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## **Federal variety versus harmonisation: Recent monument legislation in Germany**

### **1. Introduction**

“God save me from dust and dirt, from fire, war and monument protection” – this ironic slogan sometimes adorns facades of historic buildings in Germany, including a nineteenth-century house in the core of the UNESCO World Heritage Site in Bamberg. In fact, the image of monument protection as a kind of natural disaster is a rather persistent misperception. According to an estimate of the Federal Statistical Office, there are approximately one million protected buildings in Germany<sup>1</sup> – most of them owned by private persons. Thus, conflicts between private interests and state restrictions are destined to arise. Even though heritage protection is held in high esteem by the German public since the European Architecture Heritage Year in 1975, current challenges, such as demographic change, climate change, and structural transformation outweigh cultural heritage and put it under serious pressure to adapt. Consequently, controversies between the public interest in heritage preservation and issues regarding rural and urban development, energy supply, and conservation of resources are the order of the day as well.

### **2. Legislative powers and administrative responsibilities**

Whereas in the Unification Treaty of 31 August 1991 the reunified Germany is characterised as a “cultural state” (art. 35), in the German Basic Law the legislative power in the culture field is not explicitly assigned to the Federation, except for the safeguarding of German cultural assets against removal from the country (art. 72 sec. 1 sub-sec. 5a). Consequently, cultural heritage legislation predominantly belongs to the constitutional competencies of the German states (*Länder*). Thus, at the federal level, the Act on the Protection of Cultural Property in Germany of 31 July 2016, solely governs

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<sup>1</sup> Federal Statistical Office, press release, 13.06.2018, No. 208.

the national market and the international traffic in artworks and antiques.<sup>2</sup> Any other issues of cultural heritage protection are regulated by laws of the German states.

As far as monument legislation is concerned, the sixteen monument protection laws of the states cover protection, preservation, and popularization of architectural and archaeological monuments, according to regional features and legal tradition. This “federal variety” in the field of monument protection causes different legal approaches to the distribution of administrative responsibilities, listing procedure, assessment of interferences, and the prosecution of offences. All attempts to achieve a legal harmonisation have failed so far. Particularly, a draft resolution for a Model Law on Monument Protection, submitted by Alliance 90/The Greens in 2013,<sup>3</sup> was rejected by the German Bundestag.<sup>4</sup>

According to this, there is no federal authority responsible for monument protection. Especially, the Federal Government Commissioner for Culture and the Media has no administrative competence for protection of monuments, but rather supports this public task by launching subsidy programmes for the maintenance of monuments of national significance. On the contrary, all issues of monument protection, such as the creation of permanent inventories of monuments and the assessment of building projects in the heritage sector, are to be managed by authorities at the regional and municipal level.

For the German administrative structure, a division into specialised monument preservation services (*Denkmalfachbehörden*) which usually cover the territory of a state,<sup>5</sup> and on-site monument protection authorities (*Denkmalschutzbehörden*) is very typical. Whilst the monument preservation services are mainly concerned with identification and evaluation of monuments, conducting archaeological excavations and historic construction research and popularisation of the architectural and archaeological heritage, the monument protection authorities ensure the enforcement of the monument legislation. This includes, for example, the issuing of permissions for building projects concerning monuments and sites, the ordering of maintenance measures, and the prosecution of administrative offences against monuments. Furthermore, the monument protection authorities are usually divided into Lower Monument Authorities, established at the district or the local level, and a Higher Monument Authority, located within a ministry of the state. In some German states, a middle level of monument protection authorities is also provided.

Administrative interaction (*verwaltunginterne Beteiligung*) between the monument preservation services and the monument protection authorities varies from one state to another. Before taking decisions, particularly concerning restoration, main-

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<sup>2</sup> Federal Government Commissioner for Culture and the Media, *Key aspects of the new Act on the Protection of Cultural Property in Germany*, Berlin 2016.

<sup>3</sup> German Bundestag, Printed Matter 17/13914 of 12.06.2013, p. 2.

<sup>4</sup> In the field of building legislation, however, a Model Building Code (*Musterbauordnung*) has been adopted by the Conference of Construction Ministers (*Bauministerkonferenz*) in 2002.

<sup>5</sup> Except for North Rhine-Westphalia, where there are separate monument preservation services for both the regions of Rhineland and Westphalia-Lippe.

tenance, or conversion of a monument, a monument protection authority regularly submits its proposal to the responsible monument preservation service, which has to evaluate and to approve or reject it.<sup>6</sup> Thereby, the approval (or rejection) of the proposed action is of a different significance: whilst in Hesse a suggested decision can be vetoed by the State Monument Preservation Office, in North Rhine-Westphalia the monument protection authority is not bound by a negative statement of the monument preservation service. Accordingly in Hesse, the Lower Monument Protection Authority may complain to the Higher Monument Protection Authority in order to force through the vetoed decision. On the contrary, in North Rhine-Westphalia, the outvoted Monument Preservation Service has a right to apply to the Higher Monument Protection Authority if it wants its decision to prevail.

Despite the fact that any nationwide harmonisation at the legislative level, as mentioned above, has failed so far, a kind of harmonisation has been achieved, at least, in the field of the law enforcement. Thus, the German National Monument Protection Committee (Deutsches Nationalkomitee für Denkmalschutz), an expert body, maintained both by the Federation and the German states, serves as a communication platform, *inter alia*, on legal topics. Furthermore, the monument preservation services of the states have established two professional associations, the Union of Regional Conservationists in the Federal Republic of Germany (Vereinigung der Landesdenkmalpfleger) and the Union of Regional Archaeologists in the Federal Republic of Germany (Verband der Landesarchäologen) at the national level. Although these organisations are not entrusted with tasks of a public authority, they, however, provide an opportunity to coordinate strategies to combat cross-border challenges.

### 3. Objects of protection

#### 3.1. Monuments

The key notion of the German monument legislation is indeed the notion of “monument” (*Denkmal*). Despite varying terminology used in the monument protection laws of the German states – those in Brandenburg and North Rhine-Westphalia use the term “monument”, whilst those in Baden-Württemberg and Hesse prefer the term “cultural monument” – there is a general idea of what objects are to be preserved. The term “monument” is understood to cover all kinds of property of historic, artistic, scientific, or urban significance, either in the form of solid objects or in the form of groups of items. In particular, monuments are usually divided into subcategories, such as building monument (*Baudenkmal*), ground monument (*Bodendenkmal*),<sup>7</sup> or garden monument (*Gartendenkmal*), whereas groups of buildings may be characterised

<sup>6</sup> J. Viebrock, “Monument Preservation Services” [in:] *Martin/Krautzberger. Manual for Monument Protection and Monument Preservation*, eds. D. Davydov, J. Spennemann, Munich 2017, p. 371.

<sup>7</sup> This sub-category includes archaeological and occasionally also palaeontological remains.

as ensembles (*Ensemble* or *Gesamtanlage*), protected zones (*Schutzzone*), monument zones (*Denkmalzone*), or monument areas (*Denkmalbereich*). Besides that, moveable monuments (*bewegliches Denkmal*), such as the Feldmann's ferries wheel in Telgte (Westphalia) or the riverboat "The City of Cologne" (Rhineland), are covered by law.<sup>8</sup> As far as "combined works of man and nature" (sites) are concerned, which are mentioned in the Convention for the Protection of the Architectural Heritage of Europe of 3 October 1985 (the Granada Convention) as a part of architectural heritage, there are just a few monument protection laws to consider here. For instance, in the Monument Protection Law of Schleswig-Holstein historic cultural landscapes and parts of them are characterised as "monument areas" (*Denkmalbereich*) which is a sub-category of the monument.

Although the monument protection laws of Bavaria, Rhineland-Palatinate, Saxony-Anhalt, and Schleswig-Holstein define monuments as things "from bygone times", a specific age which an object must reach in order to become a protected monument is not incorporated into law. However, in conservation theory the general idea has been established that a certain distance in time – for instance, one generation – is necessary in order to adequately appreciate the significance of a building or an art object.<sup>9</sup> Thus, in practice it is rare that objects are placed under protection before reaching the age of thirty. In exceptional cases, indeed, this time limit can be reduced. For example, the new building of the plenary chamber of the German Bundestag in Bonn, completed in 1992, could be considered as a striking example of a bygone political era just after the transfer of the capital to Berlin, so it became a protected monument in 2000.

In the archaeological sector the idea that archaeological ground monuments must regularly come from "illiterate epochs" predominated for the long time. As the former Hessian Monument Protection Law of 5 September 1985 had referred to illiterate epochs, the Administrative Court in Wiesbaden, which dealt with a law case of illicit excavations in November 2000, stated that metal detecting finds from the Thirty Years War did not belong to archaeological heritage.<sup>10</sup> Later on, the Hessian legislator abandoned this restriction in the course of a legal amendment in 2016. In the explanatory memorandum<sup>11</sup> to the new Hessian Monument Protection Law of 28 November 2016, the legislator made clear that archaeological heritage may include even material remains from the Second World War.

Basically, the legal concept of monument does not imply that just a few exquisite, excellent or unique buildings, such as the castle of Eltz or the Cathedral of Cologne, deserve to be protected. Since an extension of the understanding of the term monu-

<sup>8</sup> A moveable monument may at the same time be recognised as national cultural property pursuant to the Cultural Property Protection Act of 31 July 2016.

<sup>9</sup> D. Davydov, "Too Close to Present Time? The Time Limit as a Requirement of the Term Monument" [in:] *Monument Preservation as a Cultural Practice*, ed. Monument Preservation Office of Lower Saxony, Hannover 2018, pp. 64–68.

<sup>10</sup> Decision of the Administrative Court in Wiesbaden of 3.05.2000, 7 E 818/00.

<sup>11</sup> Landtag of Hesse, Printed Matter 19/3570 of 6.07.2016, p. 13.

ment<sup>12</sup> was established in the course of the European Architecture Heritage Protection Year 1975, it is generally accepted that even average objects which represent the lifestyle of the poorer classes – those “modest works of the past” mentioned in art. 1 of the Venice Charter for the Conservation and Restoration of Monuments and Sites of 31 May 1964 (hereinafter: the Venice Charter) – may be taken under protection. Thus, in 2016 the Higher Administrative Court of North Rhine-Westphalia confirmed that even the subterranean remains of an ordinary rural cottage from the nineteenth century can be considered an archaeological monument.<sup>13</sup>

Deviating from this, in Baden-Wuerttemberg the legislator divided monuments into those of particular significance and ordinary ones. According to this classification, the protective regime of a monument may prove to be higher or lower: whilst a monument of particular significance must not be modified, reconstructed, restored, extended by annexes, or decked out with advertising without permission, an ordinary monument simply must not be destroyed or affected without permission. Moreover, in Baden-Wuerttemberg the preservation of a monument’s setting (which is required in art. 6 of the Venice Charter) is solely intended for monuments of particular significance. A similar two-tier system, established in Schleswig-Holstein since 1958, was abandoned in 2014.<sup>14</sup>

### 3.2. UNESCO World Heritage

The forty-six UNESCO World Heritage sites in Germany constitute a specific category of protected objects. As in most German states no special provisions on the World Heritage exist or, at best, general obligations to take account of World Heritage have been adopted, in practice the question may arise whether a World Heritage site may be considered a monument or an ensemble or a protected object *sui generis*. At first glance, the properties inscribed on the World Heritage List as Cultural Heritage sites are also single monuments or groups of monuments pursuant to the monument protection laws of the German states. Even one of the World Nature Heritage sites, the Messel Pit Fossil Site in Hesse, is a protected ground monument according to the Hessian Monument Protection Law. On closer inspection, however, it becomes evident that there is no strict coherence between inscription as a World Heritage site and legal status as a monument. In fact, a piece of ground belonging to a World Heritage site may not necessarily be a monument or part of a monument. Thus, the Administrative Court in Dessau decided in 2001 that the Garden Kingdom Dessau-Wörlitz, which had been added to the World Heritage List just one year before, was not a monument as a whole pursuant to the then applicable version of the Monument Protection Law of Saxony-Anhalt, because the law did not protect historic cultural landscapes.<sup>15</sup> The court

<sup>12</sup> W. Sauerländer, “Extension of the concept of monument?“, *Die Denkmalpflege* 1975, no. 1/2, pp. 187–201.

<sup>13</sup> Decision of the Higher Administrative Court of North Rhine-Westphalia of 14.12.2016, 10 A 1445/15.

<sup>14</sup> Landtag of Schleswig-Holstein, Printed Matter 18/2031 of 17.06.2014, p. 21.

<sup>15</sup> Decision of the Administrative Court in Dessau of 6.04.2001, 2 A 424/98 DE.

argued that it is a task of the legislator – and not of the judiciary – to harmonise the monument protection legislation with the UNESCO World Heritage Convention if their scopes diverge.

For that reason, the legislators in Saxony-Anhalt and Schleswig-Holstein have implemented the UNESCO World Heritage Convention by introducing more or less detailed legal provisions on World Heritage in the monument protection laws. Pursuant to para. 2 sec. 2 subsec. 2 of the Monument Protection Law of Saxony-Anhalt, the subcategory “monument area” (*Denkmalbereich*) may include, *inter alia*, historic cultural landscapes inscribed in the World Heritage List. In Schleswig-Holstein, the legislator has qualified World Heritage sites either as “protected zones” (*Schutzzone*) or as “monuments” (para. 2 sec. 3 of the Monument Protection Law). As opposed to this, the Saarland Monument Protection Law simply declares that building monuments and ground monuments inscribed in the World Heritage List are to be considered as monuments pursuant to this law.

## 4. Administrative procedures

### 4.1. Listing procedure

Two different procedures have been established in order to place identified monuments under protection (*Unterschutzstellung*). In either case, an identified monument is to be included in a list of monuments (*Denkmalliste*) which is usually established, kept up to date, and published by state monument preservation services.<sup>16</sup> The legal significance of the monument list, however, differs from one German state to another.

Within the scope of the formerly widespread so-called constitutive system, which nowadays still exists in North Rhine-Westphalia, an identified monument is placed under protection by being included in the monument list. Thus, the inclusion in the list is constitutive for protection. As the listing is an administrative act,<sup>17</sup> it can be contested by any person concerned. In turn, an identified monument remains unprotected as long as the inclusion is not completed. A variant of the constitutive system is established in Bremen: the protective regime is, however, activated not by the inclusion of an identified monument in the monument list as such, but by a written order, issued by the monument protection authority and open to appeal. The monument is to be included in the list after this order becomes final.

As opposed to this, the so-called *ipsa lege* system, used in most of the German states, does not require the inclusion of an identified monument in the list as a con-

<sup>16</sup> In North Rhine-Westphalia, in contrast, the local monument protection authorities are responsible for the monument list.

<sup>17</sup> According to the judgement of the Higher Administrative Court of North Rhine-Westphalia of 2.04.2013, 10 A 671/11, a sovereign decision to include a monument in the list has to be qualified as a “general order” (*Allgemeinverfügung*), as this administrative act concerns the public law status of an object.

dition for launching the protective regime. Rather, it is sufficient that the identified building, ensemble, or archaeological remain meets at least one of the appropriate legal criteria, such as historical, artistic, scientific or urban significance. Finally, in Baden-Wuerttemberg the *ipso lege* system and the “constitutive system” are combined: whilst ordinary monuments are protected *ipso iure*, those of particular significance have to be included in a so-called “monument book” (*Denkmalsbuch*) as a condition of their protection.

Opinions strongly diverge on the question as to which system is more effective and practicable. On the one hand, legal certainty for the persons concerned and clarity of the legal status of the property are significant benefits of the constitutive system. If the property owner does not contest the placement of his/her property under protection within the relevant period of time, this decision becomes final and can not be revised in the future. As the monument list reveals the main characteristics of a monument and the scope of its protection, financial risks and opportunities can be better estimated by potential buyers and developers. On the other hand, complexity and duration of the listing procedure are a serious disadvantage of the constitutive system. In practice, it could happen that months go by from the identification of a monument by the monument preservation service to the completion of the listing procedure. Obviously, long-term uncertainty about the legal status of the property can be a burden for the owner. Moreover, within the scope of the constitutive system, protection authorities are forced to adjust their case-by-case orders to the monument list’s content: if a specific feature of a listed monument is not explicitly mentioned in the monument list, appropriate conservation can hardly be expected in this regard. Thus, the Higher Administrative Court of North Rhine-Westphalia decided that the monument protection authority is not allowed to demand traditional materials, in particular, the installation of wooden windows instead of plastic windows in a late nineteenth-century villa, if the historic significance of the used material is not expressly declared in the local monument list.<sup>18</sup>

As for the *ipso lege* system, the administrative decision to include an identified monument in the monument list can not be qualified as an administrative act<sup>19</sup> and, accordingly, can not become final. The property owner, though, has the right to go to the Administrative Court, which then clarifies whether the listed property is a monument. Otherwise, the legal status of the property remains open. In this case, a judicial clarification can be arranged by any legal successor in the future. Thus, a certain risk of a subsequent loss of protection is implied. A huge advantage of this system, nonetheless, is that there is no gap between the identification of a monument by the responsible preservation service and its protection by law.

While the monument preservation services of the German states have an official mandate to identify monuments and sites and to assess their historic and cultural value, in the Monument Protection Laws no concrete specifications are made for the

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<sup>18</sup> Decision of the Higher Administrative Court of North Rhine-Westphalia of 2.03.2018, 10 A 2580/16.

<sup>19</sup> Decision of the Administrative Court in Frankfurt am Main of 28.08.2018, 8 K 7264/17.F.

assessment procedure. At best, in some states administrative instructions have been adopted which contain certain selection criteria. Apart from that, the state preservation services simply act upon standards of their professional associations, which have the status of recommendations.

Nevertheless, the expertise of the state preservation services plays an important role in disputes concerning a monument's significance, particularly, in the context of administrative court proceedings. Although a few private experts have authorisation in the monument sector, in practice, the state preservation services have a *de facto* monopoly on the assessment of monument value. Generally speaking, official expertise ranks higher than private expertise. In accordance with this, administrative courts make use of private experts if, and only if, the expert opinion delivered by the state monument service contains contradictions or some special knowledge is required.<sup>20</sup>

## 4.2. Approval procedure

The monument approval procedure (*denkmalrechtliches Erlaubnisverfahren*) is one of the central administrative procedures in the field of monument protection. The monument owner is required to have permission if he/she plans to perform any conservation or restoration work or to adapt the monument for modern use.<sup>21</sup> An approval application shall be, in any case, accompanied by project documentation. In the event that a demolition of the monument is intended, the application shall include a verifiable statement that the owner's interests prevail over the public interest in regard to monument preservation. Particularly, if an applicant wants to get rid of an unprofitable property, he/she is required to submit a profitability calculation which reveals that a permanent preservation of the monument can not be compensated for by its current receipts.

Besides the work in and on a monument, construction projects in its surroundings regularly require consent. Thus, construction works in the monument's setting shall not be allowed if, therefore, the outward appearance or the structure of the monument would be substantially affected. As monuments are not provided with a permanent buffer zone, approval authorities have to assess the impact of construction projects in the surroundings of monuments on a case-by-case basis. Thus, an Administrative Court in Hesse stated that the installation of wind turbines planned about three to four kilometers away from the medieval castle of Münzenberg would have a serious impact on the appearance of this prominent monument,<sup>22</sup> whilst an Administrative Court in North Rhine-Westphalia denied the negative impact of the Lenin statue in

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<sup>20</sup> D. Davydov, "Legal Requirements" [in:] *Martin/Krautzberger...*, pp. 149–153.

<sup>21</sup> As a rule, it is up to the monument protection authorities to issue permits, but in the case of complex infrastructure projects, a monument approval is embedded in another administrative procedure, for instance, in the planning approval process (*Planfeststellungsverfahren*).

<sup>22</sup> Decision of the Administrative Court in Gießen of 15.09.2020, 1 K 4076/17.GI.

Gelsenkirchen, erected just ten meters away from the protected savings bank building from the early 1930s.<sup>23</sup>

At the same time, concrete requirements for impact assessment are not laid down by the law. Consequently, in practice, the standards of the professional associations and the international principles of conservation, such as the ICOMOS charters, are more or less taken as a basis by the responsible authorities. As there is, however, not a shred of reference to these principles in the heritage protection laws – or even in the explanatory memoranda – some administrative courts tend to ignore them. Particularly, the Higher Administrative Court of North-Rhine Westphalia stated in 2008<sup>24</sup> and once again in 2018<sup>25</sup> that the Venice Charter is not binding with regard to questions as to what is a monument in North Rhine-Westphalia and how to deal with it.

### 4.3. Monument protection order

In the event that a monument owner neglects his/her legal obligation to maintain the monument, conservation measures can be demanded by the monument protection authority (*Erhaltungsanordnung*). At the same time, monument protection authorities are strictly required to comply with the principle of proportionality (*Verhältnismäßigkeitsprinzip*) so that they usually pare down their demands to the minimum. As a rule, the responsible authority requests the owner to undertake just the most urgent work in order to stop decay.

An administrative order is also the tool of choice in the event that illicit construction work or other unauthorised activities are performed in or on the monument. The responsible monument protection authority can immediately bring illicit works to a halt (*Stilllegungsverfügung*) and request the restoration of the *status quo ante* (*Wiederherstellungsanordnung*). Such administrative orders can be combined with the threat of a fine or other coercive means. However, it remains a point of contention whether reconstruction can be demanded if a monument has been completely demolished. On the one hand, monuments are protected by law precisely because of their authenticity. On the other hand, a reconstruction order has a general preventive effect even if the finally reconstructed building does not fit the legal criteria of a monument any more.

## 5. Monument protection versus property guarantee

As mentioned above, the overwhelming majority of protected objects is owned by private persons. Accordingly, legal restrictions, such as the obligation to maintain monuments, are in competition with constitutionally protected rights, especially with the right of ownership, provided in art. 14 of the Basic Law. Opinions are divided about

<sup>23</sup> Decision of the Administrative Court in Gelsenkirchen of 5.03.2020, 16 L 250/20.

<sup>24</sup> Decision of the Higher Administrative Court of North Rhein-Westphalia of 26.08.2008, 10 A 3250/07.

<sup>25</sup> Decision of the Higher Administrative Court of North Rhein-Westphalia of 2.03.2018, 10 A 2580/16.

what is the scope of the liabilities which the state can place on the individual owner. In particular, the abstract formulation of the obligation to maintain monuments does not explain to what extent financial encumbrances are to be accepted.

According to the Federal Constitutional Court, the legislator has a certain amount of room for manoeuvre by defining the content and the limits of the constitutional right to property. The higher the public interest in the property, the more limitations of the owner's powers are acceptable. The legislator is, however, not allowed to touch the essence of the property guarantee to which the Court attributes profitability. Consequently, if the monument's owner has no opportunity to use it profitably as a result of the protective regime, the legal status of the monument "does not deserve to be called private property".<sup>26</sup> Thus, legal norms limiting the owner's powers *pro bono publico* are unconstitutional if they mean that the owner is neither able to use the monument profitably nor to dispose of it at an acceptable price, and if his/her financial burden is not compensated by the state.<sup>27</sup> As a result, the maintenance of an unprofitable and unsaleable monument must not be demanded. In practice, the monument protection authority either has to comply with the owner's request, particularly, to permit a demolition of the monument, or it may offset unreasonable burdens by awarding a grant or assuming ownership with fair compensation.<sup>28</sup>

Although general constitutional requirements with regard to monument protection practice seem to be clear, the devil is in the details. For how long has an owner to offer the monument on the real estate market in order to verify that it is unsaleable? The Higher Administrative Court of Rhineland-Palatinate stated that two years are a reasonable term, at least when we speak about monuments in remote areas with a low demand for such buildings.<sup>29</sup> On the contrary, the Higher Administrative Court of North Rhine-Westphalia argued that there is no legal basis for this specification.<sup>30</sup> Is an owner required to put both the plot and the protected building up for sale? The Higher Administrative Court of Saxony-Anhalt decided that the monument and the plot constitute an "economic unit", so that the total income shall be taken in account, if the monument's profitability is in doubt.<sup>31</sup> It can, therefore, be concluded that an "economic unit" is also the relevant object of examination as far as the saleability of the monument is concerned. As opposed to this, the Higher Administrative Court of North Rhine-Westphalia considered that a protected building can be lawfully parcelled and sold separately, so that the owner is not required to offer his/her property as a whole to the market.<sup>32</sup>

Still another issue is a limitation of property rights for archaeological reasons. Pursuant to art. 6 no. ii of the European Convention on the Protection of the Archaeologi-

<sup>26</sup> Decision of the Federal Constitutional Court of 2.03.1999, 1 BvL 7/91.

<sup>27</sup> *Ibidem*.

<sup>28</sup> Decision of the Higher Administrative Court of North Rhine-Westphalia of 27.06.2013, 2 A 2668/11.

<sup>29</sup> Decision of the Higher Administrative Court of Rhineland-Palatinate of 17.07.2015, 8 A 11062/14.OVG.

<sup>30</sup> Decision of the Higher Administrative Court of North Rhine-Westphalia of 2.03.2018, 10 A 1404/16.

<sup>31</sup> Decision of the Higher Administrative Court of Saxony-Anhalt of 15.12.2011, 2 L 152/06.

<sup>32</sup> Decision of the Higher Administrative Court of North Rhine-Westphalia of 2.03.2018, 10 A 1404/16.

cal Heritage (Revised) of 16 January 1992 (hereinafter: the Valletta Convention), each contracting state undertakes to increase material resources for rescue archaeology, *inter alia*, by taking measures to ensure that provision is made in major public or private development schemes for covering, from public sector or private sector resources, as appropriate, the total costs of any necessary related archaeological operation. Accordingly, it is a commonly accepted practice that developers whose projects interfere with archaeological monuments and sites are responsible for rescue archaeology measures. In Germany, this so-called the “polluter pays” principle (*Verursacherprinzip*) has been laid down in most of the monument protection legislation of the German states, for instance in para. 14 sec. 9 of the Monument Protection Law of Saxony-Anhalt. At the same time, a project developer has to bear the costs of rescue archaeology only “within a reasonable scope”. Thus, it is still not completely clarified to what extent a developer can be burdened with costs. The Higher Administrative Court of Saxony-Anhalt decided that even an amount up to 15% of the total investment costs can be considered as “reasonable”.<sup>33</sup> In practice, however, infrastructure projects with low investment costs but high damage on the archaeological heritage may take place occasionally. In this case, developer costs up to 15% of any profit seem to be reasonable.

Whilst in the Valletta Convention only “major public and private schemes” are mentioned, the question arises whether the “polluter pays” principle also implies that average private property owners who build single-family houses are required to bear the costs of archaeological rescue measures. On the one hand, in the monument protection laws no division into different categories of “polluters” is provided. On the other hand, the Federal Constitutional Court has pointed out that the right of ownership deserves the more respect the more an owner relies on the property.<sup>34</sup> Thus, from the constitutional point of view, there is a certain difference between a privately used property which deserves stronger protection and a commercially used property. Consequently, if private building projects make archaeological measures necessary, only a relatively modest part of the costs can be passed on the person causing them.

The legal status of a monument is otherwise not only a burden on private owners, but also a benefit, as it qualifies them for tax relief and entitles them to receive State aid. Besides that, the Federal Administrative Court decided in 2009 that it would violate the constitutional right of ownership if a monument owner would not be able to defend him/herself against neighbouring building projects which interfere with the visual integrity of his monument.<sup>35</sup> Since that time, it is commonly accepted that a monument owner may appeal against administrative permits issued for such projects. However, it is still not completely clarified under what conditions an action may have a chance of success.

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<sup>33</sup> Decision of the Higher Administrative Court of Saxony-Anhalt of 16.06.2010, 2 L 292/08.

<sup>34</sup> Decision of the Federal Constitutional Court of 23.02.2010, 1 BvR 2736/08.

<sup>35</sup> Decision of the Federal Administrative Court of 21.04.2009, 4 C 3/08.

## 6. Public participation

The appropriate way of making possible public participation in the protection of monuments, especially in administrative decision-making in this field, is a highly debated issue. A substantial impetus for greater public involvement comes from the Council of Europe. According to the Namur Declaration, adopted in 2015,<sup>36</sup> a participatory government in the heritage field is a part of the Cultural Heritage Strategy of the Council of Europe. This general approach includes the participation of citizens in "heritage inventories, survey and protection work, validated by experts to ensure the appropriate level of quality".<sup>37</sup>

In the monument protection laws of the German states, however, the role assigned to private persons interested in heritage is that of administrative volunteers (*Verwaltungshelfer*). This function does not imply any decision-making-power, but rather ancillary tasks. Besides that, in some states independent expert panels have been established at the governmental level. These "state monument councils" (*Landesdenkmalrat*), which usually consist of elected representatives of professional associations, universities, and religious communities, have an advisory function in "issues of major concern".<sup>38</sup> As opposed to that, no provision is made for the day-to-day participation of heritage NGOs in the administration's decision-making processes, such as the listing procedure and the approval procedure. All attempts to provide those NGOs with participatory rights have failed so far, in particular, the legislative proposals of the Left Party in Hesse in 2016<sup>39</sup> and of the Greens in Saxony in 2018.<sup>40</sup>

At the same time, in the Federal Nature Conservation Act,<sup>41</sup> the procedural participation of nature conservation associations recognised by the state was established in 2002. Moreover, the Environmental Appeals Act<sup>42</sup> put "recognised associations" – viz. environmental NGOs – in the position to file appeals (*Verbandsklage*) against administrative decisions which violate statutory provisions with regard to the environment. In 2009, the German Society for Pre- and Protohistory (Deutsche Gesellschaft für Ur- und Frühgeschichte e.V. – DGUF) failed in an attempt to receive recognition as a nature conservation association pursuant to the former version of the Federal Nature Conservation Act.<sup>43</sup> The Administrative Court argued that the society did not pursue

<sup>36</sup> Council of Europe, Final Declaration of the 6<sup>th</sup> Conference of ministers responsible for cultural heritage.

<sup>37</sup> Council of Europe, Recommendation of the Committee of Ministers to Member States on the European Cultural Heritage Strategy for the 21<sup>st</sup> century, of 22.02.2017, CM/Rec(2017)1.

<sup>38</sup> D. Davydov, "The State Monument Council: The Institutionalisation of Public Participation in Monument Law", *Denkmalpflege in Westfalen-Lippe* 2016, no. 1, pp. 41–44.

<sup>39</sup> Hessian Landtag, Printed Matter 19/3788 of 14.09.2016.

<sup>40</sup> Saxon Landtag, Printed Matter 6/14736 of 13.09.2018.

<sup>41</sup> Act on Nature Conservation and Landscape Management of 12 February 1976, last revised on 29 July 2009, last amended on 19 June 2020.

<sup>42</sup> Act Concerning Supplemental Provisions in Appeals on Environmental Matters Pursuant to EC Directive 2003/35/EC of 7 December 2006.

<sup>43</sup> Decision of the Administrative Court in Cologne of 3.03.2009, 14 K 2310/07.

objectives of nature conservation “predominantly”, even though the protection of historic cultural landscapes, which was one of the aims of the society, in fact, fitted the legal requirements. As the concept of environment used in the Environmental Appeals Act is, however, broader than the concept of nature conservation, it seems to be obvious that recognised environmental associations may appeal against administrative decisions which violate statutory provisions in the heritage sector.<sup>44</sup>

## 7. Sanctions

Illicit activities in the monument sector, such as demolition of protected buildings without permission and unauthorised prospecting for archaeological remains are liable to prosecution throughout Germany. Nevertheless, in Saxony and Schleswig-Holstein serious violations of statutory provisions with regard to monument protection are qualified as criminal offences which may be punished by imprisonment or monetary penalty, whereas in other states violations of any type are considered as administrative offences which may only be punished by an administrative fine. Consequently, there is no common standard for estimating the amount of fines. Whilst a private owner was ordered to pay a fine of €40,000 for having demolished his nineteenth-century villa in Bad Säckingen,<sup>45</sup> another owner was sentenced to a fine of €10,000 after he had painted black his nineteenth-century villa in Pforzheim without permission<sup>46</sup>.

As far as illicit detection and excavation of archaeological remains is concerned, administrative fines lie, at best, in the three-digit range. As illegal activities in the archaeological sector are usually combined with a retention of finds,<sup>47</sup> offenders may also be called to account for embezzlement. Even then, applied penalties are sometimes too weak. For instance, an illicit detectorist in Rhineland-Palatinate, who had discovered a hoard of late Roman gold and silver objects (the so-called Ruelzheim Treasure) in 2014, finally received a simple warning with reservation of a fine of ninety daily penalty units.<sup>48</sup>

## 8. Conclusions

In conclusion, German monument legislation might be characterised as reasonably balanced. Although monument protection laws appear relatively generous with regard to the selection of objects which are to be placed under protection, they turn out

<sup>44</sup> J. Spennemann, “Monument Protection as Application of National Law Relating to the Environment”, *Natur und Recht* 2020, no. 4, pp. 229–234.

<sup>45</sup> Decision of the Local Court in Bad Säckingen of 6.09.2013, 11 OWi 20 Js 7507/12.

<sup>46</sup> Decision of the Higher Regional Court in Karlsruhe of 6.05.2019, 2 Rb 9 Ss 731/18.

<sup>47</sup> Besides Bavaria, in all German states a treasure trove has been provided.

<sup>48</sup> Decision of the Regional Court in Frankenthal (Palatinate) of 8.02.2018, 5114 Js 14230/13 – 6 Ns.

to be rather strict in taking account of the owner's rights. In particular, where monument protection and property guarantee are in conflict, cultural heritage often gets the short end of the stick. The previously mentioned equation of monument protection and natural disaster is, thus, out of date. Quite the contrary, there is still room for improvement. Not only does implementation of the international principles of conservation fall short of expectations, but so too does the current level of public participation in administrative procedures with regard to heritage.

Besides that, legal fragmentation is quite apparent. Not every variation in law which is attributable to the cultural autonomy of the German states can be explained rationally. As the cross-border challenges of cultural heritage require coordinated legal measures, there is no way of avoiding legal harmonisation.

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## Summary

*Dimitrij Davydov*

### Federal variety versus harmonisation: recent monument legislation in Germany

Due to the division of powers between the Federation and the German states anchored in the Basic Law, German monument legislation is currently still fragmented. As the concept of a monument, administrative procedures, the status of UNESCO World Heritage sites, and possible sanctions in the event of offences against protected property are governed differently in sixteen monument protection laws, the question arises how to harmonise administrative practice.

**Keywords:** monument authorities, monument preservation, monument protection, UNESCO World Heritage List

## Streszczenie

*Dimitrij Davydov*

### **Federalna różnorodność kontra harmonizacja – o ostatnich zmianach w prawie ochrony zabytków w Niemczech**

Niemieckie prawo ochrony zabytków pozostaje niejednolite, co wynika z zakotwiczonego w ustawie zasadniczej RFN podziału kompetencji pomiędzy federacją a krajami związkowymi. Ponieważ definicja zabytku, procedury administracyjne, status obiektów wpisanych na Listę Światowego Dziedzictwa UNESCO, a nawet sankcje karne za czyny przeciwko dobrom o szczególnym znaczeniu dla kultury różnią się między szesnastoma ustawami, wyłania się kwestia sposobów harmonizacji praktyki administracyjnej w tej dziedzinie.

**Słowa kluczowe:** organy właściwe w sprawach ochrony zabytków, ochrona zabytków, opieka nad zabytkami, Lista Światowego Dziedzictwa UNESCO