned	_Collective ownership _Indiviual ownership _ Famous landscapes and beauty spots – ownership of the entire people => Under the protection and management of the government ð
	Decree 288		1985		
International integration period (1987 to present	CHL 2001 Amended 2009 …	1. Intangible cultural heritages 2. Tangible cultural heritages 3. Historical-cultural relics 4. Famous landscapes and beauty spots 5. Vestiges 6. Antiques 7. National precious objects	2001 2009 ...	_under the ground _on the mainland _on islands _in inland waters _in territorial waters _within exclusive economic zones _on the continental shelf	_ Designated cultural heritage is under the entire population's ownership _Recognizes and protects forms of collective ownership, joint ownership of the community, private ownership, and other forms of ownership over cultural heritages, according to the provisions of law

Source: Author's own elaboration.

1.1. The Vietnam War period: Edict 65[1] and Decree 591[2]

Edict 65 is the first decree issued with the aim of preserving Vietnamese cultural heritage. It is a milestone in the protection of cultural heritage in Vietnam; as a result cultural heritage protection is the responsibility of the state. Edict 65 is concise and focuses only on the fundamental aspects of safeguarding cultural assets. President

1 Sắc lệnh 65 Việt Nam Dân Chủ Cộng Hòa [Decree] 23 Nov. 1945.

2 Nghị Định Quy Định 591: Thể Lệ Về Bảo Tồn Cổ Tích [Decree] 29 Oct. 1957.

Ho Chi Minh included the phrase "antiques" in the Edict, which is supposed to be synonymous with the term "cultural heritage."[3] The decree has no detailed definition of "antiques" and does not give the scope of the term "antiques." This demonstrates how Edict 65 is vague, overly generalized, and devoid of affirmative ownership of cultural heritage. However, the decree was appropriate to deal with the political instability at that time: Vietnam had to promptly address a more urgent security issue – achieving autonomy from the U.S.A. and reuniting the North and South parts of the country.[4] In addition, Edict 65 seeks to avoid losing additional national resources (in general) and cultural heritage (specifically) to war and political instability. It is preparation for the country's complete independence at a later stage.

Decree 591 was updated in 1957. The revised decree demonstrates that after a prolonged period of war, the Vietnamese government highly valued cultural values and was determined to engage with the international community via the establishment of specific policies and regulations on cultural heritage.[5] Compare Edict 65 with Decree 519: in Edict 65, the document addresses preservation as "essential" via an act of "consideration"; in Decree 519, the Vietnamese Government directly affirms its sovereignty and its protection of cultural assets. In detail, Decree 591 determined that cultural heritage is real estate, movable estate, and famous landscapes and natural beauty spots. Simultaneously, the decree also includes comprehensive explanations for three keywords (art. 1 of Decree 591). The decree also specifies the scope of application in more detail than Edict 65. Decree 591 also gives recognition to cultural heritage on land, under water, and within the Vietnamese borders; these are all specified as government-owned. In terms of ownership, the government accepted the ownership rights over cultural heritage properties of organizations (administrative units, agencies, unions) and private entities. Vietnam established its ownership and acknowledged its duty to safeguard cultural heritage through Decree 591. Nevertheless, the terms "real estate" and "movable estate" remain significant terms with broad connotations that may be mistaken for specific terms in other domains such as economics, land law , and so on. Although Decree 591 clearly defines the two keywords "real estate" and "movable estate," they have to be accompanied by historical and artistic elements to identify them;

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[3] T.Y. Nguyen, H. Nguyen, "Heritage protection in international law and national law: insights into the case of Vietnam Proteção do patrimônio no Direito Internacional e no Direito Nacional: percepções no caso do Vietnã", Brazilian Journal of Internationl Law 2020, vol. 17, no. 3, https://core.ac.uk/download/429340601.pdf (accessed: 1.06.2024).

[4] T.K. Phuong, "The Preservation and Management of Monuments of Champa in Central Vietnam: The Example of My Son Sanctuary, A World Cultural Heritage Site" [in:] *Rethinking Cultural Resource Management in Southeast Asia: Preservation, Development, and Neglect*, eds. J.N. Miksic, Geok Yian Goh, S. O'Connor, Anthem Press, London 2011, pp. 235–255.

[5] W. Chapman, *A heritage of ruins: the ancient sites of Southeast Asia and their conservation*, University of Hawaii Press, Honolulu 2013, pp. 678–680.

however, these still "lack accuracy" and entail a "high level of misunderstanding." The concept of cultural heritage has to be further edited at later stages.

1.2. The renovation period (1980 to 2000): Ordinance 14[6] and Decree 288[7]

This time is referred to as "the renovation period." The challenge for Vietnam at this point was starting a process of integratiion into the international community. The challenge lay in finding a balance between meeting the demands of the new economic market and preserving and exploiting cultural heritage.[8] During this phase, emphasis was placed on the restoration and preservation of cultural heritage in Vietnam.

According to Ordinance 14, cultural heritage is defined as "vestiges." While there are variations in the use of keywords compared to the preceding stage, the criterion for selecting cultural heritage remains consistent in terms of historical and artistic elements. Furthermore, Ordinance 14 acknowledges the significance of scientific values in the identification of cultural heritage. An ethnic element and ancient fame are also listed as among the values that define famous landscapes and beauty spots. In terms of generalization, the term "vestiges" exhibits a broader scope compared to "antiques" and a greater level of precision when compared to "real estate" and "movable estate." Another advantage to Ordinance 14 is that the state has switched ownership rights from "government ownership" to "owned by the entire people" for famous landscapes and beauty spots. Obviously, the renovation period was really one of renovation and was more democratic.

Decree 288 is clearly defined as a document based on Ordinance 14. The amendment of Decree 288 serves as a complement to Ordinance 14. Thus, basically, the keywords used in both texts are the same. In terms of the detail of the definition, Decree 288 is more detailed about what "vestiges" include. Ordinance 14, as opposed to Decree 288, demonstrated significant progress compared to contemporary documents relating to the preservation of cultural resources. Nevertheless, it is crucial to note that Ordinance 14 and Decree 288 failed to adequately address the

[6] Pháp Lệnh 14: Bảo Vệ Và Sử Dụng Di Tích Lịch Sử, Văn Hóa Và Danh Lam, Thắng Cảnh [Ordinance] April 4, 1984, https://thuvienphapluat.vn/van-ban/Van-hoa-Xa-hoi/Phap-lenh-Bao-ve-su-dung-di-tich-lich-su-van-hoa-danh-lam-thang-canh-1984-14-LCT-HDNN7-36994.aspx (accessed: 1.06.2024).

[7] Nghị Định 288: Quy Định Việc Thi Hành Pháp Lệnh Bảo Vệ Và Sử Dụng Di Tích Lịch Sử, Văn Hóa Và Danh Lam Thắng Cảnh [Decree] Dec. 31, 1985), https://thuvienphapluat.vn/van-ban/Van-hoa-Xa-hoi/Nghi-dinh-288-HDBT-quy-dinh-viec-thi-hanh-phap-lenh-bao-ve-va-su-dung-di-tich-lich-su-van-hoa-va-danh-lam-thang-canh-43640.aspx (accessed: 1.06.2024).

[8] A. Galla, "Museums in sustainable heritage development: A case study of Vietnam", INTERCOM 2006 Conference Paper, p. 5, https://www.academia.edu/3984689/Museums_in_sustainable_heritage_development_A_case_study_of_Vietnam (accessed: 1.06.2024).

crucial aspect of defining their scope of application. That would only be defined later, in the period from 1980 to 2000.

During this period, the Council of Ministers of Vietnam also declared that one of the objectives of Decree 288 was to achieve educational value. One of UNESCO's primary objectives is to educate the community about the protection of cultural heritage. Ordinance 14 and Decree 288 also reinforce Vietnam's future membership in UNESCO. Hence, it can be argued that the definitions provided in Ordinance 14 and Decree 288 exhibit considerable comprehensiveness and alignment with the existing UNESCO definition of cultural heritage.

1.3. International integration period (since 1987)

During this period, Vietnam became a member of UNESCO (in 1987). Its policies have increasingly sought to align themselves with the requirements of UNESCO membership. Vietnam is now governed according to the "rule of law."In the previous period (1980–2000), the Constitution, in particular, and the legal system of Vietnam, in general, were founded on the model of the Soviet Union. (According to some sources, Vietnam, even at this stage, predicted the collapse of the Soviet Union.) In addition, Vietnam's policy orientation after 1975 (a 100% commitment to peace) is to be friends with all countries; Vietnam does not just label itself as friends with socialist countries but rather with all countries. That is why Vietnam's legal system in the international integration period (since 1987) had to revise domestic policies and laws to fit in with international law. The first step was to get involved in NGO organizations, to sign international conventions, etc. Taking international law and international conventions as their starting point, the Cultural Heritage Law of 2001 (CHL)[9] and amendments and supplements to a number of articles of the Law on Cultural Heritage of 2009[10] (hereinafter: A&D of CHL 2009) are consistent with UNESCO principles. These include the keywords "Tangible Cultural Heritages" and "Intangible Cultural Heritages." In addition, CHL and A&D of CHL 2009 also add a series of definitions. Specifically, these include old definitions from the previous two periods: "antiques," "vestiges," and "famous landscapes and beauty spots"; they also include new definitions such as "historical-cultural relics" and "national precious objects." The concept of this period is closely related to the international concept; this is also true of the broadening of the classification of heritage from local to national.

Furthermore, the scope of application in this phase attained a commendable degree of universality and specificity, covering various areas such as underwater

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9 Luật Di Sản Văn Hóa 2001 [law] June 29, 2001.

10 Luật Sửa Đổi, Bổ Sung Một Số Điều Của Luật Di Sản Văn Hóa [Amend Law] June 18, 2009, https://thuvienphapluat.vn/van-ban/Van-hoa-Xa-hoi/Luat-di-san-van-hoa-2009-sua-doi-32-2009-QH12-90620.aspx (accessed: 1.06.2024).

areas, islands, inland waters, territorial waters, exclusive economic zones, and the continental shelf. Ownership allocation also improved significantly. Famous landscapes and beauty spots belonging to the entire people were transformed into cultural heritage belonging to the entire people. This definition has remained unchanged and has not undergone any additional additions up to the present time.

In conclusion, keywords to depict cultural heritage across the three stages are obviously different. The differences in language use partly reflect the historical context of Vietnam and the cognitive processes and advancement of Vietnamese legislators in each period. The development and progress of Vietnam's international integration are partially influenced by the length of the documents as well as their horizontal and vertical scope. The definitione of cultural heritage in CHL is much broader than in other laws.

2. The development of the legal basics of cultural heritage protection law

2.1. Vietnam War (1945–1979): The 1946 Constitution, The 1959 Constitution & Edict 65, Decree 591

During the Vietnam War (1945–1979), Vietnam had two constitutions (1946 and 1959). The two documents that protect cultural heritage are Edict 65 and Decree 591.

It is distinctive in this period that the constitution did not serve to shape the role of CHL documents, as in Edict 65 and Decree 591. The Vietnam Democratic Republic declared its independence on 9 September 1945. Edict 65 was issued on 23 November 1945. However, the Constitution of the Democratic Republic of Vietnam was adopted in 1946. This suggests that Edict 65 was not founded on the 1946 Constitution. The purpose of Edict 65 was to address promptly the political instability in the early stages of independence. Specifically, Edict 65 recognized the importance of protecting cultural heritage in Vietnam. Decree 591 in 1957 exhibited a deficiency in its legal foundation. The 1946 Constitution was not officially in force due to political events.[11] So, the 1946 Constitution was not the legal basis for Decree 591. The second constitution was proclaimed in 1959, after the enactment of Decree 591 in 1957. Hence, it is not appropriate to consider the 1959 Constitution as the legal foundation for Decree 591.

During the Vietnam War (1945–1979), cultural heritage protection documents served a transient purpose in addressing the prevailing political circumstances. The aim was to mitigate the potential depletion of national resources in an era

[11] See: Bui S.N., "The Global Origins of Vietnamms Constitutions: Text in Context", *University of Illinois Law Review* 2017, no. 2, p. 528, https://doi.org/10.2139/ssrn.2934139 (accessed: 1.06.2023).

characterized by precarious security, economic, and social conditions. However, in the legal background, Edict 65 and Decree 591 lacked a formal legal foundation and were only relevant to a specific historical context or event.

2.2. The renovation period (1980–1986)

The 1980 constitution was established during this period. Ordinance 14 (1984) and Decree 288 (1985) are the primary documents under consideration in terms of cultural heritage protection in this period.

Vietnam's transition from a Democratic Republic to a Socialist Republic is the most notable event of this period. The political situation achieved stability and followed a Soviet model.[12] The political-institutional transformation significantly influenced the formulation of the 1980 Constitution. The 1980 Constitution exhibited a superior level of organization and detail compared to the two Constitutions of 1946 and 1959. The CHL documents are organized more methodically during this period. Ordinance 14 is grounded in the legal framework established by the Constitution of 1980. Decree 288 is grounded in the legal framework established by Ordinance 14 and the Constitution of 1980. The text is consistent and uniform when compared to previous ones.

However, from 1980 to 1986, the impact of international conventions and agreements on local law was negligible. Certain restrictions outlined in Ordinance 14 and Decree 288 were found to be inconsistent with the International Treaty and UNESCO Recommendation.

2.3. International integration period (since 1987)

During this era, an essential change in the global system (the disintegration of the Soviet Union) resulted in the promulgation of the 1992 Constitution of Vietnam, which superseded the 1980 Constitution. There was significant transformation in the realm of cultural heritage protection. The Cultural Heritage Law of 2001 (CHL) and the amendments and supplements made to certain sections of the Law on Cultural Heritages of 2009 (A&D) are of particular significance.

This phase had two main factors that changed the constitution in general and CHL in particular: first, the collapse of the Soviet Union,[13] and second, the attempt to integrate Vietnam into the international community.[14] For these two reasons,

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[12] See: *ibidem*, p. 549.

[13] See more: N.M. Brooks, "Science in Russia and the Soviet Union: A Short History by Loren R. Graham (review)", *Technology and Culture* 1993, vol. 36, pp. 725–727.

[14] See more: N.K. Tran, H. Yoon, "Doi Moi Policy and Socio-Economic Development in Vietnam, 1986–2005", *International Area Review* 2008, vol. 11, no. 1, pp. 205–232, https://doi.org/10.1177/223386590801100112 (accessed: 1.06.2024).

the standard of international conventions adopted by the Vietnamese Government became a second legal basis (the first legal basis is the Constitution). The 1992 Constitution was also enacted to support expansion and innovation in many areas. The CHL issued during this period was guaranteed by the Constitution's legal framework and the UNESCO Convention. It was a precondition for the long-term development of the legal system of cultural heritage protection in particular and of the Vietnamese legal system in general.

3. The legal documents of cultural heritage protection today

Recognizing the significance of cultural heritage, the Vietnamese government has established a unified legal framework to preserve and develop the cultural heritage system.[15] The CHL in 2001 (Law No. 28/2001/QH10) is the first legislation on cultural heritage in the history of Vietnam's legislative system. It was later amended and supplemented by the Law on Cultural Heritage in 2009 and Decree No. 98/2010/ND-CP, which provides detailed guidelines for the implementation of amended and supplemented laws.

3.1. First official version: CHL 2001

Cultural heritage is effectively protected under the 2001 Cultural Heritage Legislation. This is superior to the CHLs that were previously enacted. The 2001 legislation is advantageous in that it is grounded within a framework of theory that originated in the 1992 Constitution. Vietnam ratified numerous UNESCO agreements during this period to demonstrate its international commitment.[16] The aforementioned two elements serve as the fundamental basis for the CHL of 2001. Put differently, the legislation enacted in 2001 took precedence over all prior laws (Decree No. 65, Decree No. 591, and Decree No. 288) that were directly associated with CHL prior to 2001. It functions as a mechanism for subsequent progress and signifies a pivotal moment in the evolution of the museum system.[17] The preamble of the CHL of 2001 delineates the objectives of the legislation. These are: "To protect and enhance the value of cultural heritage, meet the increasing cultural needs of the people, contribute to the construction and development of an advanced Vietnamese cul-

[15] H.P. Nguyen, "Hệ thống pháp lý về bảo tồn di sản văn hóa phi vật thể tại Việt Nam – Đôi điều ngẫm nghĩ", *Journal of Culture & Resources* 2014, no. 1, https://www.hcmuc.edu.vn/bolg/he-thong-phap-ly-ve-bao-ton-di-san-van-hoa-phi-vat-the-tai-viet-nam-doi-dieu-ngam-nghi.html (accessed: 1.06.2024).

[16] T.L. Tu, "Cultural Heritage in Vietnam with the Requirements of Sustainable Development", *International Relations and Diplomacy* 2019, vol. 7, no. 4, pp. 172–187, https://doi.org/10.17265/2328-2134/2019.04.004 (accessed: 1.06.2024).

[17] A. Galla, "Museums in sustainable heritage development…", p. 5.

ture that is rich in national identity, and contribute to the global cultural heritage; To enhance the effectiveness of state management and increase the responsibility of citizens in participating in the protection and promotion of cultural heritage values..."[18]

The phrases "protect and enhance," "the effectiveness of the state management," and "increase the responsibility of the citizens" are the focal points of the content of the CHL of 2001. The introductory section of the 2001 version effectively emphasizes the focus on protecting cultural heritage in its textual content. This is also the first official use of the term "cultural heritage" in a document, rather than using synonymous terms as in previous texts. The 2001 version has well-structured content that clearly confirms the roles of various entities in safeguarding and promoting Cultural Heritage. Compared to previous documents, the first version in 2001 not only included the theoretical foundations from two core sources, namely UNESCO treaties and the Vietnam Constitution of 1992, but also strengthened the legal framework, and the protection responsibilities of different entities in relation to cultural heritage and CHL.

3.2. Second version: A&D of CHL 2009

In the second version, the purpose is to improve upon the 2001 version by making modifications and additions in various respects, such as: expanding the definition of Intangible Cultural Heritage; emphasizing the state's protection of cultural heritage; establishing criteria for evaluating and classifying cultural heritage; setting out the framework for penalties for violators (although not yet detailed); identifying enforcement agencies; and establishing the obligations and responsibilities of cultural heritage management agencies. Additionally, the A&D of CHL 2009, art. 4 point 16 declares: "A museum is a cultural institution that serves the purpose of collecting, preserving, researching, exhibiting, and introducing cultural heritage, material evidence of nature, human beings, and the human living environment, in order to serve the needs of research, learning, visiting, and enjoying culture by the public."[19]

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[18] In this article all translations from Vietnamese to English are my own. Original version: "Để bảo vệ và phát huy giá trị di sản văn hoá, đáp ứng nhu cầu về văn hoá ngày càng cao của nhân dân, góp phần xây dựng và phát triển nền văn hoá Việt Nam tiên tiến, đậm đà bản sắc dân tộc và đóng góp vào kho tàng di sản văn hoá thế giới; Để tăng cường hiệu lực quản lý nhà nước, nâng cao trách nhiệm của nhân dân trong việc tham gia bảo vệ và phát huy giá trị di sản văn hoá..."

[19] Original version: "Bảo tàng là thiết chế văn hóa có chức năng sưu tầm, bảo quản, nghiên cứu, trưng bày, giới thiệu di sản văn hóa, bằng chứng vật chất về thiên nhiên, con người và môi trường sống của con người, nhằm phục vụ nhu cầu nghiên cứu, học tập, tham quan và hưởng thụ văn hóa của công chúng."

The 2009 Supplementary Law defined museums as cultural institutions with the general purpose of education. When comparing the CHL of 2001 to the 2009 version, it is evident that there is a greater emphasis on the implementation of communication and education via the establishment of a museum system. Furthermore, the government also encourages foreign organizations, individuals, and researchers to explore and invest in this field. Based on the above arguments, it can be asserted that the 2009 version identified "museums" as a tool to serve in the field of education on the preservation of cultural heritage. Simultaneously, several methods are advanced to promote awareness of Vietnam's cultural heritage.

In addition to the CHL (2001) and the A&D of CHL (2009), there appeared also updated and supplemented documents for Cultural Heritage in 2005, 2013, and 2019, as well as the Consolidated Document in 2013 and 2022, which address the protection of CHL from various perspectives. All of the texts were modified, supplemented, and developed in line with "Economic Heritage" in order to fit in with the era of the "Market Economy." Put simply, the cultural heritage of Vietnam is not only limited to cultural values and their protection by the state (individuals, organizations, agencies); but it also involves the exploitation and use of cultural heritage to generate economic benefits via the development of tourism and services.[20] Furthermore: "Heritage protection regulations are also found in numerous other legal documents such as the 2014 Law on Construction, the 2014 Law on Environmental Protection, the 2017 Law on Forestry."[21]

4. The achievements and challenges of cultural heritage protection law (case studies)

4.1. The efforts and achievements of the Vietnamese government

4.1.1. From "superstitious phenomena" to "intangible cultural heritage"

In 1940, the Vietnam Communist Party achieved a significant victory over France only ten years after it had been established. The Vietnam Communist Party faced the new challenge of "strengthening the culture and national spirit" in reaction to French assimilation policy[22] and the occupation of Vietnam by Japanese

[20] V.S. Duong, "Sua doi Luat Di San Van Hoa tao dieu Kien Thiet Lap va phat trien „Kinh te Di san" tai Viet Nam", Quoc Hoi VN, 5 Aug.2022, https://quochoi.vn/tintuc/Pages/tin-hoat--dong-cua-quoc-hoi.aspx (accessed: 1.06.2024).

[21] T.Y. Nguyen, H. Nguyen, "Heritage protection in international law…", p. 315.

[22] See more: J.E. Dreifort, "Japan's Advance into Indochina, 1940: The French Response", *Journal of Southeast Asian Studies* 1982, vol. 13, issue 2, pp. 279–295, https://doi.org/10.1017/s0022463400008705 (accessed: 1.06.2024).

fascists.[23] In response to this situation, the Communist Party implemented a series of innovative policies. One policy that had a significant adverse effect on intangible cultural heritage was the "Cultural Revolution".[24] Specifically, cultural practices linked to indigenous religious convictions were regarded as superstitious phenomena that necessitated control and elimination. The typical case study is the cult of the Mother Goddess.[25]

The history of Mother Goddess Worship (*Hau Dong*) was intricately intertwined with Vietnam's cultural identity throughout numerous dynasties.[26] Based on the UNESCO definition, the religious worship of Mother Goddesses is a cultural practice within the Vietnamese national community: "To meet spiritual needs, everyday wishes and gain help in achieving good health and success communities in Viet Nam worship the Mother Goddesses of Three Realms: heaven, water, and mountains and forests."[27]

The worship of Mother Goddesses is a profoundly religious practice.[28] The veneration of Mother Goddess was widespread, encompassing various elements of life, and quickly became an integral part of Vietnamese culture.[29]

However, Mother Goddess worship was considered a superstitious phenomenon and was subject to social exclusion and ostracism. The main reason for this extreme was a side-effect of two main documents in the Vietnamese Cultural Revolution: "The Outline of Vietnamese Culture 1943" and "Vietnamese National Assembly Documents Volume VI (vol. 2) 1984–1987: Presentation of the National Assembly's committee on culture and education on the issue of combating superstition,

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23 See more: Ch.W.A. Szpilman, "Fascist and Quasi-Fascist Ideas in Interwar Japan, 1918–1941" [in:] *Japan in the Fascist Era*, ed. E.B. Reynolds, Palgrave Macmillan, New York 2004, pp. 73–106.

24 For more details, see: P. Thu, „Outline of Vietnam culture 1943: Historical documents of special significance to the revolution and the path of movement and development of Vietnam's new culture", *Quoc Hoi Viet Nam*, 23.02.2023.

25 K. Fjelstad, T.H. Nguyen, *Spirits without Borders*, Springer, Cham 2011.

26 See more: N.D. Thinh, "The Mother Goddess Religion: Its History, Pantheon, and Practices" [in:] *Possessed by the Spirits: Mediumship in Contemporary Vietnamese Communities*, eds. K. Fjelstad, T.H. Nguyen, Cornell University Press, Ithaca, NY 2006, pp. 19–30, http://www.jstor.org/stable/10.7591/j.ctv1nhk70.4 (accessed: 12.06.2024).

27 UNESCO, "Practices related to the Viet beliefs in the Mother Goddesses of Three Realms", https://ich.unesco.org/en/RL/practices-related-to-the-viet-beliefs-in-the-mother-goddesses-of-three-realms-01064 (accessed: 1.06.2024).

28 See more: T.H. Vu, T.H.N. Doan, "Discussion on classification of the motherworship religion", *Journal of Science and Technology* 2018, vol. 179, no. 3, pp. 25–29, http://tailieudientu.lrc.tnu.edu.vn/Upload/Collection/brief/135890_812020102644CTv178V179S32018025.pdf (accessed: 1.06.2024).

29 T.M. Nguyen, "Taoism with Vietnamese Mother Goddess Worshipping Belief", *International Journal of Philosophy* 2021, vol. 9, no. 3, pp. 148–153, https://doi.org/10.11648/j.ijp.20210903.15 (accessed: 1.06.2024).

building a new way of life and the quality of selection and training of cadres." The Communist Party of Vietnam's perspective during this period was as follows: there were "Three principles of the movement of the cultural revolution: Ethnicization, massification and scientificization."[30] Further, the Party argued that "There are superstitious phenomena closely tied to age-old customs. (…) There are superstitious phenomena inextricably linked to religion (…) There are superstitious phenomena associated with scientific problems (…) here are superstitious phenomena that are inextricably linked to psychosocial states (…) Superstitious phenomena [are] associated with enemy psychological warfare plots."[31]

Through the two documents, it can be understood that in the view of the Communist Party of Vietnam at the time, Mother Goddess worship was a controversial, unscientific, and superstitious activity. In addition, there were several objective causes for such hostility, such as political complexity. There was a relatively rapid rate of transformation of Vietnamese political institutions (from 1900 to 1976 institutional change took place on average every twenty-five years), so reform and uniformity of ideology in the community was crucial. The consequence of the Vietnamese Cultural Revolution was similar to that of the Chinese Cultural Revolution (1966–1976).[32] As the cultural revolutionary movement was pushed to its extreme, not only were religious activities temporarily stopped (in this case, Mother Goddess worship), but these activities were severely condemned.

However, the government promptly addressed and resolved this situation. In 1945, Vietnam declared independence. At the same time, UNESCO was established. Subsequently, the Vietnamese government enacted a series of decrees and laws and signed treaties for international integration purposes.[33] In 1976, Vietnam joined UNESCO. As a member, Vietnam expeditiously assimilated indigenous prin-

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30 "Những giá trị nổi bật của Đề cương về văn hóa Việt Nam năm 1943 – Cương lĩnh đầu tiên của Đảng về văn hóa, định hướng và soi đường cho nền văn hóa Việt Nam phát triển bền vững – Tạp chí Cộng sản" [Outstanding values of the 1943 Outline on Vietnamese culture – The Party's first platform on culture, orientation and illumination for the sustainable development of Vietnamese culture], *Communist Review*, 12.03.2023, https://www.tapchicongsan.org.vn/web/guest/van_hoa_xa_hoi/-/2018/827143/nhung-gia-tri-noi-bat-cua-de-cuong-ve-van-hoa-viet-nam-nam-1943---cuong-linh-dau-tien-cua-dang-ve-van-hoa%2C-dinh-huong-va-soi-duong-cho-nen-van-hoa-viet-nam-phat-trien-ben-vung-%C2%A0.aspx (accessed: 1.06.2024).

31 Văn kiện Quốc hội Việt Nam Tập VI (Vol. 2)1984–1987: Bài trình bày của Ủy ban Văn hóa, Giáo dục của Quốc hội về vấn đề chống mê tín dị đoan, xây dựng nếp sống mới và chất lượng tuyển chọn và đào tạo cán bộ (1987), https://quochoi.vn/tulieuquochoi/anpham/Pages/anpham.aspx?AnPhamItemID=3675 (accessed: 1.06.2024).

32 See more: T. Tsou, "The Cultural Revolution and the Chinese Political System", *The China Quarterly* 1969, no. 38, pp. 63–91, doi:10.1017/S0305741000049146 (accessed: 1.06.2024).

33 N.S. Trung, H.V. Van, "Vietnamese Cultural Identity in the Process of International Integration", *Journal of Advances in Education and Philosophy* 2020, vol. 4(05), pp. 220–225, https://doi.org/10.36348/jaep.2020.v04i05.006 (accessed: 1.06.2024).

ciples and domestic legislation into global agreements. Specifically, the UNESCO Convention on Intangible Cultural Heritage was adopted in 2006. In 2009, Vietnam officially updated the intangible cultural heritage definition in Vietnamese, amending and supplementing several articles of the Law on Cultural Heritage of 2009. Mother Goddess Worship was made officially free from accusations of superstition, thus opening a new chapter for religious activities and beliefs in general. In 2016, UNESCO officially recognized Mother Goddess Worship as an Intangible Cultural Heritage. This was seen as an achievement in overcoming the side-effects of old policies and as a positive innovation for the future.

4.1.2. The history of the museum system and education in territorial sovereignty offered by it

In 2014, the Ministry of Culture, Sports and Tourism reported that Vietnam had a total network of 161 museums, which was initially formed during the Resistance War against the French and expanded over time to the present day. Not only has The Vietnam Museum of Ethnology significantly contributed to the conservation of the diverse cultures of the fifty-four ethnic groups within Vietnam's borders,[34] but the museum network is the most successful of the two case studies on history education and on education related to national territorial sovereignty.

First case study: history education – from general information to information regarding war crimes that are not extensively known within the global community.

The term "general information" refers to information that has gained significant international recognition through the Vietnamese government's efforts. A particular example is the War Remnants Museum. The War Remnants Museum is an exhibition of Vietnam War relics in particular, and it is further focussed on World War I and World War II events in general. In addition, this is also the place where evidence is stored relating to "Agent Orange"[35] – that is, information on war crimes involving environmental destruction and destruction of the DNA of the Vietnamese generation whose parents lived in the "Agent Orange" zone.

In addition, local authorities and the Vietnamese government have built and established museums and historical records of genocidal crimes that have not been widely publicized in the international community. These include: first, the Ba Chuc Tomb House – the home of evidence relating to and a memorial to 3,157 Vietnamese victims of Pol Pot's genocidal policies on Vietnamese territory;[36] and second,

[34] See more: A. Galla, „Museums in sustainable heritage development…", p. 5.

[35] See more: J.M. Stellman, S.D. Stellman, "Agent Orange During the Vietnam War: The Lingering Issue of Its Civilian and Military Health Impact", *American Journal of Public Health* 2018, vol. 108, no. 6, pp. 726–728, https://doi.org/10.2105/ajph.2018.304426 (accessed: 1.06.2024).

[36] For more, see: T.H. Pham, H.M.P. Tran, "International Obligations Performance of An Giang's Military Forces in Ta Keo Province (1979–1989)", *TNU Journal of Science and*

the monument to the Ha My and My Lai villages massacres in Quang Nam province. The Ha My massacre was carried out by South Korean troops in support of U.S. troops in 1968; the My lai massacre was carried out by U.S. troops in the same year.[37]

Second case study: National territorial sovereignty

In Vietnam's museum system, the Truong Sa Museum and Hoang Sa Gallery are dedicated museums. They show that the functions of a museum are not only to store historical monuments, to promote education, visits, and cultural enjoyment on the part of the public, but also include political purposes related to international legal issues concerning Vietnamese territorial sovereignty. The Truong Sa Museum and Hoang Sa Gallery provide a home for all the evidence of Vietnam's territorial sovereignty that historically obtained over the area of the Truong Sa and the Hoang Sa islands. In other words, this is a measure taken by Vietnam to counter China's nine-dash line policy.

4.1.3. The application of technology to historical relics

According to the latest updates, the Vietnamese government has implemented advanced technologies (LED light, AI, leap motion, mapping 3D, and VR) at historical sites such as the Complex of Hue Monuments (1993) and The Temple of Literature. Furthermore, Hoi An Ancient Town (1999) – another UNESCO-recognized heritage site – is now hosting the "Hoi An Memories" event, incorporating modern techniques into the ancient site. The purpose of using technology in historical sites is not only to provide a fresh perspective to the field but also to attract attention and interest from both the domestic and international communities. The process of education is complexly integrated. All the aforementioned events were organized toward the evening, at the end of the year 2023.

The use of modern technologies on historical sites is no longer a novelty for countries all over the world. However, for Vietnam, this represents a significant advancement and an impressive achievement in the integration of modernization and historical heritage for the purposes of promotion, propaganda, and education. Furthermore, this also demonstrates that the implementation of the Cultural Heritage Protection Law is not limited to traditional methods of preservation and restoration, but also encourages openness and innovation.

Technology 2020, vol. 225, no. 10, pp 24–30, http://thuvienlamdong.org.vn:81/bitstream/DL_134679/24250/1/50997-1297-154986-1-10-20201008.pdf (accessed: 1.06.2024).

[37] For more, see: H. Kwon, "Massacres in the year of the monkey, 1968" [in:] *idem*, *After the Massacre: Commemoration and Consolation in Ha My and My Lai*, University of California Press, Berkeley – Los Angeles 2006, pp. 28–59.

4.2. The success of promotion of heritage and education – the position of the Vietnamese new generation

4.2.1. The effect of Gen Z on cultural heritage protection

Promoting and disseminating knowledge are recognized as primary goals in the effort to protect cultural assets, as is stated in dedicated cultural heritage legislation and broader cultural heritage initiatives following UNESCO recommendations. The younger generation of Vietnam is responsible for a remarkable accomplishment in promoting knowledge and educating the country. The age of the individuals participating in the study and gathering cultural assets in many sectors in Vietnam is currently falling. Currently, specific sectors of the younger generation are using resources derived from the country's historical cultural heritage (including tangible and intangible elements) to make goods that capture the interest of the national community.

One of the most influential individuals in the field of academic research and collecting is La Quoc Bao (羅國寶)[38] – an antiquarian, heritage-inspired artist, textile researcher, and entrepreneur from Vietnam. He was born in 1997. Despite being relatively young, La Quoc Bao has a strong passion for cultural heritage and has achieved notable accomplishments in the field of Cultural Heritage Protection. In 2023, he collaborated with a representative from UNESCO on the Nguyễn-dynasty clothing restoration project, known as the Hoa Quan Lệ Phục (華冠麗服) project, directed by La Quoc Bao himself. La Quoc Bao has achieved a great deal in the cultural heritage protection campaign. This includes promoting Vietnamese cultural heritage through collaborations with globally recognized companies such as Sulwhasso (Beauty brand), Valentino, and Converse (Fashion brand); repatriating antiquities from countries like America, the Netherlands, and France through artifact collection efforts; and influencing the younger generation through community cultural projects.[39]

4.2.2. Cultural heritage – economic exploitation potential realized by the Vietnamese Gen Z

Gen Z's achievements come not only from representative individuals but also from an engagement in business and in producing materials derived from Vietnamese cultural heritages. Moreover, Gen Z plays an essential role in the process of revival of traditional values, popularisation of heritage, and creation of heritage-related products.

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[38] La Quoc Bao Facebook profile: https://www.facebook.com/baroluo (accessed: 9.06.2024).

[39] T. Nguyen, "Đam mê kỳ lạ của nhà sưu tập cổ vật 9x", *VietNamNet News; VietNamNet*, 19.02.2023, https://vietnamnet.vn/dam-me-ky-la-cua-nha-suu-tap-co-vat-sinh-nam-1997-2109603.html (accessed: 1.06.2024).

Case Study: Vietnamese traditional clothes – economic development potential on the part of Gen Z

Costumes are widely recognized as significant in manifesting cultural values and heritage within ethnic communities.[40] Hence, in contemporary times, several Asian nations promote traditional attire through various means such as entertainment, services, and tourism, thereby contributing to the preservation of cultural heritage. Examples are Chinese traditional costumes such asHanfu (漢服), the Kimono (着物) from Japan, and the Hanbok (한복) from Korea. Traditional costumes have shown and still show multi-facetted business potential.

Following this trend, Vietnamese Gen Z has not only promoted Ao Dai costumes, a traditional Vietnamese costume that is internationally popular, but also has also revived and redistributed traditional Vietnamese costumes from different dynasties, those preserved by older Vietnamese generations in historical records. This is one of the most successful (so far) trends, for the Vietnamese Gen Z customer interest in traditional fashions supports Vietnamese cultural heritage. This is because the trend has helped distinguish the characteristics of traditional Vietnamese clothes from traditional Chinese dress and other traditional Asian costumes. Furthermore, Gen Z has played a prominent role in the renaissance of Vietnamese traditions and has served as a source of inspiration for adopting traditional costumes in contemporary Vietnamese society.

After restoring the costumes of the former Vietnamese dynasties, many members of Gen Z began to open their own Vietnamese traditional clothes businesses and quickly received a welcome from the local community. Such shops are: Great Vietnam 大越南, Ỷ VÂN HIÊN 倚雲軒, Đa La Xước Phục多羅綽服, Hoa Niên, and V'style—Việt Cổ Phục Cách Tân. All of the above shops draw their founders, co-founders, and researchers from Gen Z.

The promotion and distribution of Vietnamese culture, including Vietnamese traditional costumes, through various businesses such as trade, clothing rental, and studios, with the aim of attracting both domestic and international tourism, is highly commendable. Given the fervor exhibited by Generation Z and the favorable reception of the movement within the populace, Vietnam can anticipate heightened prospects for profit generation through the commercialization of traditional costumes, which represent the intangible cultural heritage of the Vietnamese people.

[40] H.S. Tran, "Thực trạng nghiên cứu và vấn đề tiếp cận lý thuyết trong nghiên cứu trang phục các dân tộc ở Việt Nam", *Journal of Ethnic Minorities Research* 2023, no. 1, pp. 108–117, https://nsti.vista.gov.vn/publication/download/hE/qFIDhEPbGhE.html (accessed: 1.06.2024).

4.3. The issue of theft and illegal trafficking of antiquities (domestic and international)

The issue of theft and illegal trade of antiquities in Vietnam is complex. Various ancient artifacts have been lost or taken out of the country for a multitude of reasons. One of the main reasons is war, especially during the French colonial period. Following the withdrawal of French forces, several French researchers (or French soldiers) brought back a number of Vietnamese artifacts to their country. Currently, the artifacts are on show in the Louvre in Paris.[41] Several antiquities have been repatriated through three main channels: through negotiations between the Vietnamese government and the organizations holding the antiquities; through financial support from private individuals in repatriating the antiquities; and through free auctions by private individuals and organizations abroad.[42] According to the periodic report on Vietnam by UNESCO in 2011, Vietnam is still facing difficulties in "The lack of legislative basis and information about the artifacts and shortage of international collaboration and willingness of the countries that imported these artifacts."[43]

Regarding the issue of theft and illicit trade within the country, Damien Huffer and Duncan Chappell note that such robbery can occur anywhere in Vietnam. The illicit trading of antiquities is highly complex due to the difficulty in determining the "provenance" of artifacts on the market. Not all antiques on the market are of illegal origin. Among these are hereditary legacies, belonging to traditional families. The ultimate destination of these antique items is typically a private collector or a private trader (or both) with a family-scale operation. Both the terrestrial and underwater heritage share the same current condition as mentioned by Huffer and Chappell.[44] Moreover, archaeologist number 6 (one of the interviewees in Huffer and Chappell's study) made the following observation: "At the time (2008) I wondered how a private individual managed to have a better collection of Đông Sơn drums (many of which still had dirt stuck to them) than the ones I had seen in the Vietnamese Museum of History."[45]

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41 D. Huffer, D. Chappell, "Local and International Illicit Traffic in Vietnamese Cultural Property: A Preliminary Investigation", *Journal of Heritage and Identity* 2017, vol. 3: *Cultural Property Crime: An Overview and Analysis of Contemporary Perspectives and Trends*, pp. 266.

42 "Những con đường hồi hương cổ vật Việt", Vnexpress.net, 17.11.2022, https://vnexpress.net/nhung-con-duong-hoi-huong-co-vat-viet-4536896.html (accessed: 1.06.2024).

43 UNESCO, National report on the implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property: Vietnam, 2011, https://unesdoc.unesco.org/ark:/48223/pf0000388020 (accessed: 1.06.2024).

44 D. Huffer, D. Chappell, "Local and International Illicit Traffic…", pp. 275–277.

45 *Ibidem,* p. 276.

In conclusion, this reflects some of the shortcomings in the Vietnam Cultural Heritage Protection Law in terms of the management of collecting and purchasing artifacts, the ownership of heritage by collectors, and the domestic trade in artifacts.[46]

4.4. The awareness of legal aspects among citizens and various levels of government and departments

There is a lack of awareness regarding the significance of cultural heritage, which is shown at many levels. Firstly, at the individual level, the issue of robbery and illicit trading is a menace (as mentioned above). According to one of the interviewees in Huffer and Chappell's research, some people (the research specifically mentions Quang Ngai Province) see cultural heritage that is found "inadvertently" as a "source of personal enrichment."[47] This means that some individuals sell to private entities at high prices instead of to the government. Thus, the inadequate awareness of the population regarding the value and significance of cultural heritage has detrimental effects on the national cultural heritage.

Regarding the level of management, several agencies in Vietnam lack the necessary vision, awareness, and expertise. This leads to the negative commercialization of heritage.[48] Specifically, there have been several instances of misconduct in projects involving the combination of heritage and tourism, such as the Spiritual Cultural Ecological Tourism Area in Lung Cu commune, the Dong Van Rock Plateau Park, and the Trang An World Cultural and Natural Heritage Area.[49] These projects have damaged the environmental landscape and cultural heritage of Vietnam in the implementation process. The scandals directly reflect deficiencies in the perception, vision, and management of the relevant departments and agencies.

In conclusion, offenses against cultural heritage protection laws can be found at many levels. The challenge of protecting cultural assets in Vietnam is evident and urgent. Contemporary individuals suffer from a deficiency in comprehension and foresight regarding the implementation and execution of legal safeguards, resulting in several limitations on their effectiveness.[50]

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[46] *Ibidem*, p. 266.

[47] *Ibidem*, p. 278.

[48] T.L. Tu, "Cultural Heritage in Vietnam…", p. 175.

[49] Bao Nhan Dan, "Xử lý hiệu quả hành vi xâm phạm di sản quốc gia", *Nhan Dan News*, 5.11.2019, https://nhandan.vn/xu-ly-hieu-qua-hanh-vi-xam-pham-di-san-quoc-gia-post375905.html (accessed: 1.06.2024).

[50] T.Y. Nguyen, H. Nguyen, "Heritage protection…", p. 317.

4.5. Case study: The cultural heritage – Complex of Thang Long-Ha Noi

The complex of Thang Long, Ha Noi – cultural heritage located right in the middle of the capital of Vietnam – was recognized by UNESCO as part of the objective heritage of mankind in 2010. This is a heritage that has continued for thirteen centuries, and it has consistently been selected as the focal point of regional political authority.[51] Nevertheless, the process of restoring the heritage has encountered significant challenges. This is so for two main reasons: "Heritage stacking up heritage" and the problem of heritage reconstruction.

The phrase "heritage stacking up heritage" refers to the accumulation and architecture of the cultural traditions from various dynasties built up in a single location. Thang Long-Ha Noi has a complex historical context. In 1010, the king of Ly's dynasty selected the Thang Long area as its capital and constructed the Thang Long complex. This signified Dai Viet's attainment of autonomy; Dai Viet is usually seen as the precursor of Vietnam. From 1010 to 2023, the Thang Long complex was consistently selected as the area of political power throughout different dynasties. Specifically, the Thang Long Complex has experienced six feudal Vietnamese dynasties (1009 to 1945). Additionally, Thang Long served as the occupied capital during the French colonial period from 1884 to 1945. Presently, it serves as the capital of the Socialist Republic of Vietnam. During this period, the architectural design of the Thang Long Complex underwent reconstruction and expansion under the influence of the dynasty in power. Moreover, the Thang Long Complex was demolished by war. Furthermore, French-built architecture has been stacked up over the old Vietnamese heritage.For the reasons above, exploiting the heritage and identifying any architectural structure by age is extremely difficult.

Preserving the cultural legacy of the Complex of Thang Long is a subject of considerable controversy. There exist three distinct concerns, namely reconstruction, planning, and finance. The issue of reconstruction is a contentious matter that centers on determining "which dynasty should be chosen to reconstruct our cultural heritage in the six ancient civilizations?" Moreover, "should we undertake the demolition of French-era architectural structures in order to preserve Vietnamese heritage?" Secondly, there is the problem of planning; at present, the Thang Long Complex covers the entire central area of the capital of Vietnam. It includes all of Vietnam's residential, parliamentary, and administrative districts. The impossibility of relocating and liberating the site poses a significant challenge to its exploitation. Finally, the financial problem of rebuilding the Thang Long complex is enormous.

[51] UNESCO, "Central Sector of the Imperial Citadel of Thang Long – Hanoi", https://whc.unesco.org/en/list/1328/_(accessed: 1.06.2024).

The heritage covers 18,395 hectares[52] and the heritage area is the capital, the most valuable real estate area in Vietnam. The financial challenge associated with reconstructing the Thang Long Complex is clear.

There are currently two schools of thought on the issue within the Vietnamese community. One group advocates the reinstatement of the Thang Long Complex because of its significance in shaping Vietnamese national identity. The reconstruction of the Thang Long Heritage Complex has the potential to not only enhance the historical significance of Vietnam's cultural heritage, but also to establish a basis for making documentary films pertaining to Vietnam, promoting tourism and entertainment. A second faction is not in favor of restoring the Thang Long Complex because the country is still developing, and the economy is volatile because of post-Covid-19 factors. Other aspects are the high cost associated with ground release, lengthy construction time, and challenges in terms of investment return and profit generation.

In conclusion, the good news is that the state of Vietnam has spent 1,800 billion VND to rebuild the Thang Long Heritage Complex.[53] The project will be underway in the near future. For the rest of the Thang Long Heritage Complex, Vietnam will use 3D techniques to re-scale the entire monument.[54] However, the issue remains of collecting historical documents to serve the restoration of heritage.

5. Conclusions

The evolution, augmentations, and endeavors of Vietnam in constructing and implementing CHL have been demonstrated in the period between 1900 and 2023. The definition and legal foundation of CHL have undergone a typical development. Moreover, this article highlights the effective education and dissemination of cultural heritage preservation among the younger generation in Vietnam. Primarily, the Z genes have given rise to unique characteristics that have initiated a period of revitalization in cultural heritage. Nevertheless, a significant limitation lies in the exclusive emphasis on competence in heritage repair while neglecting the legal aspect of the issue. Vietnam is currently striving to achieve more specific goals in the global market than ever before. An instance of this is its selection for the esteemed role of vice-president of the Commission overseeing the Asia-Pacific region. Vietnam is currently demonstrating a proactive approach toward advancing tourism and its associated heritage-related services for forthcoming years. There is

52 See more: UNESCO, "Central Sector…"

53 H. Hong, "Khai quật, khảo…"

54 N. Nguyen, "Ung dung congnghe de bao ton va phat huygia tri di san", *Cong An Nhan dan news*, 7.01.2022, https://cand.com.vn/van-hoa/ung-dung-cong-nghe-de-bao-ton-va-phat-huy-gia-tri-di-san-i640648/(accessed: 13.12.2023).

widespread incorporation of cultural heritage in commercial exploitation. Nevertheless, a lack of information in the younger generation can readily result in unfavorable outcomes in conserving cultural property. In 2024, a number of promising new projects are set to begin, but they are accompanied by a range of obstacles and intricate challenges. The Vietnamese government is should promptly address the situation and provide a legal framework that aligns with Heritage Economy theory.

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SUMMARY

Nguyen Le Uyen Phuong

VIETNAM'S CULTURAL HERITAGE PROTECTION LAWS (1900–2023) AND THEIR PROS & CONS FROM THE POSITION OF VIETNAM'S NEW GENERATION: CASE STUDIES

The article aims, first, to examine the evolution of cultural heritage protection in Vietnam from 1900 to 2023, focusing on the Vietnam War, renovation (1980–2000), and international integration (since 1987). Second, it analyses the Cultural Heritage Law 2001 and the Amending of Cultural Heritage Law 2009, the two main texts governing this field. Third, it presents case studies of the challenges and successes of cultural heritage protection as it is perceived by the Vietnamese new generation and by the Vietnam government as part of the market economy.

The author observe that historical events strongly shaped the Vietnamese Cultural Heritage Law (CHL). Changing definitions of CHL over time reflect citizens' ideology in conserving cultural heritage. Further, the Constitution of Vietnam (1946, 1959, 1980, and 1992) differs in its CHL orientation via three major stages. Every time legal basics and political situations change, CHL documents will serve various interests. Finally, the Vietnamese new generation's cultural heritage education and distribution achievements are discussed.

Author demonstrates that the Vietnam War was the most difficult time for CHL growth. Decree 65 and the 1946 Constitution's generic definitions were responding to complex political conditions and were not intended to promote CHL. Vietnam became a socialist country under Soviet influence during reconstruction (1980–2000). The 1980 Constitution is strong enough to govern historic resource ownership and conservation, as is shown by new cultural heritage documents like Ordinance 14 (1984) and Decree 28 (1985). However, the ability to exploit heritage and obtain worldwide recognition was limited. Vietnamese CHL had access

to international treaties and recommendations when Vietnam joined UNESCO in the international integration period (after 1987). In this period, the 1992 Constitution (internal role) and an international source (external role) inspired the 2001 CHL and 2009 Amendment to CHL. Both documents still play a principal main role in enabling Vietnam to enter the Heritage Economy.

Young Vietnamese citizens' achievements promote cultural values and involvement. However, Vietnamese teens have not paid attention to develop the legal aspects of CHL. Unanswered is the issue of whether Vietnam's legal framework is robust enough to prevent abuses in heritage exploitation.

Keywords: heritage protection law, Vietnam, Vietnam War, renovation period

STRESZCZENIE

Nguyen Le Uyen Phuong

WIETNAMSKIE PRAWO OCHRONY DZIEDZICTWA KULTURY (1900–2023) ORAZ JEGO WADY I ZALETY Z PERSPEKTYWY NOWEGO POKOLENIA WIETNAMCZYKÓW: STUDIA PRZYPADKÓW

Artykuł ma na celu, po pierwsze, zbadanie ewolucji ochrony dziedzictwa kultury w Wietnamie w latach 1900–2023, koncentrując się na wojnie wietnamskiej, okresie renowacji (1980–2000) i integracji międzynarodowej (od 1987 r.). Po drugie, dokonano w nim analizy ustawy o dziedzictwie kultury z 2001 r. i nowelizacji ustawy o dziedzictwie kultury z 2009 r., czyli dwóch głównych tekstów regulujących tę dziedzinę. Po trzecie, zaprezentowano studia przypadków wyzwań i sukcesów ochrony dziedzictwa kultury, ponieważ jest ona postrzegana przez wietnamskie nowe pokolenie i rząd Wietnamu jako część gospodarki rynkowej.

Zauważono, że wydarzenia historyczne silnie ukształtowały wietnamską ustawę o dziedzictwie kultury (CHL). Zmieniające się z czasem definicje dziedzictwa kultury odzwierciedlają ideologię obywateli w zakresie ochrony dziedzictwa kultury. Co więcej, Konstytucja Wietnamu (1946, 1959, 1980 i 1992) różni się pod względem orientacji na CHL na trzech głównych etapach. Za każdym razem, gdy zmieniają się podstawy prawne i sytuacja polityczna, dokumenty CHL będą służyć różnym interesom. Na koniec omówiono edukację nowego pokolenia Wietnamczyków w zakresie dziedzictwa kultury i osiągnięcia w jego dystrybucji.

Autorka wykazuje, że wojna w Wietnamie była najtrudniejszym okresem dla rozwoju CHL. Dekret 65 i ogólne definicje konstytucji z 1946 r. były odpowiedzią na złożone warunki polityczne i nie miały na celu promowania CHL. W okresie renowacji (1980–2000) Wietnam stał się krajem socjalistycznym pod wpływem Związku Radzieckiego. Konstytucja z 1980 r. jest wystarczająco silna, aby regulować własność i ochronę zasobów historycznych, co pokazują nowe dokumenty dotyczące dziedzictwa kultury, takie jak Rozporządzenie 14 (1984) i Dekret 28 (1985). Jednak zdolność do wykorzystywania dziedzictwa i uzyskania światowego uznania była ograniczona. Wietnamskie CHL miało dostęp do międzynarodowych

traktatów i zaleceń, gdy Wietnam dołączył do UNESCO w okresie integracji międzynarodowej (po 1987 r.). W tym okresie konstytucja z 1992 r. (rola wewnętrzna) i międzynarodowe źródło (rola zewnętrzna) zainspirowały CHL z 2001 r. i poprawkę do CHL z 2009 r. Oba dokumenty nadal odgrywają główną rolę w umożliwieniu Wietnamowi wejścia do gospodarki dziedzictwa.

Osiągnięcia młodych obywateli Wietnamu promują wartości kulturowe i zaangażowanie. Jednakże wietnamskie nastolatki nie zwróciły uwagi na rozwój prawnych aspektów CHL. Bez odpowiedzi pozostaje pytanie, czy wietnamskie ramy prawne są wystarczająco solidne, aby zapobiegać nadużyciom w wykorzystywaniu dziedzictwa kultury.

Słowa kluczowe: prawo ochrony dziedzictwa kultury, Wietnam, wojna wietnamska, okres renowacji