

Theodosios Tsivolas

Law and Religious Cultural Heritage in Europe

Foreword by
Professor Norman Doe

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*To the love of my life,
A n i*

Foreword

One of the most enduring images of Europe, which we conjure up in our mind's eye, is the picture of landscapes, rural and urban, in which more often than not, somewhere, appears a religious edifice, whether in the foreground or in the background. These church buildings, and other religious sites, both manufactured and natural, as well as the items associated with them—from sacred books through sacred vessels to sacred relics—are precious not only to human life and memory but also to the archeological, architectural, and artistic patrimony of our various peoples. But these buildings and objects have often been the subject of division, dispute, and discord. For both reasons, they are the focus of complex bodies of law—the laws of the State as well as the laws and other norms of the religious traditions to which these entities also belong. Because of the value which they place on religious freedom as a fundamental right, all States in Europe have norms on the acquisition, administration, and disposal of religious property. All States address ways in which to enable religious organisations to enjoy juridical personality so as to exercise rights of ownership and control over that property. And all religious communities have norms on the construction, maintenance, and protection of their religious sites and objects, many of which norms may or may not be mirrored in those of the State.

It is a rare scholar indeed who is able to guide us through the complexities of such norms on a European scale as well as bring to life the issues—political, economic, and cultural—which underlie these norms. In this volume, Theodosios Tsvolas has performed these tasks not only with authority but also with serious attention both to the minutiae of the rules involved and to the wider issues associated with them. It is the untidiness of the real world, which the norms of religion law and those of religious law address in matters of the religious cultural heritage in Europe. In this world of the fabric of religious buildings, protecting these and their objects for the enjoyment of future generations, and disputes about them, the laws of States perform a profoundly enabling role. And this feature is one which comes to the fore time and time again in the studies contained in this book. The author is not shy to tackle head on the substantive law with a critical appraisal of this on the basis of evaluation formed within the context of the theoretical

frameworks in which these legal norms exist. The book's treatment of current developments and political trends, its definition of the religious cultural heritage, its typology of protected elements, and its meticulous review of international and national norms in the field, is a model treatment of the subject. This is an excellent and most welcome book, which will rank among the classics in the field of law and religion and, I hope, find a place on the shelves of all involved in the religious cultural heritage in Europe.

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Chapter 1

Introduction

*Remnants of things that have passed away,
Fragments of stone, reared by creatures of clay
The Siege of Corinth, 1816
Lord Byron*

In his seminal study of 1912, *Les Formes élémentaires de la vie religieuse*, Émile Durkheim argued that, since the dawn of human communal living, the basic habitat of religions has been the public domain; Durkheim located the notion of *sacredness* at the nexus of human practices and social projects. As far as the European continent is concerned, religions have been, indeed, molded within *foro externo*,¹ as symbolic constructions of ‘collective identity’,² closely related to the cultural construction of modernity and its institutionalization in nation-states.³ Even in the present time of post-modernity, they still bear, according to Jürgen Habermas, a valuable semantic potential for inspiring other people beyond the limits of a particular community of faith, once that potential is delivered in terms of its ‘profane truth content’.⁴ This notion is best exemplified in the case of religious cultural goods. The latter manifest an aesthetic synthesis of the sacred/profane

¹ Durkheim E. (1912) *The Elementary Forms of the Religious Life*, translated by Cosman C. (2001) Oxford University Press, p. 319.

² For a constructive criticism on the notion of ‘collective identity’ see Vargas Llosa M. (2001) *The Culture of Liberty*, Foreign Policy No. 122, pp. 66–71.

³ Koenig M. (2007) *Religion and Public Order in Modern Nation-States: Institutional Varieties and Contemporary Transformations*, in: Brugger W. & M. Karayanni M. (eds.) *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* [=Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 190], Heidelberg: Springer, p. 5 f. cf. Siedentop L. (2014) *Inventing the individual. The origins of Western Liberalism*, Allen Lane, p. 252 f.

⁴ Habermas J. (2006) *Religion in the Public Sphere*, European Journal of Philosophy, Vol. 14, p. 17.

qualities, since it is in their very nature to embody a complicated amalgam of the aesthetic and the numinous.

In other words, following the relevant German literature (Heckel 1968), these particular cultural elements, and perhaps more importantly those that still preserve an *active* devotional character as well as a liturgical function (*liturgische Funktion*), are, by their very nature, monuments of internal unity (*innere Einheit*): they demonstrate an indivisible union of sacred and aesthetic qualities, and, therefore, constitute a cultural blend of art and belief within the public sphere. Perhaps it is precisely this ambivalent unity between the sacred and the secular, which has always made religious cultural elements, landmarks of historical change and complex sociopolitical choices.

The balance of the aforementioned qualities is often delicate and contingent, when religious cultural goods are being produced to serve a particular (liturgical) function within a particular (devotional) setting, and, in the course of time, due to various reasons, their very function and/or setting is being altered. We could take as an example the religious products of classical Greece: we still find aesthetical delight in the beautiful temples and marvelous statues of the gods of the past, without necessarily accepting the worldview from which they emanate. A similar set of examples in this respect, can be found also in later religious monuments, such as the great *Stephansdom* in Vienna, the Byzantine *Daphni Monastery* in Athens, the *Hohe Domkirche St. Petrus* in Köln, the *Basilica di Santa Maria di Fiore* in Florence, the *Mezquita de Córdoba*, the *Dohány Street Synagogue* in Budapest, and Le Corbusier's *Chapelle Notre Dame du Haut* in Ronchamp, which is one of the finest examples of twentieth century religious architecture. This spiritual *tour de force* attracts huge numbers of visitors (be they tourists, regular worshipers, art aficionados, or pilgrims) from all over the world, albeit for quite different reasons: others seek just an enjoyment of the religious beauty, others seek a way to manifest their inner beliefs on a purely devotional level, while others experience mixed feelings since they cannot tell the difference “*between worldliness and grace, between the hard materiality and the conditional holiness inherent in art associated with religion*” (Feigenbaum and Ebert Schifferer 2011, p. 2).

Another common paradigm regarding the difficult equilibrium between the sacred and the secular, would be that of Europe's redundant historic places of worship. In Britain, for instance, according to the official 2012 Report of the competent *Church Buildings (Uses and Disposals) Committee* of the Church of England to the Board of Governors,⁵ since 1969 over 1,800 church buildings have been closed, and since the mid 1990s the underlying rate of church closures is estimated to be about 25 annually.⁶ The closure of historic buildings used for

⁵ The Committee produces an annual report to the Board of Governors which is then presented at the Commissioners' Annual General Meeting (AGM) in June each year; at the time of writing this study, the relevant Report for 2013 was in preparation and was going to be made available after its presentation to the AGM in June, 2014.

⁶ The Church of England online Document Library: <http://www.churchofengland.org/document-library>. Accessed on March 31, 2014.

worship, has been an inevitable consequence of decreasing congregations also within the Methodist Church. However, unlike buildings owned by the Church of England or the Roman Catholic Church, Methodist places of worship are not consecrated; they are simply buildings which, once their function has ceased, may be disposed of for other uses. This is due to the fact that non-conformists do not accept consecration: holiness, they argue, resides in the people, not the buildings. The closure of a non-conformist church puts an end to any religious status it previously enjoyed. Thus, it becomes a vendible asset, to be sold off in order to finance further work of the denomination (Powell and De La Hey 1987, p. 10). Many redundant churches owned by the Church of England and the Roman Catholic Church seek new uses as places of worship by other Christian bodies, or as venues for a variety of social, community, commercial or residential purposes (Truman 2006; English Heritage 2010). Nevertheless, as far as consecrated churches are concerned, apart from the fact that in many cases their edifices have been previously listed due to their historical significance, it is quite difficult to find alternative uses suitable to their inherent cultural element of sacredness. By way of contrast, there are European countries where the closing of churches is hardly ever contemplated. In Norway, for instance, a negligible number of churches have been closed during the past six decades; on the basis of the Norwegian Church Act of 1996, the national government finances the dioceses and the Church's other central organizational structures, while the municipalities are responsible for the maintenance of the ecclesiastical buildings (Ingar Mørk 2006, pp. 449 f.).⁷ Besides, the notion of 'religious heritage' is not limited to the Christian tradition only. In the aforementioned case of Britain, for example, "the biggest challenge remains tackling attitudes towards heritage buildings within the Jewish community itself. Nowhere is this more obvious than in the case of early 20th century synagogues, the best of which are coming within the purview of 'heritage', thanks to the passage of time" (Kadish 2009, p. 13).

Furthermore, apart from individual cases of religious edifices, the range of possible elements—both tangible and intangible—that the notion of religious cultural heritage in Europe might encompass, is rather extensive. It might include complexes of buildings, sites of archaeological or historic significance, ancient works of art, ethnographic items, landscapes and topographical features, natural features endowed with special cultural significance, ritual items and ceremonial traditions. The identification of this heritage is based on an active choice as to which elements of this broader 'religious culture' are deemed worthy of preservation as an 'inheritance' for future generations. Thus, the significance of religious cultural heritage as symbolic of the culture—and those aspects of it, which a society

⁷ Nevertheless, according to Sørmoen O. (2009) *Maintenance of churches in Norway*, Conservation Bulletin, Vol. 61, pp. 26–7: "According to the Church Act (1996), the maintenance of the church should be funded by local government, a tradition going back over a century. The financial responsibility is therefore clear, although there are often insufficient funds to pay what is needed after the political priorities have been addressed. In practice the churches are underresourced. In fact there is, in many places, a considerable maintenance lag and an accelerating need for repairs".

(or religious group) views as valuable—is obvious. In fact, it is this role of religious cultural heritage which lends it its powerful political dimension, since the decision as to what is deemed worthy of protection and preservation is generally made by State authorities at national level and by intergovernmental organizations at a broader international level (Blake 2000, p. 68).

In the light of the above, and in view of understanding and defining crucial terms in the field of religious culture, such as the complex notion of ‘*sacredness*’, the aim of this study is to augment and delve into the legal concept of religious cultural heritage within the European continent, on the basis of pertinent historical facts, philosophical and political questions, as well as relevant jurisprudence at the national and international levels. For this purpose, each chapter is supported by primary references (included briefly in the text, and presented, as full bibliographical references, at the end), as well as evidence and secondary sources (provided in footnotes).

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Chapter 2

Historical Background

One of the earliest legal texts relating to the protection and preservation of *sacredness* as an integral part of the religious built environment in Europe, can be found in the sixth century fundamental jurisprudence of *Corpus Juris Civilis*. According to the provisions of Justinian's *Digesta*, where “a temple has once been made sacred the place still remains so, even after the edifice has been demolished” [semel autem aede sacra facta etiam diruto aedificio locus sacer manet].¹ This notion of ‘sacred soil’² is fundamental for the interpretation of the ancient custom of religious asylum, initially regulated in *Codex Theodosianus* (CTh 16.1.2) and later adopted by *Corpus Juris Civilis*.³ The origins of this custom can be traced in ancient Greece of the city-states, where, within the walls of the sacred pan-Hellenic sanctuaries, acts of violence were prohibited (Bugnion 2004). In the case of Peithias’ lawsuit against his Corinthian accusers, Thucydides recounts:

Peithias being acquitted, retorted by accusing five of the most considerable of his schemers, for having removed the supporting poles (*χάρακας*) from the sacred grove of Zeus and Alcinous; the legal penalty being a stater (*στατήρ*) for each pole. Upon their conviction, because of the amount of the penalty being excessive, they sought refuge as supplicants (*ικέτες*) into the temples.⁴

The cultural element of *sacredness* constitutes also an exegesis for the attitude towards temples and other sacred edifices previously belonging to opposing cults, amidst the religious conflicts of the Late Antiquity and the early Middle Ages (Williams 2005, p. 46). One could certainly argue that, throughout this period of transition, from the pagan era to the Christian epoch, cultural religious symbols of

¹ *Digesta*, I.VIII.6.3.

² “In this sense, the soil is *sacrum* though the church be pulled down” Buckland W. (1921) *A Text Book of Roman Law from Augustus to Justinian*, Cambridge University Press, p. 185, fn. 1.

³ *Codex Justinianus* 1.1.1; cf. Hallebeek J. (2005) *Church Asylum in Late Antiquity*, in: Coppens E. (ed.) *Secundum Ius. Opstellen aangeboden aan prof. mr. P.L. Nève*, Nijmegen: Gerard Noodt Instituut, pp. 163–82 (p. 166).

⁴ Hude K. (ed.) (1898) *Thucydides, Historiae*, Libr. III, § 70., Lipsiae: B. G. Teubneri, pp. 237–8.

the past were dealt, in many instances, with aggression and hostility (Makrides 2009, pp. 126 f.). A notorious example thereof, is Canon 58 [De reliquiis idolorum vel temples ab imperatoribus abolendis] of the fifth Council of Carthage (AD 401). The latter urged the emperors to order the destruction of the idololatric remains in Africa; the temples that were in remote places were set to be destroyed also, but only if they had been already stripped off their embellishments.⁵

However, the ‘anti-pagan’ legislation of the fourth and early fifth centuries, unlike the aforementioned ecclesiastical provisions of the Council of Carthage, allowed temples to be opened for the “assemblage of throngs of people and now also for the common use of the people. . . but in such a way that the performance of sacrifices forbidden therein may not be supposed to be permitted under the pretext of such access to the temple” (CTh 16.10.8). In fact, a law of AD 342 issued by the emperors Constantius and Constans, stipulated that:

Although every superstition is to be rooted out completely, nevertheless it is our wish that the temple buildings located outside the city walls should remain untouched and undamaged [Quamquam omnis superstitio penitus eruenda sit, tamen volumus, ut aedes templorum, quae extra muros sunt positae, intactae incorruptaeque consistant] (CTh 16.10.3).

In addition, despite the official forbiddance of former religious practices, *Constitutio* of January AD 399, issued by the emperors Arcadius and Theodosius, decreed that the ornaments and architectural elements of public works (among them, temples, shrines and other sanctuaries) were henceforth preserved by law (“*publicorum operum ornamenta servari*”).⁶ Due to the relevant provisions, and beside the occasional destructive attitude against pagan monuments orchestrated by local Bishops (especially in the East and in Africa), Christians maintained in broad terms a positive attitude towards sacred ancient monuments and, in the long run, transmitted this attitude to the Byzantium of the later centuries (Saradi Mendelovici 1990; Pagoulatos 1964). In fact, as the archaeological research has demonstrated, sanctuaries that had previously served other cults, were transformed, in many cases, into churches, and, thus, were incorporated into the new religion. Many important temples (pre-eminent among them the Pantheon in Rome) were actually preserved because they had been transformed for Christian use.

From an ecclesiastical perspective, official consent for the devotional function of sanctuaries previously belonging to other cults, was originally provided in AD 601 by Pope Gregory the Great, when he ruled that the sacred edifices of the newly converted Saxons ought to be preserved. In St. Gregory’s own words:

[T]he temples of the idols . . . ought not to be destroyed at all . . . Let holy water be sprinkled in the same temples, and let altars be erected and relics placed there [quia fana idolorum

⁵ Joannou P. (ed.) (1962) *Discipline générale antique* [=Pontificia Commissione per la Redazione del Codice di Diritto Canonico Orientale, Fonti, Fasc. IX], Vol. I/2: *Les canons des Synodes Particuliers*, Grottaferrata (Roma): Tipografia Italo-orientale S. Nilo, p. 295.

⁶ *Codex Theodosianus*, 16.10.15.

destrui . . . minime debeant . . . Aqua benedicta fiat, in eisdem fanis aspergatur, altaria construuntur, reliquiae ponantur].⁷

According to a well-substantiated interpretation (Schildgen 2008, pp. 88 f.), this papal wording reflects the Church's attitude towards pagan temples during the early Christian era: a dynamic synergistic process of adapting the earlier cultural contributions and historical sacred buildings to a new cultural form, while keeping the original structures alive (Makrides 2009, pp. 152 f.). This pattern of reuse and adaptation became a vital element for the preservation of cultural heritage within the Church, as the latter understood early on—and St. Gregory's point of view, serves as a corroboration for this understanding—the importance of culture for the fulfillment of her earthly mission.

To an important extent, St. Gregory was also a great defender of Christian Art: he supported the use of artistic images within religious practice, as he underlined their value in recording the memory of Christian history and in arousing profound sentiments of spirituality (Schildgen 2008, pp. 67 f.). One century later, it was another St. Gregory, Pope Gregory the Third, who condemned Iconoclasm, as a heresy (Treadgold 1997, p. 354; Louth 2007, p. 82). According to his *Decree* of AD 731:

[I]f anyone, in the future, should condemn those who hold to the old custom of the apostolic Church and should oppose the veneration of the holy images, and should remove, destroy, profane, or blaspheme against the holy images of God, or of our Lord Jesus Christ, or of his mother, the immaculate and glorious Virgin Mary, or of the Apostles, or of any of the Saints, he should be cut off from the body and blood of our Lord Jesus Christ.⁸

The above vigorous defense of the visual dimension of devotional art, is quite similar to St. John of Damascus' *Three Treatises on the Devine Images*.⁹ As the eighth century theologian argued, icons are not simply useful adjuncts to worship, but rather “*vessels of divine energy and grace*”. According to his teachings, “painters transfer human forms to canvas through certain colors, laying on suitable and harmonious tints to the picture, so as to transfer the beauty of the original to the likeness”. This is, indeed, the classical viewpoint of the Orthodox Church, regarding icons as sacramental items, different from ordinary artistic objects (Howes 2007, pp. 7 f.). Yet, our ‘modern’ view of an icon as a work of art, to be preserved for its own sake, and not just as a utilitarian cult object, appeared already in eleventh century Byzantium, at the time when the first amateur artists emerge (Oikonomides 1986). In addition, one has to take into consideration that, even during the Byzantine era (especially after the end of Iconoclasm), a holy icon was considered to be an asset of value, certainly not excessive, depending on its size and, above all on the

⁷ Sanctus Gregorius Magnus, *Epistola Ad Mellitum abbatem* (LXXVI), in: Migne J. P., *Patrologia Latina*, v. 77, p. 1215.

⁸ Thatcher O. J. & Holmes McNeal E. (eds.) (1905) *A Source Book for Mediaeval History. Selected Documents Illustrating the History of Europe in the Middle Age*, New York: Charles Scribner's Sons, p. 101.

⁹ Migne J. P., *Patrologia Graeca* Vol. 94, p. 1232 f.

materials used for its decoration (Oikonomides 1991). Today, it is self-evident, that Byzantine icons are objects of great value, not only because of their beauty, which is a rather subjective criterion, but, most importantly, because of their age.

During the Middle Ages, even if the primary incentive for the preservation of Christian cultural objects (buildings and artifacts), due to their devotional character, remained the element of sacredness (Odendahl 2005, p. 9), the artistic value of these objects was also acknowledged on a legislative level. This is best reflected in Charlemagne's administrative legislation relating to the architectural preservation and improvement of sacred edifices. Cathedrals and chapels remained, pursuant to the provisions of *Capitulare Aquisgranense* (AD 802), under the protection and authority of the Church ["*omnis ecclesiae adque basilicae in ecclesiastica defensione et potestatem permaneat*"].¹⁰ Nevertheless, despite being within ecclesiastical purview, *Capitulare Aquense* of AD 807 instructed the renovation of churches and the reconstruction, wherever necessary, of their deteriorated architectural elements (roofs, walls, floors etc.) ["*Primum de aecclesiis, quomodo structae aut destructae sint in tectis, in maceriis, sive parietibus, sive in pavimentis, necnon in pictura, etiam et in luminariis, sive officiis*"].¹¹ Similar provisions relative to the preservation and management of the ecclesiastical property, as an integral part of the overall religious patrimony ("*Patrimoine culturel*"),¹² can be traced within the *corpus canonum* of the Orthodox Church, i.e. the system of established canonical rules that have been diffused within Eastern Europe between the ninth and twelfth centuries, through liturgical life and worship (Konidaris 1994).

Relevant providence for the maintenance of the religious built environment can be also found in legal sources of Byzantine 'private law'. Testaments, wills and monastic archives are undoubtedly the richest source of such information. Many regulatory texts, often written by monks who were heads (*hegoumenoi*) or founders (*ktetores*) of monasteries in the Christian East, reflect the practices used by these establishments to administer their sacred structures. The majority of these canonistic documents of the Byzantine era, called *typika*, dated between the ninth and twelfth centuries,¹³ indicate the existence of an elaborate and complex system of management for the monastic estates, directed to safeguard both the continuation

¹⁰ Pertz G. H. (ed.) (1835) *Monumenta Germaniae Historica*, Vol. I, Hanover: Legum, p. 91. See also Henderson E. F. (1896) *Select Historical Documents of the Middle Ages* London: George Bell and Sons, p. 193.

¹¹ *Monumenta Germaniae Historica*, op. cit., p. 149. See also Inama Sternegg K. T. (1965) *Deutsche Wirtschaftsgeschichte bis zum Schluss der Karolingerperiode*, Hildesheim G. Olms, p. 461.

¹² Papatomas G. (2006) *La protection du Patrimoine culturel au sein de la Tradition canonique de l'Église (1er-9e siècles)*, in: Basdevant-Gaudemet B., Cornu M. & Fromageau J. (eds.) *Le patrimoine culturel religieux, enjeux juridique et pratiques culturelles* [Collection Droit du patrimoine culturel et naturel], Paris: L'Harmattan, pp. 195–233.

¹³ For a thorough historical and legal overview of the monastic *typika* in general see Konidaris I. M. (2003) *Legal aspects of the Monastic "Typika"* [in Greek], Athens: Ant. N. Sakkoulas Editions.

of the monastic communities and the maintenance of their sacred edifices.¹⁴ The examination of relevant monastic archives in Central and Western Europe, provides similar evidence regarding the concern of the monastic communities in relation to the protection and preservation of their sacred structures and artifacts. To name a famous example, in the early sixteenth century one of the clauses of the testament of the Carmelite monk Andreas Stoß, relating to a sacred altar (*Flügelaltar*) that was sculpted by his father, the leading German sculptor Veit Stoß, and was donated to the Karmelitenkloster in Nuremberg, stipulated that:

[The altar] should never be lightly painted with colors, that no large candles should be installed upon it because of the smoke, and that it should be open only on feast days [nie leichthin mit Farben bemalt werden sollte, daß wegen des Rauchs keine großen Kerzen aufgestellt werden sollen und daß er nur an Feiertagen geöffnet werden dürfe].¹⁵

Obviously, distinguishing between *secular* and *sacred* in the religious art of the epoch in question, risks anachronism, imposing the values and divisions of modern mentalities upon thoughts and practices of the past. Indeed, from the medieval era and forth, works of religious architecture and art record an overlap between the *secular* and the *sacred*, making absolute distinctions between these two features, in a given religious monument or object, such as the aforementioned altar of Veit Stoß, extremely difficult. For instance, as scholars of northern early Renaissance have observed in relation to the coinciding religious symbolism and artistic realism of the Netherlandish altarpieces, these cultural objects “brought basic church doctrine to life for [their] patrons with glowing color, meticulous detail, and convincing spatial representation”.¹⁶ Another eloquent example, within the discipline of the intangible artistic heritage, is the sacred music of Johan Sebastian Bach; the latter, having its musicological roots in the Middle Ages,¹⁷ united “the plenary tenderness of prayer with the solitary echo of the divine”.¹⁸ As it has been noted (Walker and Luyster 2009, p. 8) regarding the characteristics of European religious art:

Overall current work on the theme of secular and sacred can be characterized by a greater appreciation for the fluidity of these categories and their productive confluence. Rather than performing dissections of secular and sacred organs from the anatomies of objects and buildings, scholars today allow worldly and spiritual features that were conjoined by their makers to work together as a single body . . . strict divisions are not assumed *a priori*, and

¹⁴ Smyrlis K. (2002) *The management of monastic estates. The evidence of the Typika*, *Dumbarton Oaks Papers*, Vol. 56, pp. 245–61.

¹⁵ Schädler A. (1983) *Stetigkeit und Wandel im Werk des Veit Stoss*, in: *Veit Stoss in Nürnberg*, exhibition catalogue, Nuremberg: Germanisches Nationalmuseum, p. 39.

¹⁶ Lane B. (1988) *Sacred versus Profane in Early Netherlandish Painting*, *Simiolus: Netherlands Quarterly for the History of Art* Vol. 18, No. 3, p. 115.

¹⁷ Flindell E. F. (2005) *Bach and the Middle Ages*, *Bach Journal*, Vol. 36 No. 2, pp. 1–119.

¹⁸ Grimaud H. (2008) *Foreword*, in: Idem, *Bach*, booklet, Deutsche Grammophon, 2008; cf. Schrade L. (1946) *Bach: The Conflict between the Sacred and the Secular*, *Journal of the History of Ideas* Vol. 7, No. 2, pp. 151–94.

the secular, when articulated as a separate category, is identified as a multi-faceted realm with the potential to equal the formal and semantic complexity of sacred art.

Consequently, the argument that the existence of vagueness between the sacred and the artistic is mainly a contemporary narrative (Howes 2007, p. 167), is not quite accurate from a historical perspective. Even in the Middle Ages and the early Renaissance, in fact during the entire epoch of the united *res publica christiana*,¹⁹ the sacred and the profane connotations were, to a great extent, blurred. It is within this historical context and conceptual framework that the Church became not only a patron of arts and artists, but also a dedicated supporter of the protection and enhancement of cultural heritage *in globo*.

To elaborate upon this broad outline, beginning in the late medieval/early Renaissance period, from Pope Pius II's *Cum Almam Nostram Urbem* (1462),²⁰ which promoted the beauty and value of ancient remains extending the protection of Rome's fabric from its cathedrals to its ancient ruins, and Sixtus' *Quam provida* (1474),²¹ which protected Rome's churches against damage, whether they were already derelict or not, prohibiting the removal of antique, or otherwise valuable, elements or objects from churches, through the nineteenth century (with the institution of the *Commission of Sacred Architecture* [Commissione per l'archeologia sacra] in 1852), the long and uninterrupted series of papal legislation for the protection of religious monuments set the foundation for the 'modern' approach of regulating artistic patrimony (Schildgen 2008, p. 173; Levi 2008, pp. 105 f.).²²

The various acts promulgated during the seventeenth century (such as Cardinal Aldobarini's prohibition against the extraction of metal or marble statues, antiques or similar [Prohibitione sopra l'estrazione di statue di marmo o di metallo figure, antichità e simili] of 1624²³ or Cardinal Sforza's *Edict* of 1646²⁴), set strict laws against the intentional damage, theft or illegal excavations, banishing the extraction of figures of any material, while expressing concern that historical pictures, mosaics and manuscripts should not be removed from their sites. The Papal *Chirograph* of October 1802 entitled "*La conservazione*", signed by Cardinal Doria Pamphili, under the auspices of Pope Pius VII, became the basic law for the protection of

¹⁹ Brugger W. (2007) *On the Relationship between Structural Norms and Constitutional Rights in Church-State-Relations*, in: Brugger W. & M. Karayanni M. (eds.) *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* [=Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 190], Heidelberg: Springer, p. 21 f.

²⁰ Theiner A. (1862) *Codex diplomaticus domini temporalis S. Sedis: extraits des Archives du Vatican* Vol. III, pp. 422–23.

²¹ *Ibid.* cf. Stubbs, J. H. (2009) *Time Honored: A Global View of Architectural Conservation*, John Wiley & Sons, p. 187.

²² Cf. Siedentop L. (2014) *Inventing the individual. The origins of Western Liberalism*, Allen Lane, p. 252 f.

²³ Mariotti F. (1892) *La legislazione delle Belli Arti*, Roma, p. 208.

²⁴ *Ibid.*, pp. 208–11.

cultural property in this period.²⁵ It was revised in 1820 by *Camerlengo* Cardinal Pacca,²⁶ but its principles remained unchanged until superseded by the laws of the United Kingdom of Italy after 1870 (Jokilehto 1999, p. 75; Wolf 2003, pp. 165 f.). The relevant *Edict* of Cardinal Pacca regarding the inventory of all sacred and secular goods in the Pontifical State, was issued on 7 April 1820 and instructed that:

Any superior, administrator or rector, or individual who directs public buildings and places, ecclesiastical or secular alike, including churches, oratories, convents, where collections of statues and paintings are preserved, museums of sacred and secular antiquities, and even one or more precious artistic objects of Rome and of the State, without person of exception, even if privileged or very privileged, should present a very exact and distinct note of the objects mentioned above in double copy, with a description of each piece. (Wolf 2003, p. 245)

The general principle of the *Edict*, that introduced for the first time the drafting of an (ecclesiastical) inventory, was to conserve the grate religious artistic treasures in their original location, by placing an impediment on their exportation from Italy. This included, for example, keeping paintings in the churches, from which they could be removed only with special permission, even for purposes of restoration or copying (Jokilehto 1999, p. 76). This principle of preserving cultural goods *in situ*, became the foundation for the subsequent ecclesiastical norms regulating the preservation of sacred art within the Church.²⁷ According to the Canon 1280 of the 1917 Pio-Benedictine Code of Canon Law (rephrased in Canon 1189 of the current CIC)²⁸:

Precious images, that is, those outstanding by virtue of age, art, or cult, exposed in churches or public oratories for the veneration of the faithful, if they are in need of restoration, shall never be restored without consent from the Ordinary given in writing, who before granting this permission shall consult wise and expert men.²⁹

In the same vein, Canon 1281 § 1 of the Bio-Benedictine Code (rephrased in Canon 1190 § 2 of CIC), stipulated that: “Precious images . . . or images that are honored in some church with a great veneration of the people cannot validly be alienated or perpetually transferred to another church without the permission of the

²⁵ *Ibid.*, pp. 226–33.

²⁶ *Ibid.*, pp. 235–41.

²⁷ Cf. Durand J. P. (2006) *Intérêt patrimonial et patrimoine religieux. Le droit canonique*, in: Basdevant-Gaudemet B., Cornu M. & Fromageau J. (eds.) *Le patrimoine culturel religieux, enjeux juridique et pratiques culturelles* [Collection Droit du patrimoine culturel et naturel], Paris: L’Harmattan, pp. 159–93.

²⁸ “If they are in need of repair, precious images, that is, those distinguished by age, art, or veneration, which are exhibited in churches or oratories for the reverence of the faithful are never to be restored without the written permission of the ordinary; he is to consult experts before he grants permission”. Cf. Beal J., Coriden J. & Green Th. (eds.) (2000) *New commentary on the Code of Canon Law*, New York: Paulist Press, p. 1415.

²⁹ Peters E. (2001) *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco: Ignatius, pp. 433–34.

Apostolic See". Along the same line, pursuant to Canon 1530 of the Bio-Benedictine Code (cf. Canons 1291–1293 of CIC):

With regard for the prescription of Canon 1281 § 1, for the alienation of ecclesiastical goods, whether immobile or mobile [res ecclesiasticas immobiles aut mobiles], that are such that they should be preserved, there is required: 1.º An estimation of the good by a thoughtful expert done in writing; 2.º Just cause, that is, urgent necessity . . . ; 3.º Permission of the legitimate Superior, without which the alienation is invalid.³⁰

In fact Pacca's *Edict* served not only as the basis for the aforementioned ecclesiastical Canons, but also as an inspiring model for the laws on securing religious cultural heritage drawn up in the nineteenth and twentieth centuries in various European countries. During this period, a continuous and growing interest in the safeguarding of religious 'national' assets was initiated in the form of artistic and historical monuments (Baldwin Brown 1905, pp. 15 f.).

The era of 'modern care' measures regarding the protection of religious monuments, began in the early part of the nineteenth century and was indissolubly connected with the Romantic movement, a reaction against the neo-classicism of the preceding hundred years of the Age of Enlightenment. This flux is best illustrated in the attitude of the French writer Victor Hugo, who opened a crusade for the rescue and protection of the medieval cathedral of *Notre-Dame de Paris*, a "sublime and majestic building . . . a vast symphony in stone [vaste symphonie en pierre]".³¹ According to Hugo's perspective:

[W]hat we say of the cathedral church of Paris, must be said of all the churches of Christendom in the Middle Ages. All things are in place in that art, self-created, logical, and well proportioned [ce que nous disons de l'église cathédrale de Paris, il faut le dire de toutes les églises de la chrétienté au Moyen Âge. Tout se tient dans cet art venu de lui-même, logique et bien proportionné].³²

In Germany the aforementioned movement began when the national consciousness had been roused in the struggle of the Wars of Liberation, and it found at once a classic expression in a *Report* of 1815 to the Prussian government submitted before the Higher Council of Architecture (*Oberbaudeputation*) by the prominent architect Karl Friedrich Schinkel.³³ The latter visited the *Schlosskirche* in Wittenberg, that had been damaged during the French wars, and prepared a description of the condition of the church's fabric. Schinkel made his report, in which he listed several construction measures necessary to make the *Schlosskirche* safe, an occasion of a forcible appeal to his countrymen to save the glorious religious monuments of their medieval past. In England during the first half of the nineteenth

³⁰ *Ibid.*, p. 512.

³¹ V. Hugo (1906) *Notre Dame de Paris*, Paris: Société d'Éditions Littéraires et Artistiques, p. 76; cf. Grossman K. (1986) *The Early Novels of Victor Hugo. Towards a Poetics of Harmony*, Genève: Droz, pp. 165–6.

³² Hugo, *op. cit.*, p. 77.

³³ Ibbeken H. & Blauert E. (eds.) (2001) *Karl Friedrich Schinkel: das architektonische Werk heute*, Fellbach: Edition Axel Menges, p. 346.

century, the Romantic movement, and the contemporary High Church religious revival, drew special attention to medieval sacred structures (churches and chapels), which were found to be in a dilapidated and encumbered condition, unfit for the newly zeal of the times (Baldwin Brown 1905, p. 51). In Denmark, at the early dated of 1807, a Royal Commission (*Kongelige Commission for Oldsagers Opbevarung*) was appointed by King Frederik VI for the conservation of (sacred and secular) antiquities, collections and important sites. In Greece, and to some extent also in the Austrian Empire, attention was first given to movable (religious) objects of artistic and historical interest. Pursuant to the Hellenic Law on antiquities, promulgated in the spring of 1834: “it is forbidden to abstract, without an official permission, any kind of relics from churches or monasteries [απαγορεύεται εις . . . ιδιώτας, άνευ αδείας . . . να αφαιρούν αρχαιότητας οποίας δήποτε από εκκλησίας ή μοναστήρια]”.³⁴ In the course of time, several other European countries possessed similar Monument Acts (e.g. Hungary, 1881; Great Britain, 1882; France, 1887; Bulgaria, 1889; Portugal, 1901), or issued royal decrees and local regulations (such as Belgium, Holland, Spain and Switzerland) to protect their artistic and historic wealth (Baldwin Brown 1905, pp. 44 f.). Italy modeled its 1902 *Monument Law* on the aforementioned ecclesiastical legislation, “that went back five hundred years to prohibit spoliation and independent unsupervised archaeology and mandate protection of the country’s wealth from the ancient periods through the Renaissance” (Schildgen 2008, p. 173). In France the cultural goods of the “*patrimonium Crucifixi*” (“les biens du Crucifie”),³⁵ were eventually included within the scope of the *Historical Monuments Act* of 1887 relating to the protection of the “*monuments historique et artistique*”³⁶ and, in principle, were recognized as property of the State. In particular, the relevant provisions of the 1905 *Law* ‘on the separation of the Churches and the State’, established a legislative basis for:

[A]n additional classification of buildings serving public worship (cathedrals, churches, chapels, temples, synagogues, archbishop’s palaces, bishops’ houses, presbyteries, seminaries), which is to include all buildings exhibiting, in whole or in part, artistic or historical value. The movable or immovable objects referred to in Article 13, which have not yet been included in the ranking list drawn up under the law of 30 March 1887 are, by virtue of this Act, added to the list. [Il sera procédé à un classement complémentaire des édifices servant à l’exercice public du culte (cathédrales, églises, chapelles, temples, synagogues, archevêchés, évêchés, presbytères, séminaires), dans lequel devront être compris tous ceux de ces édifices représentant, dans leur ensemble ou dans leurs parties, une valeur artistique ou historique. Les objets mobiliers ou les immeubles par destination mentionnés à

³⁴ Petrakos V. (1982) *Essay on the Archaeological Legislation* [in Greek], Athens: Ministry of Culture, pp. 136–37.

³⁵ Dormaels M. & Berthold E. (2009) *Patrimoine et sacralisation* (Collection Cahiers de l’Institut du patrimoine de l’UQAM; 8), Quebec: Editions MultiMondes, p. 3.

³⁶ *Loi du 30 mars 1887 pour la conservation des monuments et objets d’art ayant un caractère historique et artistique*: in: *Journal Officiel*, 31.3.1887; see a scanned copy of the *Journal* online at: http://www.mediathèque-patrimoine.culture.gouv.fr/fr/documentation/pdf/loi_mh_30mars1887.pdf.

l'article 13, qui n'auraient pas encore été inscrits sur la liste de classement dressée en vertu de la loi du 30 mars 1887, sont, par l'effet de la présente loi, ajoutés à ladite liste].³⁷

Contrary to the French centralizing approach and expropriation system, in Germany monument legislation was entrusted to the separate member states, where several protective measures were received on a domestic level. Although each member state had developed formal monument Acts by the end of the nineteenth century and no single 'federal' law prevailed, Germany, on the whole, succeeded from early on "in accomplishing a wonderfully profitable result by resorting to legal provisions of a general character",³⁸ such as the numerous fiscal obligations borne by the religious congregations in the case of historical church buildings in Prussia and the regular upkeep of similar sacred buildings by the State of Bavaria. Two landmarks, which set the parameters for other legislative acts in Saxony, Baden, Württemberg, Oldenburg and Bavaria, were the Hessian law of 1902 and the Prussian law of 1907 (Baldwin Brown 1905, pp. 97 f.). As a response to public pressure since the 1880s, the Hessian law in particular, provided for the drawing up of a list of protected monuments (*Denkmalliste*), similar to the French *classement*, by a competent council of monuments, in which representatives from the churches also participated. It stated that private or corporate owners of monuments could be fined or even imprisoned for altering a listed site without state permission (Koshar 1998, p. 37). Strict penal provisions, analogous to the aforementioned measures relating to the protection of the religious built environment (sacred monuments and sites), regarding the protection of *movable* religious goods, could be found even in the *Reich Criminal Code* of 1876 (that remained in force until 1969). Based on the relevant legal instructions of the old regime, § 304 of the Code stipulated that:

He who damages or destroys intentionally and in violation of the law objects of worship belonging to a religious order established within the State, or objects used in religious ceremonies, or else funeral monuments, public monuments, objects preserved in public collections and having an artistic, scientific, or industrial value . . . shall be punished by imprisonment up to three years or by a fine up to 1500 R.M. [Wer vorsätzlich und rechtswidrig Gegenstände der Verehrung einer im Staate bestehenden Religionsgesellschaft, oder Sachen, die dem Gottesdienste gewidmet sind, oder Grabmäler, öffentliche Denkmäler, Gegenstände der Kunst, der Wissenschaft oder des Gewerbes, welche in öffentlichen Sammlungen aufbewahrt werden oder öffentlich aufgestellt sind . . . beschädigt oder zerstört, wird mit Gefängniß bis zu drei Jahren oder mit Geldstrafe bis zu eintausendfünfhundert Mark bestraft].³⁹

It is common place, that in the decades preceding the dawn of the twentieth century, many European countries had moved to legislate the protection of their religious heritage, as part of their individual national patrimony. At the center of

³⁷ *Loi du 9 décembre 1905 concernant la séparation des Églises et de l'Etat*, Article 16 in. *Journal Officiel*, 11.12.1905.

³⁸ Schneider T. (1935) *Report to the Secretary of the Interior on the Preservation of Historic Sites and Buildings*, Washington D.C.: U.S. Department of the Interior, p. 48.

³⁹ *Ibid.*, pp. 51–2.

this legal effort, religious cultural elements operated, on a large scale, as ‘symbolic constructions of collective identity’.⁴⁰ However, in the course of the twentieth century, with its major wars and genocides, amidst the natural and cultural ruins left by several devastating armed conflicts, the focus on the national cultural identity shifted to give birth to ecumenical agreements and treaties intended to combat human impulses to destroy or expropriate sacred monuments, places of worship and works of religious art, on an international level (Schildgen 2008, p. 174). Before the outbreak of the Great War (1914–1918), the Hague Conventions of 1899 and 1907 that had codified the law of warfare, summed up the developments in cultural property law and reinforced the principle that a state retains sovereignty over its national patrimony (Graham 1987, p. 759). Pursuant to the relevant provisions (Articles 27 and 56) of the 1899/1907 Hague Conventions on Land Warfare:

In sieges and bombardments all necessary steps should be taken to spare, as far as possible, edifices devoted to religion, art, science, or . . . historic monuments . . . The property . . . of institutions dedicated to religion . . . even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.⁴¹

Similar efforts followed also the Great War. According to the 1922/1923 Hague Rules of Air Warfare (Article 25):

In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship . . . provided such buildings, objects, or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft.⁴²

After the atrocities of the Second World War, the Fourth Geneva Convention (1949) reinforced the rule already laid down in the previous Hague Regulations, according to which private property and the property of municipalities and of institutions dedicated to religion and the arts must be respected, by prohibiting (in Article 53): “any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations”.⁴³ As the same legal text stipulated (in Article 23): “Each High Contracting Party shall allow the free passage of all consignments of . . . objects necessary for religious worship”.⁴⁴ Acts of hostility against cultural and spiritual heritage were later

⁴⁰ Koenig M. (2007) *Religion and Public Order in Modern Nation-States: Institutional Varieties and Contemporary Transformations*, in: Brugger & Karayanni, op. cit., p. 7.

⁴¹ Schindler D. & Toman J. (eds.) (1988) *The Laws of Armed Conflicts*, Dordrecht: Martinus Nijhoff, pp. 84, 91–2.

⁴² *Ibid.*, p. 211.

⁴³ Pictet J. (ed.) (1958) *IV Geneva Convention relative to the protection of civilian persons in time of war*, Geneva: International Committee of the Red Cross, p. 300.

⁴⁴ *Ibid.*, pp. 177–8.

recognized as illicit also under the 1977 Protocol additional to the Geneva Convention of 1949. Pursuant to the Protocol's Article 53, entitled '*Protection of cultural objects and of places of worship*':

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or *places of worship which constitute the cultural or spiritual heritage of peoples*; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals.⁴⁵

In the same direction of protecting religious cultural property, the Venice Charter for the Conservation and Restoration of Monuments and Sites (1964), that was adopted in 1965 by ICOMOS (International Council on Monuments and Sites),⁴⁶ set out the modern standards for heritage preservation similar to the principles of preservation and restoration laid out by the Athens Charter for the Restoration of Historic Monuments (1931). Since the adoption of the Venice Charter there have been numerous guidelines in the form of recommendations and principles that have broadened the scope of the aforementioned "*cultural or spiritual heritage of peoples*" to include environmental and intangible values (Ahmad 2006, p. 299). The great bulk of the later statutes of the United Nations (UN), the UNESCO, the European Union and the Council of Europe, as well as the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and the World Heritage Convention (1972), represent a similar effort to expand the ambit of the protection and ensure the continuance of mankind's common *sacred* heritage.

There is no doubt, that the European history is replete with devastated religious monuments (innumerable places of worship and devotional artistic treasures), since the time of the medieval general rule of *disrcepio jus praedae*, under which the victor acquired a legal title over the cultural property taken in war (Graham 1987, p. 757) to the present day of modern conflicts. Indeed, the long and painful history of removal and/or destruction of religious cultural property has not perished among the ruins of the great wars of the past. Despite the fact that, centuries after the pillage practices of the Middle Ages, religious cultural heritage in Europe is now firmly protected by modern national/international statutes and recognized as part of the cultural patrimony of all mankind, countless sacred monuments, works of

⁴⁵ UN Treaty 17512 in. United Nations, Treaty Series (1979) Volume 1125-1, p. 27 [=Pilloud C. & De Preux J. (eds.) (1987) *Commentary on the Additional Protocols of 9th June 1977 to the Geneva Convention of 12th August 1949*, Geneva: International Committee of the Red Cross, p. 639]; cf. Art. 8 § 2 b (ix) of the *Rome Statute of the International Criminal Court* (in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, amended in 2010): "*war crimes* means . . . Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments. . .".

⁴⁶ See the text of the Charter at: http://www.international.icomos.org/charters/venice_e.pdf. Accessed on March 31, 2014.

religious art and places of worship have been destroyed in contemporary conflicts. In the case of the divided island of Cyprus (1974), for example:

In the Turkish-occupied north there has been little serious concern for the key heritage places closest to the Greek Cypriot heart – the churches and monasteries ... a declaration adopted by the EU Parliament in July 2006 condemning the pillaging of Christian churches and monasteries in the occupied north and calling for their protection and restoration ‘to their original Greek Orthodox status’. The report stated that more than 200 churches, chapels and monasteries in the occupied north have been desecrated, converted into mosques, or used as military depots, hospitals, stables and nightclubs, and have had their religious artifacts, including more than 15,000 icons, illegally removed to unknown locations.⁴⁷

Let us not forget, also, another relevant example from our modern European history; the bitter conflicts amid the Bosnian war (1992–1995):

Sarajevo’s main mosque and Mostar’s bridge were two of the thousands of Ottoman monuments destroyed or severely damaged in the Bosnian war, just as were many Croat Catholic and Serbian Orthodox buildings across Bosnia and Croatia, as front lines shifted, peace treaties were revised and people were expelled and murdered. It was the Ottoman heritage, caught between Croats and Serbs, that suffered most. Few buildings from the community’s spectacular built heritage escaped scarring altogether. Religious and cultural buildings fared worst; libraries, museums, Islamic schools, tombs and fountains were the enemy. (Bevan 2006, p. 26)⁴⁸

It is evident that sacred places, along with all the related structures, objects and sites, have always been a tangible medium through which people could vent their political and religious tensions. Scholars in the field of comparative religion (Heynickx et al. 2012, pp. 8 f.) have argued that a sacred place has to be understood in a threefold manner. Firstly, it entails a ritual place, as it offers a location for formalized, repeatable symbolic performances; secondly, it has to be interpreted as a significant place because “it focuses crucial questions about what it means to be a human in a meaningful world”⁴⁹; thirdly, and perhaps more importantly, it involves an arena of contestation where sacred symbols can be transformed into emblems of political, or even armed, conflict. As it has been noted “ancient sacred places became modern sites of struggle over nationality, economic empowerment, and basic civil and human rights to freedom of religion and self-determination”⁵⁰; therefore “sacred space anchors more than merely myth or emotion. It anchors relations of meaning and power that are at stake in the formation of a larger social

⁴⁷ Balderstone S. (2009) *Cultural Heritage and Human Rights in Divided Cyprus*, in: Langfield M., Logan W. & Craith M. (eds.) *Cultural Diversity, Heritage and Human Rights: Intersections in Theory and Practice*, Routledge, p. 230.

⁴⁸ Cf. Chapman J. (1994) *Destruction of a common heritage: the archaeology of war in Croatia, Bosnia and Hercegovina*, *Antiquity*, Vol. 68 No 258, pp. 120–6.

⁴⁹ Chidester D. & Linenthal E. (eds.) (1995) *American Sacred Space*, Indiana University Press, p. 12.

⁵⁰ *Ibid.*, p. 3.

reality”.⁵¹ Hence, the religious built environment takes on a totemic quality: a cathedral, a mosque or a synagogue is not just simply an edifice; it represents to its enemies the presence of a community marked for erasure (Bevan 2006, p. 8). In this rationale, the Nazi destruction of 267 German synagogues on the infamous ‘*Kristallnacht*’ in 1938 cannot be construed just as an erasure of religious architecture.

In our contemporary European society, armed conflicts and political struggles are not the only factor of placing religious cultural elements in jeopardy. Nearly all European countries are facing significant challenges to their religious heritage, mainly because of an ongoing demographic flux. Indeed, it seems that virtually almost every country in Europe is experiencing an altering religious landscape: increasingly more churches, monasteries and convents (landmarks of striking architecture and rich interior design) are becoming redundant, because of shrinking faith and diminishing funds. Difficulties are most acute in rural areas, where aging and declining congregations, as well as lack of resources, have a profound effect on structures previously in active use as places of worship.⁵² Redundancy from their original liturgical function (*liturgische Funktion*) is threatening the viability of such buildings in terms of damage by neglect, or loss of character, fabric and contents through conversion. As in the aforementioned example of England, France is also facing particular difficulties with religious edifices dating since the nineteenth century, for several reasons: their size and complexity of construction; their location in relatively impoverished areas; their limited heritage value in comparison with older buildings. In Germany the closure of empty church buildings and the resultant question of their future function is currently a subject of political discussion. Denmark appears to have the lowest rate of church redundancy, though there is also a considerable debate about the levels of expenditure on church buildings. In France the demolition of the latter has become a highly politicized issue, on account of the Roman Catholic Church buildings (dated before 1905) being the ownership of the State or the competent municipal authorities.

It is a fact that various schemes and heritage conservation programs, mostly based on locally-driven projects and initiatives with central technical and resource support, exist in almost all of the European countries. Nevertheless, a substantial question of profound political significance is raised thereof: why should the European states (or the political entities that the latter form jointly) care about their religious, i.e. *sacred*, cultural heritage? Is there a legal basis for such political structures to be engaged with the protection of ‘sacred’ cultural elements, albeit our age of ‘secular’ political institutions?

⁵¹ *Ibid.*, p. 17.

⁵² Cf. Haynes N. (2008) *Research Report on Church-State Relationships in Selected European Countries*, Commissioned by the Historic Environment Advisory Council for Scotland (HEACS).

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Chapter 3

Current Developments and Political Trends

3.1 The Principles of Pluralism and Neutrality

3.1.1 *Religious Pluralism*

At the core of Europe's identity lies a wealth of cultural, linguistic and religious diversity, characterized by plurality. The several forms of religious pluralism in different European countries have been, and still are, bound up with their respective religious traditions. The latter's socio-religious content, organizational forms and process of integration into the nation-state, have resulted in different types of pluralism such as the French 'individualistic pluralism', founded on the religious freedom of the individuals, or the 'pluralism of the communities', a reaction to the assertion of modernity (mainly the rise of secularization) as established, for example, in the Netherlands, and to an extent (as 'communitarian individualistic pluralism') in the United Kingdom (Champion 1999). Moreover, co-operation between State and religion may involve 'principled pluralism', when the State recognizes the public value of religion, or 'pragmatic pluralism', when the State collaborates with religion to achieve common goals (Doe 2011, p. 38), such as the preservation of historical chapels, cathedrals, sculptures, frescos and other monuments that bear witness to a long European history of unparallel aesthetic and religious values; the vast variety of spiritual traditions and the plethora of religious cults (i.e. established practices, rituals and rites) are also constituent elements of the same exquisite European culture.

The fast link between the notions of '*culture*' and '*cult*' is based prima facie upon their common etymological root.¹ As it has been demonstrated (Odendahl 2005, p. 356), both words stem from the Latin verb '*colere*' (i.e. care, cultivate), that refers simultaneously to the state of being intellectually or artistically

¹ Cf. Danesi M. & Rocci A. (2009) *Global Linguistics: An Introduction*, Berlin: Walter de Gruyter, pp. 138–9.

cultivated and to that of cultivating religious rituals (*in deos colere*). This etymological simultaneity is not just a verbal coincidence. The evolution and development of religious rituals and rites, as the anthropological and archaeological research has revealed,² has always been firmly associated with the profound human need for artistic expression and creativity. The latter is also a fundamental aspect of religious freedom, both in its individual and collective form. In this rationale, religious pluralism³ becomes a key factor of freedom of religion, as well as an important aspect of cultural identity (Donders 2002, p. 278).

Collective freedom of religion (*kollektive Religionsfreiheit*) in particular,⁴ which could be construed as the freedom of each religious community to act autonomously within the public sphere (Kalb et al. 2003, pp. 61 f.; von Campenhausen and de Wall 2006, pp. 52 f.; Pesendorfer 2009, pp. 16 f.), serves as the ‘fertile ground’ on which any such community may cultivate, on an equal basis, its own cultural products and practices. Since religious communities aspire to live pursuant to their very own customs, on the basis of their very own beliefs and traditions, this cultural process unfolds naturally in accordance with the normative rules prescribed *per se* by each group. In view of this, the recognition of the collective aspect of the right to manifest religion and beliefs as a way of representing their specific cultural characteristics, provides religious groups with the means of preserving their unique way of life and culture.

This autonomous and culturally fruitful associative life, as the European Court of Human Rights (ECtHR) has already stipulated, should be safeguarded against any unjustified State interference. As the Court underlined, *obiter dicta*, in the case of *Hassan and Chaush v. Bulgaria*, religious communities traditionally exist in the form of organized structures and abide by rules, which are often seen by followers as being of a divine origin.⁵ Accordingly, the ECtHR articulated further the importance of the collective dimension of religious liberty, affirming that the State must remain neutral vis-à-vis different religious cultures and groupings and

² Pfeiffer J. (1982) *Creative explosion: Inquiry into the Origins of Art and Religion*, New York: Harper & Row; MacCauley R. & Lawson T. (2002) *Bringing Ritual to Mind: Psychological Foundations of Cultural Forms*, Cambridge University.

³ Regarding the notion of ‘religious pluralism’ see Baubérot J. (1990) *Pluralisme et minorités religieuses*, Louvain: Peters; Wentz R. (1997) *The Culture of Religious Pluralism*. Boulder: Westview; Wydmusch S. (2001) *Religiöser Pluralismus: Zeichen der Moderne? Deutschland und Frankreich im Vergleich*, Spiritia. Zeitschrift für Religionswissenschaft, pp. 8–14; Banchoff Th. (2006) *Religious pluralism, globalization, and world politics*, New York: Oxford University; Monsma V. & Soper C. (2009) *The Challenge of Pluralism*, New York: Rowman & Littlefield Publishers.

⁴ See from the relevant German literature: Muckel St. (1997) *Religiöse Freiheit und staatliche Letztentscheidung, Die verfassungsrechtlichen Garantien religiöser Freiheit unter veränderten gesellschaftlichen Verhältnissen*, Berlin: Dunker & Humblot, p. 169 f.; Jeand’ Heur B. & Corioth St. (2000) *Grundzüge des Staatskirchenrechts*, Richard Boorberg Verlag, p. 72 f.; Weber H. (2002) *Die individuelle und kollektive Religionsfreiheit im europäischen Recht einschließlich ihres Rechtsschutzes*, Zeitschrift für evangelisches Kirchenrecht Vol. 47, p. 265 f.

⁵ *Hassan and Chaush v. Bulgaria*, Reports of Judgments and Decisions 2000-XI, § 62.

must not recognize one group, among several, as being the legitimate one (Frowein 2007, p. 251). Different religious communities and sub-communities can coexist and develop their cultural goods within a democratic and pluralistic system, and, therefore, the State should interfere with their free cultural development as little as possible.⁶ As expressed by the dissenting opinion in the case of *Cha'are Shalom ve Tsedek v. France*: “the role of the public authorities is not to remove any cause of [religious] tension by eliminating pluralism, but to take all necessary measures to ensure that the competing groups tolerate each other”.⁷ It is evident that, from a legal viewpoint, Europe remains secular, first and foremost, by virtue of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The latter is not only a legally binding text, but also:

[A] document that vouches for a shared ethos -in particular a common conception of and a common respect for human rights. The European states upholding this ethos are ‘driven by the same spirit and possess a common heritage of political ideals and traditions, of respect for liberties and of the pre-eminence of law’ (Preamble to the Convention) -a shared ethos that manifests itself on the intellectual level by an attitude promoting critical thinking (including about oneself), freedom of judgment (*libre examen*) and the duty of knowledge. European *laïcité*, therefore, does not mean the end of religious systems but the end of religion as a system of power and the repositioning of its role in a pluralistic society freed from domination by the clergy. (Willaime 2010, p. 24)

Western European societies are, indeed, in broad terms, shaped by the hegemonic regime of secularism (Casanova 2004). As liberal democratic societies they tolerate and respect individual rights, among them religious freedom. However, in the words of Taylor (1994, p. 62) “liberalism can’t and shouldn’t claim complete cultural neutrality”. In other words, as the Grand Chamber of the ECtHR has recently adjudicated in the controversial case of *Lautsi and others v. Italy*,⁸ even if the ECHR imposes on Contracting States a “duty of neutrality and impartiality”:

⁶ *Serif v. Greece*, ECHR Reports of Judgments and Decisions 1999-IX, § 53. Cf. *Hassan and Chaush v. Bulgaria*, § 62 “[T]he believers’ right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable from pluralism in a democratic society and is thus an issue at the very heart of the protection, which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable”.

⁷ *Cha'are Shalom ve Tsedek v. France*, Joint Dissenting Opinion, Reports of Judgments and Decisions 2000-VII.

⁸ *Lautsi and others v. Italy*, No 30814/06, ECHR Reports of Judgments and Decisions 2011. The Court held that in deciding to keep crucifixes in the classrooms of the state schools in Italy, the authorities acted within the limits of the ‘margin of appreciation’ left to the State in the context of its obligation to ‘respect’, in the exercise of the functions it assumed in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious convictions. Furthermore, the Court considered that no separate issue arose under Article 9 of the ECHR. Cf. McGoldrick (2011) *Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?*, Human Rights Law Review Vol. 11 No. 3.

[T]he decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development. It emphasizes, however, that the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols.⁹

3.1.2 *Aspects of Neutrality*

The study of various European constitutional texts and the examination of the relationship between State and religious traditions in different European countries provide corroboration for the aforementioned argument. Across the liberal democratic spectrum, references to ‘God’ (e.g. Germany, United Kingdom) or to the ‘Holy Trinity’ (e.g. Greece, Ireland) at a constitutional level are not unusual in Europe (Willaime 2010, p. 18), while at the same time, some states maintain traditional ties with one religion (e.g. Denmark, Greece, Malta, England and Scotland in the United Kingdom) or established partnerships with various ‘recognized’ religious groups (e.g. Germany, Italy). At the level of political philosophy, these examples are not to be considered just as the remnants of a religious past, but rather as cultural signals of a contemporary, vivid, “nonprocedural liberalism” (Taylor 1994, p. 63), which is evident even in those European countries that have adopted a more ‘militant’ aspect of secularism (*laïcité*). Indeed, even in France, which is a secular country par excellence, the doctrine of ‘*laïcité positive*’ generates co-operation between State and religion in relation to the protection of sacred cultural heritage: far from being neglectful or careless about the country’s religious heritage, the State provides assistance to the maintenance of historic places of worship (Haynes 2008, p. 14; Doe 2011, p. 34). This *positive secularism*, according to which the State accommodates the various religious traditions and their cultural products, does not preclude, but, on the contrary, incorporates, as part of the doctrine of religious tolerance and non-discrimination, the principle of the State’s neutrality; in other words, as the *Conseil d’État* stated in its 2004 report on *laïcité*: “while the State recognises no religion, it must ignore none” [*l’Etat ne doit donc désormais “reconnaître” aucune religion, il ne doit en méconnaître aucune*].¹⁰ This dynamic approach of the fundamental principle of the State’s neutrality, constitutes an essential prerequisite for the existence and continuance of religious pluralism; it implies that only a *positively* neutral, and not an indifferent, State can protect effectively the religious cultural treasures that it encompasses and, hence, be in the position to safeguard diversity, both in religious and cultural terms, of the heritage located within its territory.

⁹ *Lautsi and others v. Italy*, op. cit., §§ 60 and 68.

¹⁰ Conseil d’État (2004) *Un siècle de laïcité - Rapport public*, Available online at: <http://www.conseil-etat.fr>. Accessed on March 31, 2014.

On the basis of religious neutrality, the notion of a positive, mindful and attentive stance of the State towards the religious elements of its cultural heritage, has been articulated by the Austrian legal theory (Kalb et al. 2003, pp. 42–43; Pesendorfer 2009, p. 139; Potz 2009). The latter has drawn a subtle distinction between the two different forms of religious neutrality: the ‘distancing’ Neutrality (*distanzierende Neutralität*) and the ‘including’ Neutrality (*hereinnehmende Neutralität*). On the one hand, as far as the State performs genuine non-exchangeable tasks such as public administration or jurisdiction that fall within the core of its sovereign authority, religious neutrality is realized in its ‘distancing’ form: any possible identification with religious beliefs is avoided. On the other hand, within the cultural sphere, which is located at the periphery of the State’s sovereignty and includes *inter alia* the protection of monuments and other cultural elements, the State can (and must) welcome the various cultural goods that have been created by the different religious traditions, and shelter them under its aegis as protected elements of a common heritage. This protection, however, can be efficient and consistent with the axiom of religious and cultural diversity, only if the State acknowledges the various religious traditions on an equal basis (as long as the latter function within the limits of *reasonable pluralism*),¹¹ and respects not only the aesthetic or historical value of these goods, but also their unique, i.e. religious, character, which constitutes an essential feature of their cultural structure. In this rationale, the protection and preservation of the religious heritage remains in accordance with the principle of the State’s denominational neutrality and the safekeeping of religious pluralism within a democratic society. The distinction between ‘distancing’ and ‘including’ Neutrality justifies, for example, the presence of the crucifix, which “is above all a religious symbol”,¹² in classrooms but not in courtrooms.¹³

It is evident that the above deliberations have to be consistent with a modern substantial comprehension of the freedom of religion, based on “the foundational

¹¹ According to the political philosophy of John Rawls, the capacity for genuine toleration and mutual respect, that is inherent to the human nature, gives hope that the diversity of worldviews in a democratic society may represent not merely pluralism, but *reasonable pluralism*: i.e. toleration within the religious sphere and acceptance of the fundamental values of a democratic society. Thus, a reasonable pluralism might contain, e.g. a reasonable Catholicism, a reasonable interpretation of Islam or a reasonable atheism; being reasonable, none of these doctrines will advocate the use of coercive political power to impose conformity on non-believers Cf. Richardson H. & Weithman P. (eds.) (1999) *The Philosophy of Rawls. A Collection of Essays V: Reasonable Pluralism*, New York, London: Routledge; Wallner J. (2003) *Rawls und Religion: Zur religionsrechtlichen Konzeption im Werk von John Rawls*, Österreichisches Archiv für Recht und Religion No. 50, pp. 554–87.

¹² *Lautsi and others v. Italy*, op. cit., §§ 66.

¹³ See Federal Supreme Court of Switzerland, judgment of 18 January 1995 on crucifixes in courtrooms (ATF 121 I 42) and judgment of 26 September 1990 on crucifixes in classrooms (ATF 116 Ia 252); German Bundesverfassungsgericht, judgment of 16 May 1995 on crucifixes in classrooms (BVerfGE 93, 1) and judgment of 17 July 1973 on crucifixes in courtrooms (BVerfGE 35, 366).

documents” that “constitute the basic building blocks”¹⁴ of its legal architecture, i.e. the *Universal Declaration on Human Rights* adopted in 1948,¹⁵ the *International Covenant on Civil and Political Rights* (ICCPR) adopted in 1966,¹⁶ and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (*Religion Declaration*) adopted in 1981.¹⁷ As a result of this basic human right, the State is bound to denominational neutrality, which is described, across the European continent, as a constitutional principle also (Doe 2011, pp. 40 f.). Nevertheless, the right of religious freedom does not maintain only a negative aspect, but a positive significance as well (Potz 2009).

One such constituent element of the positive aspect of religious freedom, is the right of a religious group to establish and maintain places of worship (Kalb et al. 2003, pp. 193 f.; von Campenhausen and de Wall 2006, pp. 189 f.). It is argued (Villaroman 2012) that the normative content of this right entails: the right to construct a place of worship and to make necessary repairs, subject only to local planning regulations¹⁸; the right to solicit and receive voluntary financial and other contributions for the purpose of building a place of worship;¹⁹ the right of protection to places of worship against interference by the State or non-State stakeholders; and the right against discrimination in applications to build a place of worship.²⁰ As the Human Rights Committee has commented: “The freedom to manifest religion or belief in worship . . . encompasses a broad range of acts . . . including the building of places of worship, the use of ritual formulae and objects, the display of symbols . . .”²¹ According to a similar wording of a U.N. *Report* issued in 2007:

[M]osques, churches and other places of worship need to be fully respected and protected by the authorities. The Special Rapporteur would like to remind the Government of article 6 (a) of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief which states that the right to freedom of thought, conscience,

¹⁴ Taylor P. (2005) *Freedom of Religion: UN and European Human Rights Law and Practice*, Cambridge University Press, pp. 1–2.

¹⁵ G.A. Res. 217A(III), UN Doc. A/3/810 (1949).

¹⁶ G.A. Res. 2200A (XXI), 21, U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

¹⁷ G.A. Res. 36/55, UN Doc.A/36/51 (1982).

¹⁸ Cf. Gabrielli V. (1998) *Le droit de l’urbanisme et les ‘nouveaux mouvements religieux’: le cas des Témoins de Jéhovah*, Mémoire polygraphié, Sophia Antipolis: Université de Nice, p. 44 f.

¹⁹ Cf. Lupu I. & Tuttle R. (2002) *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, Boston College Law Review No. 43.

²⁰ See for example the case of *Manoussakis v. Greece*, Reports of Judgments and Decisions 1996-IV. In the *Manoussakis* case the ECtHR concluded that Article 9 of the ECHR had been violated because the Greek authorities had tended to use the possibilities afforded by the relevant law to impose rigid, or indeed prohibitive, conditions on the practice of religious beliefs by certain non-Orthodox movements, in particular by hindering the construction of places of worship by Jehovah’s Witnesses; see Konidaris I. M. (2005) *Legal Theory and Practice on Jehovah’s Witnesses* [in Greek], Athens: Ant. Sakkoulas, p. 448 f.

²¹ Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, July 30, 1993 (CCPR/C/21/Rev.1/Add. 4 § 4).

religion or belief includes the freedom ‘to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes’. Furthermore, in its Resolution 2005/40, the Commission of Human Rights urged States to exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights law, to ensure that religious places, sites, shrines and religious expressions are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction.²²

In fact, the above collective right of religious groups to establish and maintain the infrastructure necessary for their enjoyment of religious freedom, is intertwined, in many cases, with the State’s obligation to protect various tangible elements, i.e. various monuments (temples, mosques, synagogues and churches) and other places of cultural and/or historical significance, as integral parts of a broader, national, heritage. In these cases, the protective approach should respect the dual nature of these *sacred* structures, “which are at once the places in which the defining activity of the faith occurs, and at the same time vital parts of a community’s historical and cultural legacy”.²³ Indeed, the same structures perform a critical cultural function in a twofold manner: on the one hand, they constitute physical locations (*loci sacri*) where members of a religious group assemble in accordance with their spiritual rituals and ceremonies, and, on the other hand, they serve as significant symbols of a community’s historical and cultural legacy within the public sphere.

The aforementioned approach of an ‘including’ neutrality towards the multiplicity of religious structures, objects, places and expressions, remains in harmony with the principle of pluralism, as long as the protection of these cultural assets is also harmonized with the principle of cultural diversity. The latter is as necessary for the European societies as biodiversity is for nature. In line with the second Article, entitled ‘*From Cultural Diversity to Cultural Pluralism*’, of the UNESCO *Universal Declaration on Cultural Diversity* adopted by the General Conference of UNESCO in Paris, November 2, 2001:

In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities, as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society, and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.²⁴

Moreover, according to the *Preamble* of the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* of 2005,²⁵ cultural diversity, which is “a defining characteristic of humanity”, forms

²² Report of the Special Rapporteur on Tajikistan, A/HRC/7/10/Add. 2 (27 November 2007), § 55.

²³ Lupu I. & Tuttle R., op. cit., p. 1176.

²⁴ *Standard-setting in UNESCO, Conventions, Recommendations, Declarations and Charters adopted by UNESCO (1948–2006)* (2007) Leiden - Boston: UNESCO Editions/Martinus Nijhoff Publishers, p. 708.

²⁵ *Ibid.*, p. 326 f.

“a common heritage of humanity” and thus “should be cherished and preserved for the benefit of all”. As it is emphasized within the same international instrument:

[C]ultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples and nations . . . flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, is indispensable for peace and security at the local, national and international levels.²⁶

Besides, specifically in support of religious pluralism and diversity, UNESCO has already set, within the context of the World Heritage Convention, important guidelines for the necessary building of a mutual respect and dialogue between the various stakeholders (state authorities, religious communities, institutions, property owners, funding bodies or other interested partners), on the basis of three pillars: (1) understanding the continuing nature of religious and sacred heritage, (2) having the capacity to protect its authenticity and integrity, including its particular spiritual significance, and (3) sharing the knowledge of a common history. In 2010, for the first time in the history of the World Heritage Convention, the issue regarding the protection of religious and sacred heritage was discussed at the international level, involving the active participation of several religious authorities, within the framework of a major meeting, that took place in Kiev (Ukraine) under the aegis of the United Nations General Assembly. The international meeting adopted unanimously a joint *Statement*,²⁷ which reaffirms “the vital further role of religious communities in conveying, expressing and sustaining spiritual identity”. It also stresses that culturally and environmentally sustainable management of religious heritage “should be the responsibility of all stakeholders concerned” and, therefore, the continuing nature of religious heritage calls for dialogue and mutual understanding “between the religious communities concerned and all other stakeholders” (such as the State authorities), who must work “in collaboration and close coordination” in order to preserve the significance of their sacred cultural elements. Finally, the Statement recognizes “the need to raise awareness of all stakeholders of the importance of the management of religious places in order to enable mutual understanding and acceptance of the World Heritage significance and specificity of each heritage place, and its associated spiritual and religious values”. The

²⁶ *Ibid.*, p. 326; cf. Article 2 of the *Declaration on the Responsibilities of the Present Generations towards Future Generations* (adopted by the General Conference of UNESCO at its 29th session, Paris, 12 November 1997): “It is important to make every effort to ensure, with due regard to human rights and fundamental freedoms, that future as well as present generations . . . are able to preserve their cultural and religious diversity”.

²⁷ See the full text of the Kiev *Statement* on the protection of religious properties within the framework of the World Heritage Convention, in: <http://whc.unesco.org/en/religious-sacred-heritage/>. Accessed on March 31, 2014; cf. Quebec *Declaration* on the Preservation of the Spirit of Place, adopted at the 16th General Assembly of ICOMOS in 2008, as well as the *Resolution 17GA 2011/35: Protection and enhancement of sacred heritage sites, buildings and landscapes* adopted at the 17th General Assembly of ICOMOS (available online at: whc.unesco.org. Accessed on March 31, 2014).

ascertainment that the dominant model in Europe is that of co-operation between State and religion (Doe 2011), is a promising step towards the prescribed directions.

3.2 European Policies on Religious Culture

3.2.1 *European Union*

At the level of the European Union (EU), the *Treaty on the functioning of the European Union* (TFEU) requires the EU to take culture into account in all its actions so as to foster intercultural respect and promote diversity (Article 167 § 4).²⁸ Therefore, one important objective is to mainstream cultural policy into activities in other areas of EU policy. Accordingly, pursuant to the *Declaration ‘on the status of churches and non-confessional organizations’* (No. 11), annexed to the Amsterdam Treaty and reaffirmed in Article 17 of the TFEU,²⁹ the latter “respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States”.³⁰ In this context, the regulation of religious culture, along with its specific elements (monuments, sites and objects), remains primarily an issue of the respective States.

From the religious perspective, the peaceful enjoyment of property is a fundamental aspect of both religious freedom and the right of faith communities to institutional autonomy. From the secular perspective, given that much religious property in Europe is of historical, architectural, and cultural importance, States have a direct interest in its protection as part of the national heritage. (Doe 2011, p. 165)

This is the case, for example, for the protection and support of the ancient cultural heritage located within the monastic communities of *Mount Athos*, which “in accordance with its ancient privileged status, is a self-governing part of the Hellenic State” (Art. 105 of the Greek Constitution). In this light, one should also interpret the Joint Declaration on *Athos* (annexed to the Final Act of the *Treaty of Accession of Greece to the European Communities*), that refers to the special spiritual and cultural status of ‘*avaton*’ (in Greek ‘*ἀβάτου*’) of the *Athos* ancient monastic peninsula and its artistic treasures.³¹

²⁸ Official Journal of the European Union, C 83, 30.3.2010, p. 122.

²⁹ *Ibid.*, p. 55.

³⁰ Official Journal of the European Union, C 340, 10.11.1997 p. 133; cf. Wieshaider W. (2007) *The Principle of “Unity in Diversity” and Law of Religion in Europe*, in: Unger F. & Eder M. (eds.) *Religion and European Integration. Religion as a Factor of Stability and Development in South Eastern Europe* [=Proceedings of contributions from the Maribor Symposium 2005, Book series of European Academy of Sciences and Arts 6], Weimar: Verlag und Datenbank für Geisteswissenschaften, pp. 89–102.

³¹ Cf. Evrigenis D. (1993) *Réflexions théoriques sur la Déclaration commune relative au Mont Athos*, in: Tachiaos A. (ed.) *Mount Athos and the European Community*, Thessaloniki: Institute for Balkan Studies, p. 13 f.; Konidaris I. M. (2003) *The Mount Athos Avaton*, Athens: Ant. Sakkoulas, p. 9 f.

However, as intercultural dialogue has gained currency in recent years, a set of common EU policies have emerged dealing with cultural religious affairs in different framings and institutional configurations, including those of the European Commission. The latter has engaged, directly or indirectly, with the ‘religious dimension’ of cultural heritage, through several initiatives that have been co-ordinated by the Directorate-General for Education and Culture.³² In accordance with Article 167 of the Treaty on the Functioning of the EU, which provides that: “[t]he Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”,³³ the notion of religious diversity has been addressed primarily through policy initiatives on intercultural dialogue (Carrera and Parkin 2010, pp. 27 f.), led by a competent Unit within the aforementioned Directorate, that focuses on “Culture policy, diversity and intercultural dialogue”. Relevant initiatives and projects have been also launched recently under the aegis of the Directorate General for Research and Innovation: e.g. the Project MUSOMED (2006–2009), which studied the architectural heritage in the Mediterranean area and explored the influence of the religious aspects of this heritage on an intercultural level,³⁴ or the Project RELIGARE (2010–2013), which examined the normative frameworks of secularism in different European countries, in conjunction, among other socio-economic and cultural values, with their religious heritage.³⁵

With some exceptions, one can observe many common points in the way European countries manage and preserve the various places of worship and the ‘movable goods’ within them, as an important part of the cultural heritage of Europe. From a financial point of view, the heritage dimension of places of worship makes religious culture eligible for funding (Fornerod 2010). As it has been noted by Professor Doe (2011, p. 180):

[European] States commonly provide financial support for the preservation of places of worship of importance to the national life and heritage. They may do so typically either on the basis of laws, as is the case in Belgium and Luxembourg, or of agreements, such as in Estonia with respect to the Estonian Council of Churches. Sometimes aid is extended

³² In practice, the European Commission, Directorate-General for Education and Culture, ensures a coordinating role over the activities managed by other Directorate-Generals with regard to culture. In terms of regional policy, the European Regional Development Fund (ERDF) has recognized the potential of activities related to heritage in generating both employment and growth and has funded various types of project involving historical buildings and sites. See Chapuis M. (2009) *Preserving our Heritage, Improving our Environment, Volume I, 20 years of EU Research into Cultural Heritage*, European Commission/Directorate-General for Research Environment, Luxembourg: Publications Office of the European Union, p. 9 f.

³³ Official Journal of the European Union, C 83, 30.3.2010, p. 121.

³⁴ *Pluralism and religious diversity, social cohesion and integration in Europe Insights from European research* (2011) European Commission, Directorate-General for Research and Innovation, p. 56 f.

³⁵ *Ibid.*, p. 22 f.

beyond the maintenance of historic buildings to that of religious artifacts and archives, which may also be of educational value.

Within the scope of EU's 'including' policy on funding religious culture (on the basis of the aforementioned principle of 'including Neutrality'), a typical example would be the *Resolution 'on economic aid to Mount Athos (Monastery Region)'*. As stated in the official text of the relevant document adopted by the European Parliament in 1981:

Whereas Mount Athos has a cultural and religious tradition unique in the Christian world as an actively thriving community with a history going back almost 1100 years; whereas valuable religious, artistic and historical Christian treasures are preserved there; whereas in recent years an amazing spiritual revival has been observed there as a result of the presence of young educated monks, not only from Greece but also from other Member States of the Community; whereas the need to preserve and develop this unique community is not just a Greek problem but concerns the entire community and the civilized world at large, and whereas it is not an exclusively Orthodox problem, but a problem for all Christians; whereas the funds required are beyond the means of the Holy Community, the monks themselves and indeed of the Greek Government; whereas it would be impossible to find words eloquent enough to describe the beauty and importance of Mount Athos and to explain the imperative need to preserve and strengthen this spiritual and historical refuge, [the Parliament] calls on the Commission to provide without delay financial and any other assistance required to avoid the loss of important and valuable works.³⁶

Following the above, since 1987, the Commission has helped to finance the restoration works undertaken on the holy monasteries of Mount Athos. These financial contributions have been attributed from the budgetary line B-3200 (destined to support programs for the protection and preservation of Europe's rich and diverse cultural heritage *in globo*) directly to the Greek *Centre for the Preservation of Mount Athos Heritage*, which is under the direct supervision of the Greek Ministry for Macedonia and Thrace. The financial support has been given on the basis of the annual restoration programs submitted to the Commission by the *Center*, which—under the direct supervision of the aforementioned Ministry—is responsible for the execution of the restoration works.³⁷ According to the relevant data,³⁸ the sum of ECU 6.1 million has been granted from the European Regional Development Fund under the Environment and Central Macedonia operational programs of the 1994–1999 Community Support Framework for Greece. In addition, as part of its action to promote the protection, conservation and development of monuments of exceptional importance in Europe, the Commission has granted the monasteries of Mount Athos ECU 300,000 in 1995, ECU 350,000 in 1996, ECU 350,000 in 1997, ECU 350,000 in 1998 and ECU 240,000 in 1999. Another source of financial assistance has been the EEA Financial Mechanism, which, since it was set up, has committed more than ECU 16 million for projects on Mount Athos at the

³⁶ Official Journal of the European Communities, 15.6.1981, C 144, p. 92.

³⁷ Official Journal, 14.03.1997, C 83, p. 91.

³⁸ Official Journal of the European Communities, 28.6.1999, C 182, p. 21.

request of the Greek authorities. The relevant decisions, allocating financial mechanism funds, have been made by the Financial Mechanism Committee.

3.2.2 Council of Europe

The Council of Europe's *Framework Convention on the Value of Cultural Heritage for Society* (2005) signed in Faro (Portugal) in 2005 and entered into force in 2011,³⁹ “[c]onvinced of the soundness of the principle of heritage policies . . . which treat all cultural heritages equitably and so promote *dialogue among cultures and religions*”,⁴⁰ requires that the member States:

- ensure, in their respective national context, that legislative provisions exist for exercising the right to cultural heritage;
- foster an economic and social climate which supports participation in cultural heritage activities;
- promote cultural heritage protection as a central factor in the mutually supporting objectives of sustainable development, cultural diversity and contemporary creativity;
- recognize the value of cultural heritage situated on territories under their jurisdiction, regardless of its origin.⁴¹

Within the ambit of the Faro Framework Convention, the aforementioned political undertakings considered to be necessary for the development of a relevant, individual and collective, right to religious cultural heritage⁴² and a corresponding responsibility of the State to protect this heritage “as a central factor in the mutually supporting objectives of sustainable development, cultural diversity and contemporary creativity” [Article 5 (e)]. This process should take place in accordance with

³⁹ Council of Europe Treaty Series (CETS) No. 199, Faro, 27.X.2005. Cf. the ‘*Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States*’ in: Official Journal C 320, 16.12.2008 pp. 10–2.

⁴⁰ *Preamble* of the Faro Framework Convention. See the official text of the Convention online at: <http://conventions.coe.int>. Accessed on March 31, 2014.

⁴¹ Article 5 (*Cultural heritage law and policies*) of the Faro Convention.

⁴² According to Article 4 (*Rights and responsibilities relating to cultural heritage*): “The Parties recognise that: a. everyone, alone or collectively, has the right to benefit from the cultural heritage and to contribute towards its enrichment; b. everyone, alone or collectively, has the responsibility to respect the cultural heritage of others as much as their own heritage, and consequently the common heritage of Europe; c. exercise of the right to cultural heritage may be subject only to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others”.

a ‘sustainable use’⁴³ of the cultural heritage, which requires Parties to “promote respect for the integrity of the cultural heritage by ensuring that decisions about change include an understanding of the cultural values involved” [Article 9 (a)]. The notion of ‘integrity’, as invoked in the Faro Framework Convention, is not reduced to a static perspective, but rather involves “interpreting, respecting and where possible adding weight to the complex and multi-dimensional values which constitute the identity and authenticity of the heritage, including values which are contested”.⁴⁴ In this rationale, it is obvious that all relevant policies should take into consideration the fact that:

[C]ultural heritage plays a positive role in promoting mutual understanding and tolerance between the many communities within Europe ... Valorisation of a cultural heritage through intercultural dialogue requires ongoing research and debate, especially to take account of disagreements which arise in the course of interpretation, for example when an ancient site is sacred to more than one religion.⁴⁵

The Council of Europe has been actively involved in the field of policy making in relation to the religious built environment, since the ‘*Report on redundant religious buildings*’ of 1989, which was followed, within April of the same year, by a Draft *Resolution* that was unanimously adopted by the Committee on Culture and Education.⁴⁶ The draft was succeeded, 1 month later, by the ‘*Resolution 916 (1989) on Redundant Religious Buildings*’, that was adopted by the Parliamentary Assembly of the Council of Europe on 9 May 1989.⁴⁷ According to the wording of this historic *Resolution*, the Assembly recalled:

[T]he Council of Europe’s statutory duty to safeguard the ideals and principles which are the common heritage of member states and to which religious buildings bear witness ... point[s] out that religious buildings are often of architectural and historical significance, and recall[s] its longstanding concern for the integrated conservation of this heritage and to ensure a future for our past; believ[es] that, when a religious building is no longer viable as such, efforts should be made to ensure a future use, whether religious or cultural, as far as possible compatible with the original intention of its construction; not[es] that a church or any other major religious building is often the focal point and central feature of a

⁴³ Its is well known that the ‘principle of sustainability’ draws on and connects with many different disciplines and fields; see for example Vos W. & Meekes H. (1999) *Trends in European cultural landscape development: perspectives for a sustainable future*, Landscape and Urban Planning, Vol 46, No. 1, pp. 3–14; Littig B. (ed.) (2004) *Religion und Nachhaltigkeit: Multidisziplinäre Zugänge und Sichtweisen* [Vol. 46], Münster: LIT Verlag; Tweed C. & Sutherland M. (2007) *Built cultural heritage and sustainable urban development*, Landscape and Urban Planning, Vo. 83, No. 1, pp. 62–9. For an introduction to the ‘principle of sustainability’ within the primary scope of Environmental Law, see Richardson B. & Wood S. (eds.) (2006) *Environmental law for sustainability: a reader*, Oxford: Hart Publishing; Bosselmann K. (2008) *The principle of Sustainability. Transforming law and governance*, Hampshire: Ashgate.

⁴⁴ Convention on the Value of Cultural Heritage for Society, op. cit., *Explanatory Report* (Notes under Article 9).

⁴⁵ *Ibid.* (Notes under Article 7).

⁴⁶ See Parliamentary Assembly of the Council of Europe, Doc. 6032, April 13, 1989.

⁴⁷ Full text of the above *Resolution* available online at: <http://assembly.coe.int>.

community and a local landmark, and believ[es] that sufficient time and encouragement should be given to such communities to rediscover a common interest and future role for such buildings.⁴⁸

In the same vein, a *Report* on cathedrals and other major religious buildings in Europe was issued in 2000.⁴⁹ In the relevant *Explanatory Memorandum*, which was submitted before the competent Committee on Culture and Education, the special Rapporteur, H. Eversdijk, noted that:

Cathedrals are emphasised because, historically, they were among the most important buildings created in Europe to the extent that they have qualities of universal cultural value, and this has been recognised by so many of them being inscribed on Unesco's World Heritage List, including Canterbury and Durham (England), Chartres (France), Burgos (Spain). Others, such as Kutna Hora (Czech Republic), Bamberg (Germany) or Strasbourg (France) are the key monuments in World Heritage Cities. Several such buildings are still used for religious purposes even though the religion may itself have changed: for example Syracuse Cathedral, which was formerly a Greek temple, the Lusignan Cathedrals of Famagusta and Nicosia and (for a time) Hagia Sophia in Istanbul, which were converted into mosques. Indeed there are many major buildings and places of other faiths throughout Europe and still in use. This is the case for example of the historic mosques in Turkey (especially Istanbul) or Bosnia-Herzegovina (Sarajevo). Important Jewish synagogues dating principally from the 17th to the 19th centuries survive in many European cities, though many (as in Toledo) are no longer in use. The second half of the twentieth century saw the rapid spread of Buddhism in Europe and the Buddhist communities have often focused on developing an existing historic castle or house as a monastery, thereby providing that building with a future. Also included in our qualification "major" are the great monasteries of the Benedictine, Cistercian, Augustinian and Carthusian orders and the Orthodox monasteries for example in Romania, though many are now preserved or romantic ruins such as San Galgano (Italy), Jumièges (France) or Fountains (UK).

As it was eloquently explained, the scope of the *Report*, rather than being limited to the fabric of the religious buildings, took into additional consideration the fact that:

[S]acred buildings of all traditions often have sculpture, carving, painted decoration, wall paintings and furniture which are not only of great cultural value in themselves but which are also integral aspects of the buildings and can only be divorced from them with loss . . . Thus many Orthodox churches in Eastern Europe may be relatively small but have mural paintings or iconostases of outstanding artistic and historic value and which require painstaking conservation. We should not of course overlook the future of the thousands of more modest or smaller churches, mosques, synagogues and monasteries that survive in profusion across the cultural landscape of Europe.

On the basis of the above, and in order to promote awareness of the problems experienced in Europe with regard to the culturally outstanding religious buildings of all faiths, the Council of Europe issued *Recommendation 1484 (2000)* regarding the 'Management of cathedrals and other major religious buildings in use'.⁵⁰ The

⁴⁸ *Ibid.* Cf. the *verbatim* wording of the Draft Resolution (Doc. 6032), *op. cit.*

⁴⁹ See Parliamentary Assembly of the Council of Europe, Doc. 8826, September 27, 2000.

⁵⁰ Recommendation 1484 (2000) *Management of cathedrals and other major religious buildings in use*, that was adopted by the Standing Committee, acting on behalf of the Assembly, on November 9, 2000.

main purpose is to encourage the respective Governments to prepare authoritative lists of sacred buildings in use, and to energize partnerships at national and local levels that will ensure the survival of such buildings.

The quest for the ‘survival of sacred buildings in use’, as an indispensable part of the Council of Europe’s strategy on ‘integrated conservation policies’,⁵¹ is even more evident in the *Recommendation ‘on measures to promote the integrated conservation of historic complexes composed of immovable and moveable property’*.⁵² On the basis of this international instrument, religious cultural heritage ‘constitutes an irreplaceable expression of the richness of Europe’s cultural heritage’, and thus each state should create preconditions necessary for the conservation of [religious] religious historic complexes composed of immovable and moveable property ‘while respecting the constitutional principles and fundamental rights affecting ownership’. Also, within the ambit of the said cultural policy falls the *Declaration ‘on the protection and rebuilding of places of worship in Kosovo and the wider Balkans’*, which was adopted on 18 July 2001 by the Committee of Ministers. The latter:

[U]rges those responsible to ensure the protection of the places of worship and to help in their reconstruction, as symbols of a possible return of mutual confidence and of harmonious coexistence between peoples, nationalities, ethnic groups and religions. It underlines the importance of restoring the original character and architectural style of places of worship which have been destroyed or abandoned.⁵³

The above *Declaration*, that refers to the severe “damage to Kosovo’s rich cultural heritage, including its churches, mosques, monasteries and other religious monuments”⁵⁴ during the armed conflicts of 1998–1999, demonstrates a political commitment, regarding the protection of Europe’s common religious cultural heritage, on behalf of the Parliamentary Assembly. The latter has taken, in fact, a significant interest in the diversity of the various cultures and cults in Europe, recognizing “religion, through its moral and ethical commitment, the values it upholds, its critical approach and its cultural expression [as] a valid partner of democratic society”.⁵⁵

⁵¹ Bizzaro F & Nijkamp P. (1996) *Integrated Conservation of Cultural Built Heritage* [=Serie Research Memoranda 12], Amsterdam: Vrije Univeriteit; Pickard R. (ed.) (2001) *Policy and Law in Heritage Conservation*, New York: Spon Press, 2001, p. 8 f.

⁵² Recommendation No. R (98) 4, Adopted by the Committee of Ministers on 17 March 1998 at the 623rd meeting of the Ministers’ Deputies.

⁵³ Declaration on the protection and rebuilding of places of worship in Kosovo and the wider Balkans, adopted by the Committee of Ministers on 18 July 2001, at the 761st meeting of the Ministers’ Deputies. Full text available online at: <https://wcd.coe.int/>. Accessed on March 31, 2014.

⁵⁴ Singh R. P. (2008) *The Contestation of Heritage: The Enduring Importance of Religion*, in: Graham B. & Howard P (eds.) *The Ashgate Research Companion to heritage and identity*, Ashgate Publishing Company, p. 134.

⁵⁵ Doc. 8270, Report of the Committee on Culture and Education. Parliamentary Assembly debate on January 27, 1999 (5th Sitting).

In addition, on the basis of the *European Declaration on Cultural Objectives*, the Assembly has admitted that “the various European cultures are strongly rooted in a humanitarian and religious tradition, which is the source of their dedication to freedom and human rights”.⁵⁶ In this rationale, the Assembly has adopted a *Resolution ‘on the Jewish contribution to European culture’*,⁵⁷ and has issued a *Recommendation ‘on the contribution of the Islamic civilization to European culture’*.⁵⁸ According to the latter, the Assembly recommended that the Committee of Ministers “should find room for consideration of the Islamic world” within the intergovernmental program of activities of the Council of Europe and in its recommendations to the governments of member States. Following the same guidelines, the Assembly proposed that:

Cultural itineraries of the Islamic world inside or outside Europe and cultural exchanges, exhibitions, conferences and publications in the fields of art, music and history should be encouraged. Museums have an important role to play in this respect . . . Selected Islamic works, classic and modern, should be translated and published in a manner more conducive to greater understanding in Western society.

Nevertheless, in reality, as the Parliamentary Assembly of the Council of Europe has noted in its *Recommendation ‘on Religion and change in central and eastern Europe’*, adherents of the (eastern and western) Christian tradition “show little interest in Jewish culture, such an integral part of European heritage, or in Islamic culture, which is becoming increasingly a part of the European scene”.⁵⁹ For that reason, the Assembly has recommended that the Committee of Ministers call on the governments of the member States, the European Union, and also the authorities and organizations concerned:

- to co-operate with the church authorities in identifying and sharing their responsibilities, such as in maintaining historic buildings and in religious education, and in promoting joint discussion of the major social, moral, ethical and cultural issues which modern societies face;
- to include information on Europe’s main religious cultures and practices in school curricula;

⁵⁶ *European Declaration on Cultural Objectives*, Adopted by the 4th Conference of European Ministers responsible for Cultural Affairs (Berlin, 1984); cf. D’Angelo M. & Vespérini P. (1999) *Cultural Policies in Europe: Method and Practice of Evaluation*, Council of Europe Publishing, p. 16 f. and 88 f.

⁵⁷ *Resolution 885* (1987). See Doc. 5778, Report of the Committee on Culture and Education. Final text adopted by the Assembly on October 5, 1987 (13th Sitting). Cf. *Recommendation 1291* (1996) ‘on Yiddish culture’: Doc. 7489, Report of the Committee on Culture and Education. Final text adopted by the Standing Committee, acting on behalf of the Assembly, on March 20, 1996.

⁵⁸ *Recommendation 1162* (1991). See Doc. 6497, Report of the Committee on Culture and Education. Final text adopted by the Assembly on September 19, 1991 (11th Sitting).

⁵⁹ *Recommendation 1556* (2002). See Doc. 9399, Report of the Committee on Culture and Education. Final text adopted by the Assembly on April 24, 2002 (13th Sitting).

- to support the activities of non-governmental organizations working to strengthen mutual understanding between religious groups, and protect the religious cultural heritage;
- to take action to secure equal access to the media, education and culture for representatives of all religious traditions;
- to encourage the setting up of special centers to promote interconfessional relations, and also the exchange of exhibitions and fairs, centered on cultural heritage, masterpieces of religious art and books, and helping people to familiarize themselves with Europe's various religious cultures; to promote exchange programmes to give students, research workers and artists a full picture of the ethical, moral and cultural values of Europe's religions;
- to encourage the development of cultural itineraries in Europe and linking Europe with neighboring countries so as to reflect and develop past perspectives and new possibilities of cultural communication;
- to provide public libraries with publications, which detail the cultural achievements and beliefs of the various religious traditions; to promote scientific research aimed at uncovering the shared roots of Europe's various cultures and fostering a better understanding of the ways in which they interrelate and complement one another.⁶⁰

In the light of all the above, one should also take into consideration *Resolution* on the '*Freedom of expression and respect for religious beliefs*', which, *inter alia*, stresses that the 'common European heritage' is based on the principle of cultural and religious diversity:

Christians, Muslims, Jews and members of many other religions, as well as those without any religion, are at home in Europe. Religions have contributed to the spiritual and moral values, ideals and principles which form the common heritage of Europe. In this respect, the Assembly stresses Article 1 of the Statute of the Council of Europe (ETS No. 1), which stipulates that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage.⁶¹

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⁶⁰ *Ibid.*

⁶¹ Resolution 1510 (2006) See Doc. 10970, Report of the Committee on Culture and Education. Final text adopted by the Assembly on June 28, 2006 (19th Sitting).

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Chapter 4

Defining Religious Cultural Heritage in Europe

4.1 Conceptual Basis

4.1.1 Religious Memory

As Hannah Arendt, following the French poet René Char said of our cultural heritage *in globo*, “*Our inheritance was left to us by no testament*”.¹ The idea of *inheritance* as a valuable resource, which European societies preserve in order to pass it on to future generations, is central in the case of religious cultural heritage. However, even if the respective religious communities bequeath it from generation to generation under specific, in most cases written, canonical provisions that define its sacred content, its proper usage and its functional purposes, the religious cultural heritage “can be as much about forgetting as remembering the past” (Ashworth et al. 2007, p. 6). This becomes quite obvious in cases where sacred buildings, e.g. historic churches, are threatened with demolition and the local communities argue about “how much of their common memory resides, both directly and indirectly, in what they are about to lose” (Davie 2000, p. 163). A recent example in this respect could be found in the historic parish of St. Marguerite in Sainte Gemmes d’Andigné (France). The latter was scheduled for demolition in 2012 by the local authorities. According to the municipal council’s decision:

After long reflection and a study of the costs involved, the town council voted to keep the bell tower, but demolish the main church and build a new church in its place . . . that would cost a million euros less than carrying out a complete restoration of the church. It is part of a larger renovation project . . . [in order] to bring back the soul to the village centre and make it evolve.²

¹ Arendt H. (1993) *Between Past and Future: Six Exercises in Political Thought*, New York: Penguin Books, p. 7. Cf. Borgman E. (2009) *Religion and Heritage: a Brief Introductory Essay*, in: Borgman E., Scatena S. & Susin L. (eds.) *Which Religious Heritages for the Future?* [=International Review of Theology, Concilium 2009/2], London: SCM Press, p. 11.

² Deutsche Welle, Article available online at: <http://www.dw.de/historic-french-churches-face-demolition/a-16122874>. Accessed on March 31, 2014.

In response to the above decision, several members of the local community formed an association to rescue the church from demolition (l' Association de Sauvegarder de l'Eglise de Sainte Gemmes d'Andigné): they gathered signatures of support and collected data from architectural and legal experts to refute the council's statements. According to one of the members: "It's our history! If we don't see anymore this church, we are not the same people".³ In other words, to paraphrase Winston Churchill's famous quote, *we shape our religious buildings; thereafter they shape us*.

It is evident that, even if in most European countries the participation in public acts of worship has dropped to low levels (Crouch 2000) due to an ongoing widespread secularization process (Pollack et al. 2012; Halman and van Ingen 2013), the memorial side of our cultural environment remains in living contact with our ambiguous religious past. We still locate ourselves in the midst of historical churches, mosques and synagogues; streets, piazzas, fountains and towns named after Saints or biblical events; sacred monuments of the past and commemorative sites of spiritual significance. As it has been noted in Maurice Halbwachs' book "*La topographie légendaire des Évangiles en Terre Sainte: étude de mémoire collective*",⁴ religious monuments and symbols become an integral part of our collective memory,⁵ due to the fact that memory and symbolism are inextricably intertwined.⁶ Likewise, according to a Vatican Document of 1999 regarding the *memorial* aspect of sacred places⁷:

A shrine is first of all a *place of memory*, the memory of God's powerful activity in history, which is the origin of . . . the faith of each believer . . . The shrine becomes a sort of *living memorial* . . . The "mystery of the temple" thus offers a wealth of possibilities for meditation and fruitful activity. As a *memory* of our origin, the shrine calls to mind God's initiative and helps pilgrims to recognize it with a sense of awe, gratitude and commitment.

In this sense, the various religious cultural elements become true *témoignages visuels* (visual testimonies)⁸ of sacredness, inasmuch as their monumentality

³ *Ibid.*

⁴ Halbwachs M. (1941) *La topographie légendaire des Évangiles en Terre Sainte: étude de mémoire collective*. Presses universitaires de France.

⁵ In relation to the notion of 'collective memory' within culture in general, you can see Halbwachs M. (1980) *The Collective Memory*, London: Harper and Row; Connerton P. (1989) *How Societies Remember*, Cambridge University; Levinson S. (1990) *Written in Stone: Public Monuments in Changing Societies*, Durham: Duke University; Ben Amos D. & Weissberg L. (1992) *Cultural Memory and the Construction of Identity*, Detroit: Wayne State University; Mathieu J. (ed.) (1995) *La mémoire dans la culture*, Quebec City: University of Laval; Choay F. (2001) *The invention of the historic monument*, Cambridge University.

⁶ Cf. Assmann J. (2006) *Religion and cultural memory: ten studies*, Stanford University Press, p. 9 f.

⁷ *The Shrine: Memory, Presence, and Prophecy of the Living God*, Vatican Document of 8 May 1999, Pontifical Council for the Pastoral Care of Migrants and Itinerant People, Available at: www.vatican.va. Accessed on March 31, 2014.

⁸ Koch G. (ed.) (2000) *Byzantinische Malerei: Bildprogramme - Ikonographie - Stil*, Symposium in Marburg vom 25.-29.6.1997 [=Spätantike - frühes Christentum - Byzanz: Reihe B, Studien und Perspektiven 7], Wiesbaden: Reichert, p. 128.

corresponds to an authentic monumental religiosity. The latter goes beyond the ‘preservation of historical memory’ and emerges as a timeless symbol of *religious memory*, that manifests, through the ages, the creedal beliefs and (individual or collective) religious activity of man. This potential is one that can be recognized from the perspective of social theory and architectural discourse⁹:

Through the cultural artefact of a name, undifferentiated space is transformed into marked and delimited place. Stories and tales may be attached to such places, making them resonate with history and experience. The culturally constructed elements of a landscape are thus transformed into material and permanent markers and authentications of history, experience and values. Although the stories change in the retelling, the place provides an anchor of stability and credibility. (Pearson and Richards 1994, p. 3)

As far as the European continent is concerned, the notion of ‘religious memory’, as it has been articulated by Davie (2000), is in fact mutating due to a rapid social and economic change.

At one extreme this [mutating religious memory] can be little more than an affection for historic buildings and practices providing a link with earlier times; at the other it indicates a concern to have continued access to sources of values not otherwise available within modern society nor created by its massive diversity of institutions and intellectual productions ... The reaching for religious memory, which is involved in both a minimal ‘heritage’ approach to religion and a more profound searching for help with timeless and unanswerable ontological questions, relates also to the search for meaning and identity, which are always fundamental to religious matters. Pursuing this path then helps us both to explore further the continuing value Europeans place on their religions, and the reasons for the prevailing weakness of those religions. (Crouch 2000, p. 93)

Thus, it is impossible to grasp the complex and multifaceted substance of the collective European memory, without recognizing the various spiritual strata of its vast cultural heritage:

[T]he Hellenistic, together with the important Greek *logos*; the Jewish, together with the messianic preaching of the prophets of Israel; the Roman, the location where the Greek heritage and the Judeo-Christian inheritance were transmitted; the cultural richness of Islam and the Arab-Muslim civilization; and the emergence of modern reason in the era of the Enlightenment. (Geffré 2009, p. 26)

The above become quite obvious within the ambit of religious architectural heritage. Several cases exist throughout Europe, where the notion of monumental religiosity is materialized in the form of elaborate structures, that still bear witness to a complex and flavorful religious physiognomy. In these cases, the multiple religious layers of the fabric correspond to the different (interior or exterior) architectural and artistic elements of the same edifice; these elements must be preserved as inherent characteristics of the structure’s overall cultural identity. This is the case, for example, for the Great Mosque of Cordova (*Mezquita de Córdoba*) in Andalusia, Southern Spain.¹⁰ The Mosque, which has been converted

⁹ See also Inge J. (2003) *A Christian Theology of Place*, Ashgate, p. 104 f.

¹⁰ For an architectural and historical overview of the Great Mosque of Cordova see Creswell K. (1958) *A Short Account of Early Muslim Architecture*, Penguin Books, p. 213 f.

into a Catholic Christian Cathedral since the thirteenth century, is regarded as one of the most accomplished monuments of the Abbasid period. It is said that the decoration in gold mosaic of the dome in front of the Mosque's *mihrab* was made by craftsmen being sent from Constantinople by the Byzantine Emperor at the express request of the Caliph of Cordova al-Hakam.¹¹ It is no coincidence that the Great Mosque became a model case for ICOMOS (International Commission on Monuments and Sites), an organization responsible for nominating sites to UNESCO for the World Heritage List, when the group met in Cordova in 1973.¹² Based on the guidelines of the 1964 Venice Charter, and in view of the fact that historic religious monuments, such as the said *Mezquita*, are "living witnesses of their age old traditions",¹³ the Commission acknowledged the contribution made by the *Mezquita* because of its complex cultural history. It also made recommendations about the maintenance of the traditional colors and size of the built environment, it linked the monument to its history from which it cannot be separated, it dealt with decorations that are an integral part of the building, stating that sculpture, painting and other decoration ought not to be removed (the co-existence of the *mihrab* and the crucifix in the same sacred space exemplifies this recommendation), and, most importantly, it emphasized that the building should be allowed to feature its multiple aesthetic and historic value, i.e. its mixture of Byzantine, Syrian, Visigothic, Islamic, Renaissance and Baroque elements.¹⁴

A similar model of how the multilayered cultural history of a sacred edifice records simultaneously the connection between the collective religious memory and the shared cultural patrimony, can be traced to the monument of *Rotunda* in Thessaloniki, Northern Greece.¹⁵ The monument was erected by Emperor Galerius around AD 300 as a temple dedicated to Zeus and during the late fourth century, under the ruling of the Byzantine Emperor Theodosios I, it became an Orthodox Christian church. Following the Turkish conquest of 1590, the building was redesigned as an Islamic Mosque (*Masjid*) and acquired a minaret.¹⁶ The latter was preserved, despite of the re-conversion of the building into a Christian church *manu militari* after the re-capture of Thessaloniki by the Greek troops in the early twentieth century. Having served three religions, *Rotunda*, which has been inscribed in the World Heritage List of UNESCO since 1988, stands in our days

¹¹ *Ibid.*, p. 215.

¹² See Schildgen B. D. (2008) *Heritage or Heresy: Preservation and Destruction of Religious Art and Architecture in Europe*, New York: Palgrave Macmillan, p. 97 f.

¹³ *Ibid.*, p. 98.

¹⁴ Nieto Cumplido M. (1976) *La mezquita catedral de Córdoba y el ICOMOS*, Servicio de publicaciones del Ayuntamiento de Córdoba, Córdoba. Cf. Schildgen op. cit., p. 98.

¹⁵ See Velenis G. (1974) *Some Observations on the Original Form of the Rotunda in Thessaloniki*, *Balkan Studies*, Vol. 15 No. 2, pp. 298–307.

¹⁶ Cf. Grabar O. (1983) *Symbols and Signs in Islamic Architecture* in: Holod R. & Rastopfer D., *Architecture and Community: building in the Islamic world today*, New York: Aperture, p. 28: "As a tower for the call to prayer, the minaret is but a sign suggesting a function; It becomes a symbol when it reminds one of Islam".

as an archaeological site and museum under the responsibility of the Greek Ministry of Culture. However, once a month, the authorities grant permission to the Orthodox Metropolis of Thessaloniki and the monument functions temporarily as a Christian church dedicated to Saint George (Ναός Αγίου Γεωργίου).

On the basis of all the above, it becomes evident that the (inter)religious character of *Rotunda* is an essential constituent of its cross-cultural significance. This multi-layered sacredness of the building, is reflected on its architectural figure (that refers to the ancient Roman Pantheon), its interior decoration (that refers to the technical perfection and beauty of the Early Byzantine Art), and its exterior elements (that refer to the Islamic past of the edifice). As in the case of *Mezquita*, the notion of religious memory, as a vital information encoded and stored within the physical continuity and structure of the sacred edifice, becomes an intrinsic element of its cultural identity. If we remove any of the aforementioned religious layers, we alter the monument's cultural identity. In this rationale, it is impossible to define or evaluate the 'mosaic' of our religious cultural heritage, without connecting each and every piece with the legacy of its religious past.

4.1.2 Religious Aesthetics

There is an unbreakable thread connecting the notion of *memory* and that of *aesthetics*. As it has been aptly noted, “*séparer l'esthétique de la mémoire n'a pas de sens*” (Trova 1995, p. 115). In the case of religious cultural heritage, the monumental character is, indeed, intertwined with an aesthetic dimension (Wynn 2009, pp. 206 f.). This particular dimension, as Max Weber has underlined in his essay ‘*Religious Rejections of the World and Their Directions*’, is shown in a variety of religious objects and forms:

[I]n idols, icons, and other religious artifacts ... in music as a means of ecstasy ... in temples and churches as the largest of all buildings, with the architectural task becoming stereotyped (and thus style-forming) ... in paraments and church implements of all kinds which have served as objects of applied art.¹⁷

The above *sui generis* aesthetic value of religion, as “an inexhaustible fountain of opportunities for artistic creation”,¹⁸ defined theoretically as ‘*Religionsästhetik*’,¹⁹ is broadly understood, within the public sphere of our

¹⁷ Weber M. (1948) *Religious Rejections of the World and Their Directions*, in: Hans Gerth H. & Wright Mills C. (eds.) *From Max Weber: Essays in Sociology*, Routledge, pp. 323–59 (p. 341).

¹⁸ *Ibid.*

¹⁹ Cancik H. & Mohr H. (1988) *Religionsästhetik* in: Cancik H., Gladigow B. & Laubscher M., *Handbuch religionswissenschaftlicher Grundbegriffe*, Vol. I, Stuttgart: Kohlhammer, pp. 121–56; Münster D. (2001) *Religionsästhetik und Anthropologie der Sinne*, München: Akademischer Verlag; Lanwerd S. (2001) *Religionsästhetik: Studien zum Verhältnis von Symbol und Sinnlichkeit*, Würzburg: Königshausen und Neumann; Idem (ed.) (2003) *Der Kanon und die Sinne. Religionsästhetik als akademische Disziplin* (Etudes Luxembourgeoises d'Histoire et de

modern-day cultivated Western societies, in terms of a “*secular enjoyment of religious beauty*” (Bercken 2005, p. 37). The latter is also recognized *per se* by the respective European States, which, though secular, cannot remain culturally color-blind (“*farbenblind*”)²⁰ before the aesthetic beauty and artistic magnitude of the various elements of religious traditions. However, it is self-evident that the relevant decision made by the State authorities as to what is deemed worthy of protection and preservation in light of its artistic value, will always be, more or less, subjective, since any such aesthetic judgment is based, by its very nature, on inner experiences and beliefs regarding beauty, taste and art.

Nevertheless, even in the colorful world of (religious) art, there are some objective guidelines. The American jurisprudence has provided relevant evidence: in the case of *Morris European and American Express Co. v. United States* (1898), the plaintiff imported into the port of New York a church altar, including a tomb and reredos, for presentation to the Trinity Episcopal Church at Binghamton. The collector classified it for duty, under the relevant provisions of the U.S. customs legislation as “dressed stone, not specifically provided for”; the importer protested, claiming the altar free of duty, as a “work of art, imported expressly for presentation to an incorporated religious society”. Was the said altar a work of art or was it just a religious product of practical utility? According to the position of the Attorney for the United States:

It is difficult to define a work of art, or say just where a work of art begins or where it ends. In a large sense, everything from the commonest design on a cheap cast-iron stove to the frieze of the Parthenon can be included in the expression ‘works of art’. There is no established line. Every man draws his own line. The nearest I can get to it is that what is generally understood by artists as a work of art purely is only such as is produced by a professional artist in his own studio, either wholly by himself or with such assistance as he needs, under his own immediate direction and supervision.²¹

As the District Court of the Southern District of New York remarked *obiter dictum*, the said church altar falls within the accepted definition of a ‘work of art’ as “*it embodies something more than the mere labor of an artisan*”.²² Besides, just because this religious product maintains a practical (devotional) utility this does not negate its artistic character (Karlen 1979, p. 200). More precisely, the Court adopted the position that:

Science des Religions), Luxembourg: Eurassoc; Koch A. (ed.) (2004) *Themenheft: Ästhetik – Kunst – Religion*, München: Münchener Theologische Zeitung 55/4; Mohr H. (2006) *Religionsästhetik*, in: Auffarth C., Kippenberg H. & Michaels A. (eds.) (2006) *Wörterbuch der Religionen*, Stuttgart: Kröner, pp. 431–3. Cf. Burch Brown F. (1989) *Religious Aesthetics: A Theological Study of Making and Meaning*, Princeton University; Idem (2000) *Good taste, bad taste and Christian taste, Aesthetics in Religious Life*, Oxford University.

²⁰ Heckel M. (1968) *Staat, Kirche, Kunst: Rechtsfragen kirchlicher Kulturdenkmäler*, Tübingen: Mohr, p. 131.

²¹ Federal Reporter (1898) *Cases Argued and Determined in the Circuit Courts of Appeals and Circuit and District Courts of the United States*, Vol. 85, p. 965.

²² *Ibid.*, p. 966.

Any human work made with the specific purpose of stirring human emotions is a work of art . . . “Art is the work of a human being, in plastic material or color, or something to render a sentiment, to imitate a form, or something of that kind, which does not grow on trees, which is not in nature.” If the proportions are sufficiently symmetrical, and the lines so far free from faults as to stir the emotions of people, the work is to them a work of art. Whether it is good or bad art is a mere question of quality. This work was originally designed by one of the leading American artists in this style of church architecture. An artist of reputation in France made original designs for the angels, and imposed his personality upon the work. The specifications and detail drawings show this fact beyond question. Whether the design and construction show such originality of conception and perfection of execution as to mark it as the work of a genius is not the question herein. The work as an entirety confessedly falls within the accepted definition of a work of art. It represents the handiwork of an artist; it embodies something more than the mere labor of an artisan; it is “a skillful production of the beautiful in visible form”. It is unnecessary to consider the contention that architectural works are not works of art [since this limitation] would exclude the famous churches, triumphal gates and graceful towers of Europe.²³

It is argued that, as far as religious buildings are concerned, the accentuated conservatism of the churches has shunned any great innovation; in most cases, contemporary sacred edifices do not show any original conception as they only hybridize styles of the past.²⁴ However, the artistic splendor and grandeur of these old styles, as they are reflected on the remarkable products of religious architecture and classic craftsmanship of the respective European traditions, provide corroboration for the aforementioned statement of the American Court. Besides, ever since Le Corbusier’s masterpiece *Notre Dame du Haut*, post-modern religious architecture is commonly described by a diversity of aesthetics and new ways of viewing familiar styles. In any case, it should be noted that the aesthetic dimension of religious culture is not limited to the “skillful productions of the beautiful in visible form”. Apart from a given spatial character, the religious cultural heritage may acquire also intangible characteristics:

Monumental qualities are not solely plastic, not to be apprehended solely through looking. Monuments are also liable to possess acoustic properties, and when they do not, this detracts from their monumentality. Silence itself, in a place of worship, has its music. In cloister or cathedral, space is measured by the ear . . . Architectural volumes ensure a correlation between the rhythms that they entertain (gaits, ritual gestures, processions, parades, etc.) and their musical resonance. It is in this way, and at this level, in the non-visible, that bodies find one another.²⁵

4.1.3 Religious Beliefs

The plenty of *credos and dogmas* incorporated in the various religious traditions, as expressed through the artistry and symbolism of their products, is anything but irrelevant to the cultural significance of the latter. In fact, the aesthetic power of

²³ *Ibid.*, pp. 965–6.

²⁴ Von Mises L. (1972) *The Anti-Capitalistic Mentality*, Libertarian Press Inc., p. 62.

²⁵ Lefebvre H. (2005) *The Production of Space*, in: Leach N. (ed.) *Rethinking architecture: a reader in cultural theory*, Oxford: Routledge, p. 136.

religious cultural objects, far from dimming their sacred potency, seems to amplify it in a rather synergistic way. Especially in the case of objects or structures that maintain an active devotional character, the element of ‘sacredness’ is highlighted by their respective artistic or historic value, as an integral part of their cultural ‘identity’.

The numinous/aesthetic synthesis, which is defined as the inner unity (*‘innere Einheit’*) of the products of religious culture (Heckel 1968, p. 131), becomes quite obvious in the case of religious (movable or immovable) elements, that still maintain a liturgical function. The spatial arrangement and topography of an ancient Christian shrine, for example, apart from expressing the harmony of its form and the spectacle of its architectural style, may also reveal a “spirit of welcome . . . to the many people who in the loneliness of a secularized and desacralized world perceive deep in their hearts a yearning for and an attraction to holiness”.²⁶ An analogous ‘sacred’ dimension can be located in the variants of religious symbolic systems, such as Christian iconography, Islamic figural representation²⁷ or Sephardic visual arts:

In such systems a coherent, non-verbal language is employed in such a way that someone familiar with the conventions can understand the significance of the symbols (i.e. what they signify). In many cases . . . the divine sentences may be repeated just as often and as authoritatively as the calligraphic inscriptions in an Islamic holy place. (Renfrew 1994, p. 53)

Religious symbols and sacred objects are indeed tangible evidence of underlying norms and values. This visual rhetoric serves as an effective medium for conveying inner emotions and ideas and as a vehicle for religion, which is, according to Durkheim’s definition, a “unified system of beliefs and practices relative to sacred things”.²⁸ Those ‘sacred things’ cannot be truly defined and protected, unless their authentic ‘religious character’ is being revealed and respected.

In the Gesu in Rome, for example, the intellectual unity of the iconography, spreading from chapel to chapel and nave to nave, and emulated in the spatial and spiritual unity of the architecture, attempted, in Howard Hibbard’s phrase, ‘to furnish a progressive religious experience for those who entered’. Once inside, especially when gazing upwards at Gaulli’s *‘The Adoration of the Holy Name of Jesus’* on the ceiling, one does not remain a passive observer, but becomes an active participant in the religious drama itself. (Howes 2007, p. 15)

This ‘deep’ human feeling of religiosity has been (individually or collectively) manifested over time, within the public sphere of Europe, through the spectrum of

²⁶ *The Shrine: Memory, Presence, and Prophecy of the Living God*, op. cit.

²⁷ See Allen T. (1988) *Aniconism and Figural Representation in Islamic Art*, in: Idem, *Five Essays on Islamic Art*, Manchester: Solipsist, pp. 17–37. Cf. De Kesel M. (2009) *The Image as Crime. On the Monotheistic Ban on Images and the “Criminal” Nature of Art*, in: Hlavajova M., Lutticken S. & Winder J. (eds.) *The Return of Religion and other Myths: A Critical Reader in Contemporary Art*, Utrecht: BAK Critical Reader Series, pp. 98–116.

²⁸ Durkheim E. (1912) *The Elementary Forms of the Religious Life*, translated by Cosman C. (2001) Oxford University Press, p. 46.

objects, images and spaces of religious devotion (e.g. cathedrals, paintings or sculptures). In our modern era of secular values, these substantial elements of the overall European heritage are being respected and protected *prima facie* because of their architectural, archaeological or historical significance. However, apart from their obvious artistic or cultural connotation, these elements reflect also the respective religious traditions from which they stem, and, at the same time, incorporate the specific ideas, beliefs and theological doctrines, with which they have been historically associated. Therefore, due to their religious background, they form their unique ‘religious character’ as a permanent trait and indelible attribute of their cultural status, regardless of whether they are ‘devoid’ of their original function or they are located outside their original context.

In fact, this substantial ‘character’ enhances our understanding of the impalpable features of the sacred artifacts located inside museums,²⁹ churches and monasteries throughout the European continent and explains the importance of religious heritage (whether movable or immovable) as a visual and intellectual feast, in spite of one’s personal (dis)beliefs or impressions of divinity. This is the case, for example, for the seventeenth century Spanish polychrome sculptures made by craftsmen such as Gregorio Fernández, Francisco Antonio Gijón, Juan Martínez Montañés or Pedro de Mena; in such life-size sculptures, that depict vividly religious themes, the spiritual magnitude of the narrative equals to the striking visual beauty and realism of the composition. Thus, in order to fully comprehend the delicate artistry of these masterpieces, one must acknowledge that these cult objects are generated by ‘worship’ and somehow still function “as a step on the upwards slope that leads to union with the divine”.³⁰ As it has been noted:

Hyper-real sculptures such as these made the sacred truly palpable ... In their original context such sculptures, whether positioned on altars and lit by candles or processed through the streets on religious feast days, would have had a strong impact not only upon the faithful but also on painters’ visual imaginations. Today, when the *paso* (float) carrying Juan Martínez Montañés’ (1568–1649) sculpture of *Christ carrying the Cross* (1619) is carried on the shoulders of thirty men during Holy Week in Seville, the effect is outstanding. The movement of the *paso* as it sways from side to side endows the sculpture with a disconcerting sense of life, as if the streets of Seville had suddenly turned into the streets of Jerusalem.³¹

The *ipso facto* ‘sacredness’ of the elements of religious cultural heritage, which is an attribute inseparable from the notion of *religious memory* and that of

²⁹ Cf. Bergot F. (1997) *Présentation des œuvres d’art à caractère religieux dans les collections publiques*, in: *Forme et sens: La formation à la dimension religieuse du patrimoine culturel*, Paris: École du Louvre/Ministère de la Culture, pp. 98–102; Paine C. (ed.) (2000) *Godly things: museums, objects and religion*, London: Leicester University.

³⁰ De Ceballos A. R. G. (2009) *The Art of Devotion: Seventeenth-century Spanish Painting and Sculpture in its Religious Context*, in: Bray X. (ed.) *The sacred made real: Spanish painting and sculpture, 1600–1700*, London: National Gallery - Yale University, p. 57.

³¹ Bray X. (2009) *The sacred made real: Spanish painting and sculpture, 1600–1700*, in: Idem, *op. cit.*, p. 17.

aesthetics, cannot be, for that reason, disregarded by the competent (legislative or judicial) State authorities, given the fact that:

[I]t is up to the legislation and jurisprudence regarding the protection of cultural property, not to separate the two notions of Memory and Aesthetics, as they seem inseparable in creating a suitable environment for the modern citizen, within which Gods and symbols support him in his deep existential anxiety. (Trova 1995, p. 115)

In essence, the notion of ‘religious character’ establishes a symbiotic relationship between the tangible and the intangible within the field of religious cultural heritage, by shedding light on the underlying religious values and norms of the various parts and aspects of this heritage. This dialectic provides a better grasp of the notion of ‘religiousness’ as a cultural feature, and, since according to Dworkin we can improve our understanding of law by referring to other fields of knowledge,³² it is particularly fruitful in the legal interpretation of the international normative instruments relating to the protection of religious cultural property. For instance, the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954) refers to the 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*”³³; the *Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970) refers to the ‘cultural property’, which is specifically designated by each State as being of importance for archaeology, history, literature, art or science “*on religious or secular grounds*”³⁴; the *Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works* (adopted by the General Conference of UNESCO in Paris, November 19, 1968) refers to the ‘immovables’, such as archaeological and historic sites, structures or other features of historic, artistic or architectural value, whether of “*religious or secular*” character.³⁵

In all the aforementioned cases, only with a clear view and understanding of the notion of ‘religious character’ can we turn to the true nature and scope of the protection provided by law. This unique ‘character’ requires a delicate safeguarding approach and methodology, since it involves a larger framework of religious norms, values, rituals and practices within which tangible elements take on shape and significance (Bouchenaki 2007, p. 108). Following the wording of the *Istanbul Declaration* of 2002, the aforesaid intangible network constitutes:

[A] set of living and constantly recreated practices, knowledge and representations enabling individuals and communities, at all levels, to express their world conception through systems of values and ethical standards. Intangible cultural heritage creates

³² Dworkin R. (1982) *Law as interpretation*, Critical Inquiry, Vol. 9 No. 1, pp. 179–200 (p. 179).

³³ *Standard-setting in UNESCO, Conventions, Recommendations, Declarations and Charters adopted by UNESCO (1948–2006)* (2007) Leiden – Boston: UNESCO Editions/Martinus Nijhoff Publishers, p. 44.

³⁴ *Ibid.*, p. 104.

³⁵ *Ibid.*, p. 403.

among [religious] communities a sense of belonging and continuity, and is therefore considered as one of the mainsprings of creativity and cultural creation. From this point of view, an all-encompassing approach to [religious] cultural heritage should prevail, taking into account the dynamic link between the tangible and intangible heritage and their close interaction.³⁶

To put it differently, the protection of religious cultural heritage requires the respect for the cultural practices, sacred traditions and festive rites, which are incarnated in the variants of manifestations (signs, symbols, images), places and structures of the respective religious communities. These physical elements of religious cultural heritage are in fact the vehicles by which religious beliefs and ideas are mediated to us. In this sense, the aforesaid concept of internal unity (*innere Einheit*), which is also regarded as a meaningful and substantial unity (*Sinn- und Wesenseinheit*) of religious heritage, (Heckel 1968, pp. 130 f.), suggests that the legal status of the latter makes sense only as an indivisible cult and cultural ‘*Sinntotalität*’, i.e. as a conceptual harmony and wholeness (Heckel 1968, pp. 76 f.; Heckel 1987, p. 85) of tangible and intangible features. This holistic approach means putting tangible religious heritage in its wider (intangible) context and taking into account the dynamic link between the numinous and the profane. As it has been, likewise, stressed by Bouchenaki (2007, p. 109):

A holistic heritage approach will therefore mean viewing the tangible heritage in its wider context, particularly in the case of religious monuments and similar sites, and relating it more closely to the [religious] communities concerned in order to take into better account the relevant spiritual, political, or social values.

4.2 Legal Dimensions

In studying a legal concept, one must seek the relevant legal definitions that will delimit the field of application, and identify the public authorities with the competence to carry out the necessary actions. In the case of religious cultural heritage, the identification and delimitation process should be based on the official instruments relating to the active choice as to which elements of this cultural ‘galaxy’ are deemed worthy of preservation as an ‘inheritance’ for future generations (Blake 2000, p. 68). The legal foundation of this ‘choice’, which is eventually made by the sovereign States on a national level and by the competent intergovernmental organizations on an international level, lies, accordingly, upon the respective national legislation and international law relating to cultural heritage. Three international organizations have made reference (directly or indirectly) to the specific elements of the concept of ‘religious cultural heritage’: The European Union, the

³⁶ The Declaration was adopted at the close of the Round Table of 71 Ministers of Culture on “*Intangible Cultural Heritage, mirror of cultural diversity*”, organized by UNESCO in Istanbul on 16 and 17 September 2002 (United Nations Year for Cultural Heritage). Full document available at: <http://portal.unesco.org>. Accessed on March 31, 2014.

Council of Europe and the United Nations Educational, Scientific and Cultural Organization.

4.2.1 European Union

To begin with, cornerstones of the relevant legal concept are the EU's constitutional instruments, i.e. the two core treaties between the EU member States, as well as the *Charter of Fundamental Rights*, the latter being legally binding, though not a treaty *per se*.³⁷ Specific provisions of the *Treaty on European Union* (TEU) coupled with the relevant provisions of the *Treaty on the functioning of the European Union* (TFEU), stipulate that the Union, in view of “the cultural, *religious . . . inheritance of Europe*” (TEU, *Preamble*) shall “respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced” (TEU, Art. 3.3). In addition, pursuant to Art. 167 of the TFEU:

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
 - improvement of the knowledge and dissemination of the culture and history of the European peoples,
 - conservation and safeguarding of cultural heritage *of European significance*.³⁸

The above provisions reflect a dual approach, which respects Member State cultural autonomy while promoting a common cultural identity derived from the various national cultures (McCrea 2010, p. 169). Besides, the above reference to the “cultural heritage of European significance” brings into the equation a further characterization of religious cultural heritage as a ‘significant’ value to the process of European integration. This process, according to the Council *Directive 93/7/EEC* on the return of cultural objects unlawfully removed from the territory of a Member State, entails the establishment of an area without internal frontiers in which the free movement of goods is ensured in accordance with the provisions of the Treaty.³⁹ The latter stipulates that the Member States retain the right to define

³⁷ Official Journal of the European Union, C 83, 30.3.2010.

³⁸ *Ibid.*, pp. 121–2.

³⁹ Official Journal L 74, 27.03.1993 pp. 74–9. One of the main purposes of the Directive is to enable Member States to secure the return to their territory of cultural objects which are classified as national treasures within the meaning of the Article 36 TFEU and have been removed from their territory in breach of the relevant national measures or of Council Regulation (EEC) No 3911/92 of December 9, 1992 on the export of cultural goods; cf. Odendahl K. (2005) *Kulturgüterschutz: Entwicklung, Struktur und Dogmatik eines ebenenübergreifenden Normensystems* [=Jus Publicum 140], Tübingen: Mohr Siebeck, p. 327. It should be noted that the aforementioned Directive was amended by Directives 96/100/EC (Official Journal L 060, 01.03.1997 pp. 59–60) and 2001/38/EC (Official Journal L 187, 10.07.2001 pp. 43–4), while Regulation No 3911/92 was codified by the

their “*national treasures possessing artistic, historic or archaeological value*” (TFEU, Art. 36) and to take the necessary measures to protect them in this area without internal frontiers.

The aforementioned *Directive* defines the notion of ‘cultural object’, as an object which is classified, before or after its unlawful removal from the territory of a Member State, among the national treasures possessing artistic, historic or archaeological value under national legislation or administrative procedures within the above meaning, and belongs to one of the categories listed in its Annex or does not belong to one of these categories but forms an integral part of: public collections listed in the inventories of museums, archives or libraries’ conservation collection or the “*inventories of ecclesiastical institutions*” (Art. 1 *in finem*). Among the objects included in the Directive’s Annex, are elements forming an integral part of “*artistic, historical or religious monuments*”, which have been dismembered, more than 100 years old; paintings executed entirely by hand, on any medium and in any material; mosaics and drawings executed entirely by hand, on any medium and in any material; original engravings, prints, serigraphs and lithographs; original sculptures or statuary and copies produced by the same process as the original; incunabula and manuscripts, including musical scores, singly or in collections; books more than 100 years old, singly or in collections; archives and any elements thereof, of any kind, on any medium, comprising elements more than 50 years old. It is no coincidence that, according to the Fourth *Report* (of 2013) from the Commission to the European Parliament, the Council and the European Economic and Social Committee ‘on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State’, the great abundance of these ‘treasures’ that were returned under amicable out-of-court settlements between the respective States (from 2008 until 2011), were *religious* cultural objects, such as a wooden *Pietà* statue; wooden statues of Church Fathers; sculptures of angels; a wooden statue of St John of Nepomuk; a church painting of St Anna; a wooden statue of St Nicholas; a fourteenth century missal; and a wooden sculpture of *Christ the Saviour*.⁴⁰

Having said the above, one should note that the religious cultural heritage of ‘European significance’ encompasses not only the respective religious “national treasures possessing artistic, historic or archaeological value” (TFEU, Art. 36), but also the “*religious rites, cultural traditions and regional heritage*” (TFEU, Art. 13), which are extremely important for the continuity of the spiritual “cultures and traditions of the peoples of Europe” (*Charter of Fundamental Rights*, Preamble). The broadening of the concept of religious cultural heritage, as defined in the relevant legal instruments of the EU, underlines the legal significance of the intangible elements and clarifies that the material elements make up only a part of all that might be regarded as a ‘significant heritage’. This understanding of the

Council Regulation (EC) No 116/2009 of December 18, 2008 on the export of cultural goods (Official Journal L 39, 10.02.2009 pp. 1–7).

⁴⁰ The official text of the above *Report* (dated 30.5.2013) is available online at: <http://eur-lex.europa.eu/>. Accessed on March 31, 2014.

concept of religious cultural heritage at the level of the EU is vital, since it makes clear that there is far less value in a cult object alone (a ceremonial Jewish *Yad* for example) than of the same object accompanied by the spiritual significance and usage for the religious tradition which created it (the liturgical function of the said example, for instance, as a pointer during the *Torah* reading).⁴¹ In essence, the aforesaid legislative approach of the EU is not mainly concerned with isolated objects or museum pieces, such as those collected for ‘chambers of curiosities’ during the eighteenth century, but rather with identifying and preserving the intangible notion of ‘sacredness’, as a cultural value, representative of the pan-European (current or past) religious traditions. In this rationale, apart from the great monumental complexes of devotion or the vast number of material cult objects, the unique identity of religious cultural heritage “depends on the appreciation of tradition and the preservation of folklore, rituals and traditional skills” (Prott and O’Keefe 1992, p. 312).

4.2.2 Council of Europe

According to Art. 167 § 3 of the TFEU: “The Union and the Member States shall foster co-operation with third countries and the competent international organisations in the sphere of culture, *in particular the Council of Europe*”. The latter, has adopted three basic legal instruments relating *inter alia* to the conceptual delimitation and preservation of religious cultural heritage: the *Convention for the Protection of the Architectural Heritage of Europe* (Granada, 1985),⁴² the *European Convention on the Protection of the Archaeological Heritage* (London, 1969; revised in Valetta, 1992),⁴³ and the *European Landscape Convention* (Florence, 2000).⁴⁴

To begin with, pursuant to the provisions of the *Convention for the Protection of the Architectural Heritage of Europe*, the religious aspect of this heritage comprises: (i) *religious monuments*, i.e. all edifices and structures consecrated for worship or ritual (churches, chapels, cathedrals, mosques, synagogues etc.) of “conspicuous historical, archaeological, artistic, social or technical interest, including their fixtures and fittings”.

An interesting set of examples in this respect can be found in Tuscany in north Italy, a part of Europe in which the artistic heritage is at its richest. The cathedrals in Florence, Pisa, and Siena, for example, are acknowledged as masterpieces all over the world and attract huge numbers of visitors; in the tourist season they are full of people for most of the day, posing difficult problems of crowd control. Payment is required in Pisa (in the tourist season) but not in Florence or Siena, though it is necessary to pay in order to enter the Baptistery in Florence. Rather less well known, but equally significant, are the museums attached to these buildings. These *Musei dell’Opera del Duomo* (Museums of the Works of the

⁴¹ Cf. Gutmann J. (1964) *Jewish Ceremonial Art*, T. Yoseloff, p. 18 f.

⁴² Council of Europe Treaty Series (CETS) No 121.

⁴³ Council of Europe Treaty Series (CETS) No 143.

⁴⁴ Council of Europe Treaty Series (CETS) No. 176.

Cathedral) are institutions closely linked with the cathedral itself and with those who are responsible for both its fabric and its artistic heritage. (Davie 2000, p. 163).

(ii) *religious complexes*, i.e. homogeneous groups of religious buildings, mainly monastery complexes, conspicuous for their historical, archaeological, artistic, scientific, social or technical interest, which are sufficiently coherent to form topographically definable units.⁴⁵ For example, the Cistercian *Maulbronn Monastery* in the State of Baden-Württemberg in Germany, which has been inscribed as a World Heritage Site since 1993, is considered to be the most complete and best-preserved medieval monastic complex north of the Alps:

The monastery's church, mainly in Transitional Gothic style, had a major influence on the spread of Gothic architecture over much of northern and central Europe. The water-management system at Maulbronn, with its elaborate network of drains, irrigation canals, and reservoirs, is of exceptional interest . . . The basic medieval layout and structure of the central complex, which is typical of the Cistercian tradition, is virtually complete. The 13th-century buildings, in the transitional style of the Master of the Paradise, provided a decisive stimulus for the development of Gothic architecture in Germany. Only the monks' refectory and the lay brethren's dormitories have undergone transformations since the Reformation, in order to adapt them for use as a Protestant seminary. There are several post-monastic buildings within the nominated area, mostly in plastered stone. They include the former hunting lodge of Ludwig, Duke of Württemberg, and the ducal stables, which have Renaissance elements in their design and decoration.⁴⁶

(iii) *sacred sites*, i.e. combined works of man and nature, being areas of (current or past) religious significance, which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest.⁴⁷

Moreover, on the basis of the relevant provisions of the *European Convention on the Protection of the Archaeological Heritage*, the religious aspect of this heritage

⁴⁵ Cf. De Beyer M. & Takke J. (2012) *Guidelines on Ways of Dealing with Religious Objects*, Utrecht: Museum Catharijneconvent, p. 39: "We refer to an ensemble when there is a certain cohesiveness between movable and immovable property of historical or art-historical significance. This refers not only to buildings with their interiors, but also to the connections between certain objects . . . Four types of ensembles are distinguished: *cohesion arising from historical continuity*: an ensemble determined by cohesiveness in continuity of ownership and use; *cohesion arising from composition*: an ensemble determined by unity of composition or by production in the same period, but not according to an integrated architectural plan; *cohesion arising from a total, integrated design*: an ensemble determined by the cohesion of an integrated architectural plan, also known as a *Gesamtkunstwerk*; *cohesion arising from provenance*: ensemble determined by the cohesiveness of one of the previous ensemble types. In this case, however, the elements of the ensemble are no longer in the original location".

⁴⁶ Data available online at: <http://www.unesco.de/307.html>. Accessed on March 31, 2014. Further information available at: <http://www.kloster-maulbronn.de/>. Accessed on March 31, 2014; cf. Anstett Janßen M. (ed.) (1999) *Kloster Maulbronn: ein Kurzführer*, Deutscher Kunstverlag.

⁴⁷ Cf. *Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas* (1976), according to which 'historic areas' afford down the ages the most tangible evidence of the wealth and diversity of "cultural, religious and social activities". *Standard-setting in UNESCO*, op. cit., p. 506 f.

comprises all sacred remains and cult objects or any other religious traces of mankind from past epochs, the preservation and study of which help to retrace the religious history of mankind. Included are “structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water” (Art. 1 of the *Convention*). One of the most famous such cases in Europe is the fourteenth century Romanesque church of *Santa Caterina* (St. Catherine), which is located inside the artificial Lake Reschen (*Lago di Resia*) at *Curon Venosta* in South Tyrol, Italy, near the Swiss and Austrian borders.⁴⁸ The steeple of the submerged bell tower (*Campanile di Curon*), which serves as a reminder of the monument’s sacred past, is today the only visible part of the medieval edifice.

The broadening of the concept of religious cultural heritage at the Council of the Europe level is illustrated by the *European Landscape Convention*.⁴⁹ The latter aims at identifying the concept of cultural landscape as a key factor in the “*spiritual well-being of individuals and societies*”⁵⁰ and as “a basic component of the European natural and cultural heritage” (*Preamble* of the *Convention*). On the basis of the provisions of the first Article of the *Convention*, a ‘religious landscape’ could be defined as an area, whose ‘religious character’, as perceived by people, is the result of the action and interaction of natural and/or human factors. Although still a physical element of the overall cultural heritage, religious cultural landscapes “bring us closer to the intangible elements since their study often relates to ethnographic information about the way of [religious] life of people as well as the close links existing between certain topographical and landscape features and cultural identity” (Blake 2000, p. 73). The said definition obviously overlaps with the aforementioned notion of ‘sacred sites’:

[S]acred sites need not involve built heritage. Indeed, many contain few buildings or have none at all. Sacred sites also vary widely in scale: some can be very large – sometimes whole mountains, or even entire regions. They may be groves of trees, springs, mountains or sacred lakes and are frequently a palimpsest of any one (or several) of these natural settings, associated with the remains of past and present human activity. These usually, of course, involve some element of ritual such as worship, prayer or pilgrimage for which the built heritage of shrines or temples may provide a focus. Such combinations of physical features with built heritage are often referred to as ‘cultural landscapes’... The term ‘cultural landscape’ has most validity for sites where natural landscape features are considered to have a spiritual significance that may, or may not, be complemented by the presence of built heritage in the form of historical or archaeological sites. Mountains, springs, forests and rivers may all, in certain mythological systems, be ‘power places’

⁴⁸ Stecher A. (2008) *Eingegrenzt und Ausgegrenzt - Heimatverlust und Erinnerungskultur, dargestellt am Beispiel der versunkenen Dörfer in der Gemeinde Graun (Vinschgau/Südtirol)*, Saarbrücken, VDM, Müller.

⁴⁹ See, among many authors, M. Déjeant Pons (2006) *The European Landscape Convention*, Landscape Research, Vol. 31 Issue 4, pp. 363–84.

⁵⁰ Council of Europe, *The Territorial Dimension Of Human Rights and Democracy*, p. 38. Official document available online at: <http://www.coe.int/>. Accessed on March 31, 2014.

where power is received, or where power is needed to protect from spiritual danger. Such locations are often considered as places where the physical and spiritual intersect. . .⁵¹

Typical examples of such ‘cultural landscapes’ are the sacred areas of the *Athos* peninsula and the *Meteora* cliff-top monastic complexes in Greece,⁵² that are included in the UNESCO World Heritage List and the *Natura 2000* ecological Network on the basis of the Council of the European Communities’ *Habitats Directive* (92/43/EEC).⁵³ These ‘religious ecosystems’ represent not only important biodiversity conservation opportunities, but also significant parts of a broader cultural network, that could be defined as ‘*religious environment*’.⁵⁴ The need for effective protection of these *sui generis* ‘landscapes’ has initiated a growing interest in, and recognition of the importance of, their religious character as a critical element to both biological and cultural preservation, especially in the light of the environmental principle of Sustainability. The *European Landscape Convention* emphasizes the idea that the landscape is “a complete entity, in which the natural and cultural elements are considered simultaneously” (Priour 2003, p. 153). In this rationale, the notion of ‘religious landscape’ combines the religious significance of a sacred site with its natural elements, and thus underlines the relationship between biological and cultural diversity as a key basis for sustainable development (Lee and Schaaf 2003). Therefore, the notion of ‘religious landscape’:

[S]hould not be perceived as a neutral material object, but as the expression of the relationship between peoples and their environment. For the same reason, [religious] landscape is not a mere collection of material structures and objects, but the variety of symbols and values that people attribute to their material world. Landscape becomes therefore an integral part of the individual and collective [religious] memory. (Maria 2009, p. 88)

It should be noted that even before the aforementioned *Convention*, the Committee of Ministers had issued in 1995 a *Recommendation* regarding the conservation of cultural sites integrated with landscape policies.⁵⁵ According to the

⁵¹ Shackley M. (2003) *Managing Sacred Sites: Service Provision and Visitor Experience*, London: Thomson Learning, p. 124.

⁵² Cf. J. Mallarach (ed.) (2008) *Protected Landscapes and Cultural and Spiritual Values* [=Values of Protected Landscapes and Seascapes 2], Heidelberg: Kasperek Verlag, pp. 51–63; J. Mallarach & T. Papayannis (eds.) (2009) *The sacred dimension of protected areas: Proceedings of the second workshop of the Delos Initiative* (Ouranopolis 24–27 October 2007), Gland, Athens: IUCN - Mediterranean Institute for Nature and Anthropos (Med-INA) pp. 107–25; Della Dora V. (2012) *Setting and Blurring Boundaries: Pilgrims, Tourists, and Landscape in Mount Athos and Meteora*, *Annals of Tourism Research*, Vol. 39, Issue 2, pp. 951–74.

⁵³ Council Directive 92/43/EEC (of 21 May 1992) ‘on the Conservation of Natural Habitats and of Wild Fauna and Flora’. The aim of the Directive is to promote the maintenance of biodiversity, “taking account of economic, social, cultural and regional requirements” and to contribute “to the general objective of sustainable development”; see *Official Journal* 206, 22.7.1992, pp. 7–50.

⁵⁴ See Tsioulos Th. (2013) *The legal protection of religious cultural goods* [in Greek], Athens - Thessaloniki: Sakkoulas Publications, p. 264 f.

⁵⁵ *Recommendation* No. R (95) 9 ‘on the Integrated Conservation of Cultural Landscape Areas as Part of Landscape Policies’, Adopted by the Committee of Ministers on September 11, 1995, at the

definitions provided by this quasi-legal document, each ‘landscape’ constitutes the “formal expression of the numerous relationships existing in a given period between the individual or a society and a topographical defined territory, the appearance of which is the result of the action, over time, of natural and human factors and of a combination of both”. Consequently, each ‘religious landscape’ is taken to have a threefold cultural dimension, considering that: it is defined and characterized by the way in which a given territory is perceived as ‘sacred’ by a religious community; it testifies to the past and present relationships between individuals and their religious environment; it helps to mould local cultures, religious practices, beliefs and traditions (Prieur 2003, p. 152).

The above ‘soft-law’ definitions could be articulated further within the scope of biodiversity conservation. Sacred landscapes are often interrelated with ‘natural’ sites, a widespread phenomenon to be found in almost every European country. These particular types of natural or semi-natural ecosystems, such as the sacred mountain of *Croagh Patrick* (St Patrick) in Ireland,⁵⁶ or the Isle of *Iona* on the western coast of Scotland, could be defined as ‘sacred natural sites’, i.e. “areas of land or water having special spiritual significance to peoples and communities”.⁵⁷ According to the International Union for Conservation of Nature (IUCN):

For many peoples, sacred natural sites are areas where nature, connection to the greater universe, and collective or individual recollections come together in meaningful ways. Sacred natural sites can be the abode of deities, nature spirits and ancestors, or are associated with hermits, prophets, saints and visionary spiritual leaders. They can be feared or they can be benign. They can be areas for ceremony and contemplation, prayer and meditation. For people of no particular faith they often inspire awe and can induce a sense of well-being. They can also hold secular values for history, culture, relaxation and enjoyment. Sacred natural sites can be important places of reference for cultural identity...⁵⁸

4.2.3 UNESCO

In addition to the above legal framework, various definitions regarding specific elements of religious cultural heritage can be traced within other fundamental international instruments, that have territorial application in Europe (as far as they have been duly ratified by the respective European States), such as the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export*

543rd meeting of the Ministers’ Deputies. Official document available online at: <https://wcd.coe.int>. Accessed on March 31, 2014.

⁵⁶ See the case *Tara Prospecting Ltd v. Minister for Energy* [1993] Irish Law Reports Monthly 771 cf. Doe, op. cit., p. 164 fn. 1 and p. 168 fn. 28.

⁵⁷ Wild R. & McLeod C. (eds.) (2008) *Sacred Natural Sites: Guidelines for Protected Area Managers*, Gland, Switzerland: IUCN, p. 5.

⁵⁸ *Ibid.*

and *Transfer of Ownership of Cultural Property* (1970)⁵⁹; the *Convention concerning the Protection of the World Cultural and Natural Heritage* (1972) [World Heritage Convention]⁶⁰; the *Convention on the Safeguarding of the Intangible Cultural Heritage* (2003)⁶¹; and the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005).⁶²

On the basis of the provisions (Art. 1) of the first, and oldest, of the aforementioned Conventions, the notion of ‘religious cultural property’, could be defined as the property which, on religious grounds, has been specifically designated by each State as being of importance for archaeology, history, or art; the assets of this property could be analyzed according to the following categories:

- sacred objects relating to religious history, e.g. a relic from the shrine of *Saint Boniface of Dokkum* (the Apostle of the Germans and first Archbishop of Mainz) in the hermit-church of Warfhuizen in the Netherlands;
- artistic or historical elements which have been dismembered from religious monuments or archaeological sites, e.g. a triptych altarpiece of the fifteenth century which was dismembered from the *St Nicholas Chapel* in the church of *San Domenico* at Perugia and it is presently displayed in the *Galleria Nazionale dell’Umbria* in Perugia, Italy;
- antiquities more than 100 years old, such as inscriptions and engraved seals, e.g. an elaborate *proshporon* wooden seal according to the Eastern Orthodox Church’s liturgical tradition;
- property of artistic interest, such as: religious pictures, paintings and drawings produced entirely by hand on any support and in any material, e.g. El Greco’s masterpiece ‘*The Resurrection*’ at the Cistercian convent of *Santo Domingo el Antiguo* in Toledo, Spain; original works of statuary religious art and sculpture in any material, e.g. the sublime nineteenth sculpture ‘*Le génie du mal*’ executed in white marble by the Belgian artist Guillaume Geefs and located within the elaborate pulpit (*chaire de vérité*) of St. Paul’s Cathedral, in Liège, France; original engravings, prints and lithographs; rare manuscripts and incunabula (such as the twelfth century Croatian *Missale Ragusinum*, also known as the ‘Missal of Dubrovnik’, that was used during the medieval liturgy), old liturgical books, documents and publications of special religious interest singly or in collections; monastic archives, e.g. the vast archive of the *St Peter’s Abbey* in Salzburg, Austria; articles of furniture more than 100 years old and old musical instruments, such as the organ located in the *Basilica of Valère* in Sion, Switzerland, which was built in the fifteenth century and is considered to be one of the oldest pipe organs in Europe.⁶³

⁵⁹ *Standard-setting in UNESCO*, op. cit., p. 103 f.

⁶⁰ *Ibid.*, p. 135 f.

⁶¹ *Ibid.*, p. 297 f.

⁶² *Ibid.*, p. 326 f.

⁶³ Cf. *ibid.*, p. 104.

Within the broader ambit of ‘religious cultural heritage’, apart from the aforementioned movable elements of ‘religious cultural property’, which could be also defined as religious ‘cultural objects’,⁶⁴ in accordance with Article 1 of the World Heritage Convention may fall:

- ‘religious monuments’, i.e. architectural works, works of monumental sculpture and painting, sacred elements or structures of an archaeological nature, and combinations of such features, which are of outstanding universal value from the point of view of history, art or science;
- ‘groups of religious buildings’, i.e. groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the religious landscape, are of outstanding universal value from the point of view of history, art or science;
- ‘religious sites’, i.e. works of man or the combined works of nature and of man, and sacred areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.⁶⁵

It should be noted that a similar set of definitions can be based on Article 1 of the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (Hague, 1954), according to which the term ‘cultural property’ shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, *whether religious or secular*; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) 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’.⁶⁶

Similarly, according to the relevant provisions of the UNESCO *Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private works* (1968), the definition of ‘cultural property’ comprises:

⁶⁴ According to the terminology adopted by the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* (Rome, 1995). See the official document of the relevant Convention online at: <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm>. Cf. the definition provided by the UNESCO *Recommendation for the Protection of Movable Cultural Property*: “movable cultural property shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest” in: *Standard-setting in UNESCO*, op. cit., p. 549 f.

⁶⁵ *Standard-setting in UNESCO*, op. cit., p. 136.

⁶⁶ *Ibid.*, pp. 44–5.

- (a) Immovables, such as archaeological and historic or scientific sites, structures or other features of historic, scientific, artistic or architectural value, whether religious or secular, including groups of traditional structures, historic quarters in urban or rural built-up areas and the ethnological structures of previous cultures still extant in valid form. It applies to such immovables constituting ruins existing above the earth as well as to archaeological or historic remains found within the earth. The term cultural property also includes the setting of such property;
- (b) Movable property of cultural importance including that existing in or recovered from immovable property and that concealed in the earth, which may be found in archaeological or historical sites or elsewhere.⁶⁷

According to the above *Recommendation*, the term ‘cultural property’ includes not only the established and scheduled architectural, archaeological and historic sites and structures, but also the “unscheduled or unclassified vestiges of the past as well as artistically or historically important recent sites and structures”.

In any case, pursuant to the aforementioned World Heritage Convention, “it is for each State Party to this Convention to identify and delineate the different properties situated on its territory” (Art. 3) and to ensure that “effective and active measures are taken for the protection, conservation and presentation” of the religious cultural elements situated on its territory (Art. 5). For this purpose, each European State—Party to this *Convention*—shall endeavour, in so far as possible and as appropriate for each country, to adopt a general policy which aims to give its religious cultural heritage “*a function in the life of the community*”.⁶⁸ The States’ commitment to maintaining an element of functionality is extremely important, especially in cases where the respective elements of this heritage retain an active liturgical function (Heckel 1968, p. 131).

According to Frigo (2004, p. 369) the concept of cultural heritage, if compared to that of cultural property, is broader in scope, as it expresses a “form of inheritance to be kept in safekeeping and handed down to future generations”. Conversely, the concept of cultural property is “inadequate and inappropriate for the range of matters covered by the concept of the cultural heritage”, which includes, *inter alia*, the non-material cultural elements which are deemed entitled to legal protection at the international level.

Indeed, since the Venice Charter of 1964, the scope of heritage has broadened from a concern for ‘physical heritage’, such as historic religious monuments and groups of buildings, to ‘non-physical heritage’ (Ahmad 2006, pp. 293–294) including environments, intangible values and cultural landscapes. According to the *Operational Guidelines for the Implementation of the World Heritage Convention*,⁶⁹ the notion of ‘cultural landscapes’, from a religious point of view, should fall into three main categories (Fromageau 2006, p. 48): landscapes ‘designed and

⁶⁷ *Ibid.*, p. 403.

⁶⁸ *Ibid.*, p. 137.

⁶⁹ The official text of the *Operational Guidelines*, which are periodically revised (last revision in July 2013), is available online at: <http://whc.unesco.org/en/guidelines>. Accessed on March 31, 2014.

created intentionally by man’ (this embraces namely parkland landscapes constructed for aesthetic reasons, which are associated with religious monumental buildings and ensembles); ‘organically evolved landscapes’, which result from an initial religious imperative and have developed its present form by association with and in response to its natural environment⁷⁰; ‘associative cultural landscapes’: the inscription of such landscapes on the World Heritage List is justifiable by virtue of the powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence, which may be insignificant or even absent. In the case of ‘sacred natural sites’, a notion that overlaps that of ‘sacred landscapes’, as it has been noted:

[H]uman disturbance has been reduced or prevented, or careful management has taken place, often for long periods of time, with resulting high levels of biodiversity. At some sacred natural sites, the human influence is greater and these sites may be semi-natural or even heavily modified, but often in ways that retain high levels of biodiversity. Examples of the latter are the globally important ingenious agricultural heritage systems, many of which are attributed spiritual values by the communities that have shaped them.⁷¹

In these cases, “landscape management should be less about ‘freezing’ the site in a desired image and more about understanding and implementing the knowledge principles and associated skills that crafted [such] historic landscapes”.⁷² A typical example in Europe, is that of Christian Orthodox ‘ecological ascetism’,⁷³ which follows the values and practices of the Byzantine agricultural tradition and it is still active, for instance, within the monastic peninsula of *Mount Athos*, in Greece.⁷⁴ These principles of Byzantine monastic tradition

recognise the sacredness of the natural world as an integral part of the Divine Creation; in this sense, Mt. Athos has been considered as ‘*the Garden of the Virgin Mary*’ ever since its origins. In addition, both autarchy and self-dependence are part of this monastic tradition and are expressed in the management and use of natural resources and in daily affairs . . . The major challenge here is how to create a synergy between the spiritual background of Mt. Athos and the requirements of natural and landscape figures of protection (such as those promulgated by UNESCO, IUCN and EC), while at the same time taking into account the daily needs of the monastic communities and their dependencies.⁷⁵

⁷⁰ Cf. Burton L. (2002) *Worship and wilderness: Culture, religion, and law in public lands management*, University of Wisconsin Press, p. 28 f.

⁷¹ Wild R. & McLeod C., op. cit., p. 5.

⁷² Fairchild Ruggles D. & Sihna A. (2009) *Preserving the Cultural Landscape Heritage of Champaner-Pavagadh, Gujarat, India*, in: Fairchild Ruggles D. & Silvermann H. (eds.) *Intangible Heritage Embodied*, Heidelberg - London - New York: Springer, pp. 96–7.

⁷³ Zizioulas J. (1996) *Ecological Ascetism: a cultural revolution*, Our Planet, Vol. 7, pp. 7–8.

⁷⁴ See Teall, J. L. (1971) *The Byzantine agricultural tradition*, Dumbarton Oaks Papers, Vol. 25, pp. 33–59; Papayannis T. & Elissaios (1994) *Nature and monasticism: The preservation of the Byzantine tradition on Mount Athos* [in Greek], Athens: Goulandris Horn Foundation.

⁷⁵ Papayannis T. (2008) *Characteristic Mt. Athos landscapes: the case of the Holy Simonopetra Monastery*, in: Mallarach L. (ed.) *Protected Landscapes and Cultural and Spiritual Values* [=Values of Protected Landscapes and Seascapes 2], Heidelberg: Kasperek Verlag, pp. 51–63 (p. 54).

Notwithstanding the above, beyond the elements of natural heritage (including religious landscapes and biodiversity), and apart from the physical ‘sacred’ artifacts, religious cultural heritage includes also intangible attributes. On the basis of the relevant provisions (Art. 2) of the *Convention for the Safeguarding of the Intangible Cultural Heritage*, these ‘intangible attributes’ comprise:

The practices, representations, and expressions, as well as the instruments, objects, artifacts and cultural spaces associated therewith, that [religious] communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible [religious] cultural heritage, transmitted from generation to generation, is constantly recreated by [religious] communities and groups in response to their environments, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.⁷⁶

According to Art. 11b of the *Convention*, each State Party is responsible “to identify and define” the various cultural elements of this intangible heritage, present in its territory, with the participation of the respective religious communities, groups and relevant non-governmental organizations, “[i]n order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity” (Art. 16 § 1). The underlying idea is that even if tangible and intangible religious heritage are very different in nature, “they are the two sides of the same coin” (Bouchenaki 2007, p. 109) in terms of embedding the religious memory of humanity. That is why the *Convention*, in view of “the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage”, requires from each State Party, within the framework of its safeguarding activities regarding intangible cultural heritage, to ensure the widest possible participation of religious communities and groups “that create, maintain and transmit such heritage”, and to involve them actively in its management (Art. 15). The involvement of the communities in the conservation of their religious heritage, through understanding and documenting intangible religious events and rituals,⁷⁷ is extremely important. A typical example in Southern Europe, is that of the feast of the *Most Holy Trinity* of *Vallepietra*, in central Italy:

The Most Holy Trinity worship of Vallepietra (Lazio) is a very complex religious reality, with multiform religious ritual performances and meanings, which combine in an apparently incoherent way. Of particular interest is the spontaneous, authentically felt worship that the faithful have for the *Most Holy Trinity* image of the sanctuary and the deep, more or less unconscious, perception of addressing their belief in a feminine divinity. The sacred place, very atmospheric and of extraordinary natural beauty, is an ancient cave, located 300 m from the bottom of a 1000 m long cliff face. The ritual performances, the songs, and the penitential faith of thousands of believers together create a sensation of powerful fascination. The area has been frequented for centuries: Neolithic objects have been found and, in the cave itself, the remains of an ancient roman cult. The devotional image

⁷⁶ Cf. *Standard-setting in UNESCO*, op. cit., p. 298.

⁷⁷ See de Coppet D. (ed.) (1992) *Understanding rituals*, London: Routledge; La Fontaine J.(ed.) (2004) *The interpretation of ritual*, London: Routledge; Bell C. (2009) *Ritual. Perspectives and Dimensions*, Oxford University.

of the *Most Holy Trinity*, not actually orthodox for the Catholic religion, is a fresco from the twelfth century AD, painted on the wall of the cave, which represents three identical figures of Christ. Thousands of pilgrims, most of them organized in ‘companies’, show deep love and gratitude for the miraculous image. The feast is celebrated the first Sunday after the Catholic festivity of Whitsunday, on a night of the full moon, during which a passion play, ‘*The Wailing of virgins*’, is performed. A second celebration is held each year on 26 July, the feast-day of saint Anne (the mother of the virgin Mary) who has a shrine near the holy cave. These and other ritual elements reflect the ancient pre-Roman cult of Mother earth. Safeguarding this religious heritage involves studying and documenting the event, and involving believers in an understanding of their ancient religious values. At the same time, it is important to realize that transformations are an unavoidable part of tradition and that the spontaneous and creative invention of culture must be supported. (Simeoni 2005, p. 74)

As it has been further pointed out by Simeoni (2005, p. 83):

To save and conserve this sort of cultural heritage, strongly tied to the everyday life of the people, is to respect them as ‘subjects’, to respect their culture, their values and feelings. This is why nothing must be done without them. They are the first owners of their cultures. When asked for information, during interviewing, filming and recording, they will remember, reflecting about themselves, creating self-observation and a self-conscious level of their cultural pattern, and so conserve their cultural performances or invent new cultural activities. This is why I believe that one instrument of safeguarding is involving the community in conservation of religious heritage, respecting popular tradition and cultural and religious values, maintaining cultural patterns, and permitting and supporting communities in the creation of new patterns and the adaptation of current practices to the future realities.

Besides, according to the Preamble of the *Convention*, as it has been already underscored in the UNESCO *Recommendation ‘on the Safeguarding of Traditional Culture and Folklore’* of 1989,⁷⁸ in the UNESCO *Universal Declaration on Cultural Diversity* of 2001,⁷⁹ and in the *Istanbul Declaration* of 2002 adopted by the Third Round Table of Ministers of Culture, the intangible (religious) heritage serve also as a guarantee of sustainable development and as a mainspring of ‘cultural diversity’. The latter, pursuant to Article 4 of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*,⁸⁰ refers to the manifold ways in which the cultures of (religious) groups find expression; these expressions are passed on within and among groups and societies. A typical such example of creative expression is that of the oral (monodic) tradition of ‘Byzantine music’ (i.e. the tradition of eastern liturgical chant), a significant (and still living) part of European religious heritage. This vocal tradition of sacred ‘psalmody’ (*ψαλμοδία*), which is accepted to have roots in the musical system of Ancient Greece, has been related to the liturgical music of the Levant (in particular Syriac and Jewish music) and has been influenced, to one extent, by the Ottoman musical

⁷⁸ *Standard-setting in UNESCO*, op. cit., p. 605 f. For the religious and secular origins of the notion of ‘folklore’ see Propp V. (1984) *Theory and History of Folklore*, Liberman A. (ed.) [=Theory and History of Literature 5], Minneapolis: University of Minnesota, p. 11 f.

⁷⁹ *Standard-setting in UNESCO*, op. cit., p. 707 f.

⁸⁰ *Standard-setting in UNESCO*, op. cit., p. 326 f.

tradition,⁸¹ is based on an elaborate system of symbols (ecphonetic signs and *neumes*) that shape ingenious melodic structures combined with beautiful poetry:

[I]f a comparison is made, it will be found that many Byzantine hymns equal, when they do not surpass, the best Latin poems in imaginative power and technical achievement. It is from these hymns, appreciated for what they are without reference to the standards of classical poetry, that Byzantine hymnology must be approached. It is impossible, however, to consider the texts apart from the music. The fusion of words and music is complete: the texts cannot be judged apart from the melodies nor the melodies apart from the words to which they are sung. The Eastern melodies show less variety in construction and detail than their Western parallels, the Gregorian melodies. But once we are accustomed to the fact that they are built up on a certain number of formulas which are characteristic of the mode of the hymn we can see how ingeniously the musicians shaped and varied the patterns transmitted to them from generation to the next, embellishing them slightly, until in the period of the *Maïstores*, or *Melurgi*, the ornamentation became more florid and the music of greater importance than the words.⁸²

The religious aspect of ‘cultural diversity’ in Europe is made manifest not only through the varied ways in which religion is expressed, augmented and transmitted through the variety of cultural expressions and cult objects, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means used. Within the context of ‘cultural expressions’ fall predominantly all the expressions of collective or individual creativity that incorporate a ‘cultural content’.⁸³ In the case of religious cultural goods, this ‘content’ is inter-related with the symbolic meaning, artistic dimension and cultural value of their unique ‘religious character’, i.e. the triptych of religious memory, religious aesthetics and religious beliefs.

In conclusion, considering the several meanings of the term ‘religious cultural heritage’ on the basis of the above international legal texts, it becomes quite obvious that, for various reasons, each Convention or Recommendation has a definition drafted for the purposes of that instrument alone. Besides, these instruments cannot challenge the definitions provided by the respective national legislations, under the territorial sovereignty of the State members. Obviously, since each and every element of this ‘heritage’, located within a European country, remains under the legislation and sovereignty of the territorial State, a general ‘European’ definition, for use in a variety of contexts, may seem pointless. However, on the basis of the observations made by Blake (2000, pp. 83–84), there are, in fact, some common values to be considered:

⁸¹ Cf. Thibaut J. (1899) *Etude de Musique byzantine*, *Byzantinische Zeitschrift*, Vol. 8, Issue 1, pp. 122–47.

⁸² Wellesz E. (1961) *A History of Byzantine Music and Hymnography* (second edition), Oxford: Clarendon Press, p. viii.

⁸³ According to Art. 4 of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*: “Cultural content” refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities (*Standard-setting in UNESCO*, op. cit., p. 330).

First, is the sense that it is a form of inheritance to be kept in safekeeping and handed down to future generations. Another important aspect of [religious] cultural heritage is its links with group identity . . . In this way, [this] heritage is less an objective, physical existence than the range of associations which accompany a [sacred] object or monument and which provide the sense of being part of a group. . . Both the European Union and the Council of Europe have sought to recruit cultural heritage, in so far as it reflects pan-European characteristics, as a vehicle for the construction of a sense of European identity.

Hence, on the basis of the aforementioned international principles and legal canons, as far as the European continent is concerned, we could arrive at the following definition: ‘religious cultural heritage’ could be described as *the variety of sacred cultural elements emanating from the different religious traditions of the peoples of Europe, which are deemed worthy of protection and preservation due to their outstanding European value, in terms of social, cultural and religious significance*. Even if presumably not the most accurate description of the general concept in question, the proposed definition, based on the argument that the ‘significance’ of this heritage is inseparable from its basic characteristic of *sacredness*, suggests that the indivisible union of sacred and cultural qualities needs special consideration when we endeavor to identify and classify the various elements of this heritage *in concreto* (and thus construct a specific ‘typology’) as well as, when we implement the necessary criteria for the protection of these elements, on the basis of the legal norms set by the aforementioned international instruments.

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Chapter 5

Typology of Protected Elements

The surfeit of concepts and legal norms relating to the delimitation of religious cultural goods in Europe, at both the national and international level, entails an array of definitions and individual descriptions of the various elements of religious cultural heritage. In this context, the proposed general definition of the latter (i.e. its description *in abstracto* as the variety of sacred cultural elements, whether tangible or intangible, which emanate from the different religious traditions of the peoples of Europe and deemed worthy of protection and preservation due to their outstanding European value, in terms of social, cultural and religious significance) shapes, in essence, a very broad outline, since it includes elements that belong to various historic periods, different cultural and geographical units, and distinct denominational traditions and doctrines. An authoritative or exhaustive list of the respective parts of this colourful ‘heritage’ is, therefore, impossible. However, a closer examination and comparison of the cultural and legal features of these elements, may formulate a classification according to specific typological categories. More precisely, the various elements of religious cultural heritage can be systematized and described in three main categories, in terms of *functionality*, *tangibility* and *ownership*.

5.1 Functional and Non-functional Elements

The aforementioned general definition of religious cultural heritage, far from being complete or accurate, is certainly indicative of the tremendous importance of the notion of *sacredness* as the common element of the ‘religious character’ of all the monuments, objects, physical settings and intangible elements which comprise the religious heritage of ‘European significance’. This particular observation is based on the scientific presupposition, suggested by Durkheim, that the various religions are all species of the same class, and thus they possess certain elements in common.

Even though the circle of sacred objects “cannot be fixed once and for all [since] its scope varies endlessly from one religion to another”,¹ as Durkheim argued:

At the foundation of all systems of belief and all cults there ought necessarily to be a certain number of fundamental representations or conceptions and of ritual attitudes which, in spite of the diversity of forms which they have taken, have the same objective significance and fulfill the same functions everywhere. These are the permanent elements, which constitute that which is permanent and human in religion; they form all the objective contents of the idea which is expressed when one speaks of *religion* in general.²

Thus the notion of sacredness is intertwined with the notion of functionality, since all sacred things are in essence “ideals that have fixed themselves on material objects”.³ An engraved golden spoon, for example, far from just an everyday utensil, becomes a liturgical implement, a sacred *cochlear* (in Greek: *Κοχλιάριον*), when it is used for distributing the Holy Communion to the laity during the Divine Liturgy of the Eastern Orthodox Church and those Eastern Catholic Churches which follow the Byzantine Rite. Nonetheless, it should be reiterated that the ‘active’ religious function of this object (originally designated for sacramental purposes) is not a prerequisite for its ‘religious character’, the latter being acquired at the time of the object’s consecration, depending on the doctrines and rituals of each religious tradition. The concept of internal unity (*innere Einheit*) is thus renewed through the element of liturgical function (*liturgische Funktion*) and emerges as an intense *living unity*, ‘lebendige Einheit’ according to Heckel (1968, pp. 52 f); Heckel (1987, p. 85), of the object’s cultural status and ‘religious character’, i.e. of its individual incorporated features of memory, aesthetics, and beliefs. This *sui generis* ‘character’, which is rooted within the object’s cultural ‘nucleus’, constitutes an indelible attribute of its identity regardless of whether the object is eventually drifted away from its original ‘sacral’ context and becomes, for instance, a permanent part of an exhibition inside a museum. Even though transformed into an exhibition piece inside this new ‘secular’ context, the aforesaid object provides a potential source of meaning about the sacred tradition from which it stems; how much of that meaning can be accessed from the object alone is, however, quite a different matter. It depends on a very complex set of equations on the part of the viewer, involving personality, belief, personal history, education and the mood of the moment (Arthur 2000, p. 4).⁴

¹ Durkheim E. (1912) *The Elementary Forms of the Religious Life*, translated by Cosman C. (2001) Oxford University Press, p. 37.

² *Ibid.*, pp. 6–7.

³ Durkheim E (1914) *The Dualism of Human Nature and its Social Conditions* in: Lukes S. (1985) *Emile Durkheim: his life and work; a historical and critical study*, Stanford University Press, p. 25; cf. Merryman J. H. (1989) *The Public Interest in Cultural Property*, California Law Review, Vol. 77 Issue 2, (pp. 339–65), p. 346: “Cultural objects embody and express moral attitudes. This is most obviously true of religious objects”.

⁴ Cf. Bertaux J. J. (2006) *Biens sacrés et biens religieux. Le point de vue du conservateur* in: Basdevant-Gaudemet B., Cornu M., Fromageau J. (eds.) *Le patrimoine culturel religieux, enjeux juridique et pratiques culturelles* [Collection Droit du patrimoine culturel et naturel], Paris: L’Harmattan, pp. 51–61.

From a legal point of view, the above concept of ‘functionality’ lays a solid cornerstone to the basic classification of the various elements of religious cultural heritage, whether objects, structures or sites, between *functional* and *non-functional* elements: the former still function as sacred items, edifices, places and mediums of veneration, adoration or worship, while the latter do not function as such any more, because they have been deserted or permanently ‘pulled from’ their original sacral context due to their deconsecration, physical deterioration/destruction or association with religious traditions of the past; the former must be approached and respected as ‘living’ elements *in use* by the respective religious communities (Odendahl 2005, pp. 325 f.), while the latter must be approached and preserved, according to the internationally accepted standards of protection and preservation, in an ‘appropriate’ and ‘sensitive’ way, in view of their sacred past and in respect of their religious roots and *sui generis* cultural character.

5.1.1 Objects

In the case of the various objects of religious cultural heritage, the question of functionality is obviously interrelated with the value of religious and historical continuity. The case of the *Nördlingen retable* (framed altarpiece) attributed to the painter Friedrich Herlin and located inside the *Stadtpfarrkirche* of St. George in Bavaria, Germany, is typical⁵:

This altar, broken in pieces by the Iconoclasts of the sixteenth century, was repaired in 1683 according to its Protestant use (without wings) and fitted with a Baroque frame. Under the influence of the growing general fervor for conservation, which has reached an ever larger public over the past twenty years, the parish (though still Protestant) considered returning the celebrated altar to its original 1462 state (the casing of the altarpiece had remained in place, while the painted wings, slightly shortened at the top, were conserved in the city museum). Following a colloquium organized to examine and discuss the problem, the decision was made to preserve the 1683 repair, not only for its historical interest, but also because the preservation of the Baroque frame would have been compromised if it were to lose its *raison d'être*. (Philippot 1996, pp. 222–223)

The preservation of ‘functionality’, as the *raison d'être* of the cultural status of the various objects of religious cultural heritage, is connected not only to the preservation of their physical condition, but also to the preservation of their inner ‘sacral’ values and meaning. This is the case, for example, for the venerated wooden sculpture of *Volto Santo* (mentioned even in Dante Alighieri’s *Inferno*, Canto XXI: ‘*Qui non ha luogo il Volto Santo!*’)⁶ located at Lucca, Italy, inside the

⁵ See Kahsnitz R. (2006) *Carved Splendor: Late Gothic Altarpieces in Southern Germany, Austria, and South Tirol*. Getty Publications, p. 40 f.

⁶ *La divina commedia di Dante Alghieri, Novamente corretta, spiegata, difesa da F.B.L.M.C., Cantica III* (1791) Presso Antonio Fulgoni, p. 291.

free-standing octagonal *Carrara* marble chapel (*tempietto*), which was built in the fifteenth century by the architect Matteo Civitali⁷:

For the art historian, the object is a Romanesque crucifix in wood that through the course of time has been clothed in various attire. And yet, for the religious pilgrim who venerates the image today, it is the actual appearance of the image, and this alone, that is the deciding factor. It is this superimposition of different historical strata that illuminates the particular importance of the work for the faithful as well as for the modern anthropologist. Here, the definition of the object to be conserved can only be the result of careful observation, implying both a gathering of information and a choice of values. (Philippot 1996, p. 219)

Even in the case of *non-functional* (from the above perspective of sacredness) religious objects, their treatment should respect their denominational background and ‘religious character’; instead of favoring the isolation of these objects, by developing an encyclopedic museology, one should seek to reconstitute such collections and to evoke the historical and spiritual contexts into which they fit.⁸ In this rationale, even if a religious object “is no longer able to fulfill its original function –functions are also transformed or fade away– we [should] try to stimulate it in order to keep the original meaning of the work alive” (Philippot 1996, p. 226).

Moreover, the *non-functionality* of religious objects occasionally gives rise to the question of their re-use or deaccessioning. According to the ‘*Guidelines on Ways of Dealing with Religious Objects*’ issued by the Museum Catharijneconvent, in the Netherlands,⁹ one refers to ‘re-use’ if an object is donated or sold, or transferred on loan, to a church (or other religious institution) or museum; in all these cases the object will once again acquire a public or institutional role. On the other hand, ‘deaccessioning’ applies to cases in which an object may be sold or donated (within the ambit of the law on cultural heritage) to a private owner, whose identity is generally unknown beforehand; the object will then be used inside a private setting under the discretion of its new owner (De Beyer and Takke 2012, pp. 22 f.), while within the limits of the relevant statutory protection.

In the case of ‘re-use’, there is always the possibility of offering the religious object to another church (or similar institution) within the same religious community. Another possibility is to donate the objects to churches, monasteries or convents in another country:

This has a better chance of success and is already taking place quite frequently. Monastic orders often donate their objects to communities within their own mission districts. Church

⁷ See Luiso F. P. (1928) *La leggenda del Volto Santo: I. Storia di un cimelio*, Benedetti & Niccolai.

⁸ Cf Price N. S., Talley M. K., & Vaccaro A. M. (eds.) *Historical and Philosophical Issues in the Conservation of Cultural Heritage*, [Series: Readings in Conservation 1], Getty Publications, p. 203 “The conservator who needs to handle an object – to repair damage caused by human beings or by time – should be able to review the entire history of the object and distinguish its *original function* and appearance (insofar as these can still be surmised) from later modifications; the conservator should not only study the relevant texts but also read the object itself to recognize the traces of its history”.

⁹ The relevant *Guidelines* (‘Handreiking roerend religieus erfgoed’) are available online at: <http://www.hrrre.nl>. Accessed on March 31, 2014.

communities frequently maintain good ties with sister Churches in Eastern Europe, for example, where there has been a great demand for religious objects since the fall of Communism. In the coming years, the same will undoubtedly apply to Asia, Africa, and South America, where Christianity is experiencing robust growth. (De Beyer and Takke 2012, p. 24)

This potential ‘flow’ of religious cultural goods within Europe, in view of the revival of their ‘functionality’ and reassignment for ‘re-use’, is *mutatis mutandis* compatible with the notion of an ‘area without internal frontiers in which the free movement of goods . . . is ensured’.¹⁰ However, this ‘flow’ must be performed according to the relevant system of international regulatory instruments. Namely, it should be performed in accordance with the provisions of the European Union’s secondary legislation on the prevention of cultural objects’ trafficking,¹¹ as well as the UNESCO *Recommendation* for the ‘Protection of Movable Cultural Property’ (1978),¹² according to which, since movable cultural property is exposed, during transport or temporary exhibition, to risks of damage, which can arise from inept handling, faulty packaging, poor conditions during temporary storage or climatic changes, special measures of protection are required.

5.1.2 Structures

The issue of maintaining religious immovable property cannot be distinguished from the question of its functionality; the latter corresponds to the basic dimension of cultural heritage, which is the promotion of this heritage to the public. The right of the public to have access to religious heritage, apart from the practical and material difficulties of implementation, may lead to tension with religious freedom. Indeed, the use of places of worship for cultural purposes, may create a situation in which two liberties (the cultural and the religious one) are implemented in the same space. It has been proved that the regular use of a religious historic monument, complying with its original (religious) function contributes to its conservation.

Nevertheless, many European countries challenge the same situation: a waning Christian community, depriving places of worship of their natural/traditional occupants and replaced by tourists; a substantial rise in public interest for heritage, religious activities replaced or cohabitating with cultural uses. The growing pressure to limit maintenance expenses and to find resources other than public funds inevitably raises the question of use. How long will religious communities be entitled to claim that the religious use of places of worship be respected? To what extent can the religious communities assert their freedom of religion toward public authorities who fund the buildings, when they are increasingly empty?

¹⁰ Council Directive 93/7/EEC of 15 March 1993 ‘on the return of cultural objects unlawfully removed from the territory of a Member State’; see Official Journal L 74, 27.03.1993 pp. 74–9 (p. 74).

¹¹ See Council Directive 93/7/EEC op. cit. and Regulation No. 116/2009 of 18 December 2008 (Official Journal L 39, 10.02.2009 pp. 1–7). Both documents available online at the EU portal: <http://eur-lex.europa.eu>. Accessed on March 31, 2014.

¹² *Standard-setting in UNESCO, Conventions, Recommendations, Declarations and Charters adopted by UNESCO (1948–2006)* (2007) Leiden – Boston: UNESCO Editions/Martinus Nijhoff Publishers, p. 549 f.

Despite the firm protection of the religious destination, the need for funds necessitates opening up the places of worship to other uses and users. This leads us to consider and assess the degree/level of secularisation of these places of worship. If places of worship represent a religious place in the public sphere, does this still correspond with a real religious purpose and what are the consequences from a financial point of view? Might the decrease in religious practice allow the public authorities to demand or impose a cultural use, which represents an undeniable financial income? The fees required to enter churches to attend a cultural event or to visit them illustrate the kind of pressure existing today (France, Italy). But to a greater extent, this pressure is illustrated by the tendency to put an end to the religious nature of these buildings to allow non-religious re-uses, such as exclusively cultural places or as housing (England, Belgium, France . . .). (Fornierod 2010, pp. 8–9)

As far as architecture is inextricably linked to the concept of functionality, the adoption of a liturgical function by a former ‘sacred’ installation may enhance the cultural content of its infrastructure (Coomans 2012). In other words, the act of consecrating does not change the nature of religious structures, but rather it ‘increases’ their function. As it is argued in terms of philosophical theology:

The function of a building is to serve human need, in terms of leisure, shelter, etc.; the function of a consecrated building includes the serving of human need but it also provides for the worship of God. So the consecration of a building does not transform the nature of the space enclosed; it increases its function. It is now capable of serving both sacred and secular ends. To believe that the consecration of a building sets it apart from secular uses would be to restrict its function; there is no such restriction in and through eucharistic consecration and there is no sound theological reason for supposing that the consecration of a building necessarily involves a restriction either.¹³

Besides, the attitude of a ‘sensitive adaptation to new uses’ (pursuant to the provisions of the aforementioned *Convention for the Protection of the Architectural Heritage of Europe*) as well as the need for ‘suitable secular activities’, such as the holding of concerts, within the built environment of religious cultural heritage, is an integral part of the European history, at least since the period of post-Reformation:

As far back as 1552–3 minstrels were playing and singing in the church at Barnstaple, but it was not until the eighteenth century that music displays began to come into vogue. Dean Swift at Dublin agreed, not ungrudgingly, to ‘lend his cathedral to players and scrapers’ to act what he called ‘their opera’. On Saturday, 27th May 1749, the Prince and Princess of Wales attended a concert of Handel’s music in the chapel of the Foundling Hospital, London, the performance being for the benefit of the foundation.¹⁴

It should be borne in mind, that in the case of *ancient* sacred places which are being adapted to new (religious or secular) uses, the guidelines of the *Verona Charter* ‘on the Use of Ancient Places of Performance’ (as adopted at the International Colloquy of Verona in August 1997) should be analogously implemented. The *Charter’s* objectives are “to preserve a store of scientific information, manage the monuments in the perspective of development and, where circumstances permit, infuse ancient sites once more with their full role of places of artistic creation,

¹³ Davies G. (1968) *The secular use of Church Buildings*, New York: The Seabury Press, p. 263.

¹⁴ *Ibid.*, pp. 203–4.

shared enjoyment and emotion” (Ballester 2001, p. 331). More precisely, on the basis of the *Charter’s* guidelines about ‘*enhancing the sites by using them*’:

- Whereas all buildings are not suitable, owing to their state of conservation, for the current organization of performances, the use to which they are put, gives them all their meaning by updating their function.
- Whatever the type of event, it is essential to take account of the site’s vulnerability and also for performances to help enhance the heritage and arouse the audience’s interest in the ancient site in which they take place.
- A balance must be struck between the need to protect monuments and the expectations of audiences, visitors and local residents. To this end, systematic co-operation must be arranged between the municipalities which own the sites, those responsible for conservation and the organizers of performances, and regulations should be adopted for the use of each site specifying a minimum rules for their proper use.
- Proper use of the sites should reduce the risks of material damage to ancient structures by performances and prohibit non-removable stagings or modifications for the public. It will bear in mind staging requirements when planning the maintenance and rehabilitation of the monument so as to ensure that its functions as a place of performance and as a heritage asset dovetail as naturally as possible.
- The staging of live performances and hi-tech pageantry shows on the place’s history will profit from the use of new technologies for lighting, images and sound with a view to improving the very quality of the performance through an enhancement of the site.
- Contemporary creations should be encouraged when organizing performances, provided that the artist is able to interpret the spirit of the site and use it to benefit both the performance and the monument. (Ballester 2001, p. 332)

It is obvious that the above non-binding guidelines, emphasize the concept of ‘sustainable functionality’ in relation to the ancient sacred structures of religious performance and, thus, broaden the scope of the aforementioned *Convention* pertaining to the architectural heritage of Europe. Particularly in the case of old religious buildings that are now ‘devoid’ of a liturgical function, a possible ‘secular’ use may not necessarily affect *prima facie* their aesthetic features or architectural value; for example, “a secularized monastery is still the same building as it was before. Its spaces maintain the structure of a monastic cell, of a reading room or a chapel, although now they are used for different purposes”.¹⁵ However, as Frattari and Albatini (2005) have showed:

[I]t is possible to modify the built environment, even when it has a strong historic and religious (sacred, if we want) and social importance, giving old buildings a new function that is respectful of the original use from different point of view: formal, constructive, material, distributive and so on. The design plan is the central moment where to settle the

¹⁵ Von Weizsäcker C. F. (1973) *Die Tragweite der Wissenschaft*, Stuttgart: Hirzel, p. 179.

appropriate activities and changing for a building, considering with great attention the original features not only of the building itself, but even of the building as object with an high social and historical importance.

5.1.3 Sites

In the case of entire ‘sites’, i.e. complex works of man and nature than combine both tangible and intangible assets, insofar as these areas are still associated with a ‘living’ religious tradition and, thus, are still functioning as ‘sacral’ places, their legal approach, and therefore their management, involves delicate issues of cultural, spiritual and natural maintenance. Hence, when approaching such sites, one must keep a balance between heritage preservation, cultural management, tourism development, and ‘active’ practices of faith (Carmichael et al. 1998; Shackley 2003, pp. 125 f.; Goral 2011). Sacred sites are arguably the oldest type of visitor attractions within the world-wide tourism system. However, tourism creates a dilemma for the organizations that manage cultural heritage assets:

Tourism provides a powerful political and economic justification for site conservation; however, inappropriate use, increased visitation, and commercialization are threats to the integrity of the site. Tourists visit cultural heritage sites for a variety of reasons . . . They vary from the purposeful tourist who is seeking authentic cultural experiences to the casual tourist who may be visiting a historic site simply because it is part of their tour. . . Tourism at religious or sacred sites is a special type of cultural heritage tourism . . . Preserving cultural heritage at religious sites requires allowing the local community to continue using the site; however, religious practices can be disrupted by the presence of tourists. Inappropriate tourist activities and commercial development around a heritage religious site can lead to the trivialization of the site. (Levi and Kocher 2009, p. 17)

Due to the protected spiritual values attributed to these ‘functional’ (from the perspective of sacredness) religious sites, restrictions on access and use often apply (Wild and McLeod 2008, p. 5), even in terms of a ‘dress-code’:

Dress is one way of expressing reverence. It also demonstrates familiarity with the cultural and religious norms of the site or building and avoids embarrassment. Reverence can also be expressed in posture. Within a Christian sacred site, for example, pilgrims may be distinguished from tourists by the adoption of a reverent posture, often with hands folded as in prayer. (Shackley 2003, p. 34)

It is true that in Europe many of such sites are seldom utilized for their original function, and thus survive today mainly as sites of just ‘archaeological’ importance; in this way they have become, according to Shackley (2003, p. 2), “visitor attractions where the visitor is likely to be a tourist rather than a pilgrim, making a trip for historico-cultural rather than religious reasons”.¹⁶ Nevertheless, the revival and

¹⁶ Cf. Inge, op. cit., p. 92: “pilgrimage is, firstly, about roots: it reminds the traveller of the Christian heritage of which he or she is a part. The pilgrimage shrine speaks in many different ways of that heritage”.

increasing flow of visitors to the major pilgrimage sites of Europe since the late twentieth century, is undeniable:

The chosen destinations are both old and new: they range from the medieval routes west to the shrine of St James at Santiago de Compostela in northern Spain, through the Marian shrines that have established themselves at various points in European history (including Czestochowa in Poland, Lourdes in the Pyrenees, Fatima in Portugal, and Medjugorje in Croatia), to more recent points of reference such as Iona in western Scotland or Taizé in eastern France.¹⁷

Moreover, in the case of sacred ‘natural’ sites the element of functionality should be combined with the need for effective integration of social, cultural and environmental values. A typical example is that of the Natural Park of the *Rila Monastery* (Рилски манастир) in Bulgaria:

The Natural Park of the Monastery of Rila is one of the largest and more significant European protected areas initiated by a Christian Church, in this case the Bulgarian Orthodox Church . . . The Rila Monastery was founded by Saint Ivan Rilsky, a hermit, at the beginning of the 10th century. Perhaps due to this origin the “holy unity” between nature and the monastery has always been preserved . . . For the Bulgarian people, Rila is the holiest place, nestling in the bosom of the most majestic mountain in the country. It is the second largest monastery in the Balkan region, with a millennial history of always being open to people. Several “sanctums” are located around the monastery: holy springs, the holy cave of the founder, five hermitages, and so on. A small monastic community currently serves the monastery. For centuries the Rila Monastery was a stronghold of the Bulgarian language and culture, a support for the people’s consciousness. The first book of Bulgarian history was written in Rila. The monastery has one of the oldest and most important libraries of the Balkan region. The Natural Park has healthy ecosystems and spectacular mountain landscapes, ranging from 1,000-2,700m, including 28 lakes, most of glacial origin, and outstanding beech, oak, and spruce forests, the oldest in the country. They include 36 native tree species, and many endemic plants, over 20 of which are found only in the area. Fauna diversity is also high, including at the top of the trophic pyramid, healthy populations of wolf and brown bear. The Natural Park of the Monastery of Rila was established by a Decree of the Ministry of the Environment and Water Resources in the year 2000 . . . The state property is recognized as a Nature Preserve, and church property is a Natural Park, with a high level of protection . . . A management plan for the Natural Park was prepared in 2003 by an interdisciplinary team, with involvement of the management team, and a consultation process. Zoning includes a specific category for religious values. No hunting or harvesting is allowed, except a small quota for the monastic community. The main goals of the management plan include: the conservation of religious and cultural heritage, conservation of natural components, management of natural resources and tourism, interpretation and education, as well as coordination of the activities of the Orthodox Church and state institutions. An important component is to guarantee and preserve the unity between nature and the Rila Monastery, and to support the rebirth of the area as the spiritual and cultural centre of Bulgaria. (Wild and McLeod 2008, p. 67)

¹⁷ Davie G. (2000) *Religion in Modern Europe. A memory mutates* [=European Societies, Crouch C. (ed.)], New York: Oxford University, pp. 157–58.

Similar examples are the *Parco Nazionale Foreste Casentinesi* in Tuscany, Italy (which includes two medieval Benedictine monasteries),¹⁸ the Orthodox monastic region of the National Park of *Vânători-Neamt* in Romania (which is the second largest monastic community in Europe),¹⁹ as well as the *Solovetsky Archipelago* on the northwest coast of Russia which is dominated by the fifteenth century homonym *Solovetsky* monastery (Соловецкий монастырь).²⁰ In all these cases, the implementation of the relevant *Principles and Guidelines for the Management of Sacred Natural Sites Located in Legally Recognised Protected Areas*, issued by the International Union for Conservation of Nature (IUCN),²¹ is of paramount importance. According to the relevant *Principles and Guidelines*, the responsible stakeholders should protect those ‘functional’ sacred natural sites ‘while providing appropriate management access and use’. More precisely, the relevant stakeholders should: develop appropriate policies and practices that respect traditional custodian access and use, where sacred natural sites fall within formal protected areas; understand and manage visitor pressures and develop appropriate policies, rules, codes of conduct, facilities and practices for visitor access to sacred sites, making special provisions for pressures brought about by pilgrimages and other seasonal variations in usage; encourage ongoing dialogue among the relevant spiritual traditions and community leaders to control inappropriate use of sacred natural sites through both protected area regulations and public education programmes that promote respect for diverse cultural values; invest in tourism activities which are culturally appropriate, respectful and guided by the value systems of custodian communities; ensure that use is sustainable and, therefore, do not impose unnecessary controls within sacred natural sites; enhance the protection of sacred natural sites by identifying, researching, managing and mitigating overuse, sources of pollution, natural disasters, and the effects of climate change and other socially derived threats, such as vandalism and theft; develop disaster management plans for unpredictable natural and human caused events; safeguard against the unintended or deliberate desecration of sacred natural sites and promote the recovery, regeneration and re-sanctifying of damaged sites where appropriate; apply integrated environmental and social impact assessment procedures for developments affecting sacred natural sites; where appropriate, pay due attention to the suitable financing of sacred natural site management and protection, and develop mechanisms for generating and

¹⁸ Pungetti G., Locatelli F., & Hughes P. (2009) *The National Park of the Casentine Forests*, in: J. Mallarach & T. Papayannis (eds.) (2009) *The sacred dimension of protected areas: Proceedings of the second workshop of the Delos Initiative* (Ouranoupolis 24–27 October 2007), Gland, Athens: IUCN - Mediterranean Institute for Nature and Anthropos (Med-INA), pp. 61–5.

¹⁹ Sauciu B. & Catanoiu S. (2009) *The monastic area of Vanatori Neamt Nature Park*, in: Mallarach & Papayannis, op. cit., pp. 146–8.

²⁰ Davydov A., Bolotov I. & Mikhailova G. (2009) *Solovetsky Islands: a holy land surrounded by the Arctic Ocean*, in: Mallarach & Papayannis, op. cit., pp. 89–103.

²¹ See the relevant *Principles and Guidelines* online at: <http://data.iucn.org/dbtw-wpd/html/PAG-016/cover.html>. Accessed on March 31, 2014.

sharing revenue that take into account considerations of transparency, ethics, equity and sustainability (see Wild and McLeod 2008, pp. 21 f.).

In addition, according to the same *Principles* and *Guidelines*, the competent authorities should ‘respect the rights of sacred natural site custodians within an appropriate framework of national policy’. In this context, the authorities should understand traditional management institutions and enable and strengthen the continued management of sacred natural sites by these institutions; support the recognition, within the overall national protected area framework, of the rights of custodians to their autonomous control and management of their sacred sites and guard against the imposition of conflicting dominant values; where sacred natural sites have been incorporated within government or private protected areas in ways that have affected the tenure rights of their custodians, explore options for the devolution of such rights and for their long-term tenure security; finally, root the management of sacred sites in a rights-based approach “*respecting basic human rights, rights to freedom of religion and worship*” (Wild and McLeod 2008, p. 25). Indeed, the ability of religious communities to designate and use their sacred sites, is one of the keystones of religious liberty (Edge 2002, pp. 321 f.). In fact, continued use of heritage religious sites is important for both visitors and local (religious) communities (Levi and Kocher 2009, p. 19). Religious use by a local community provides meaning to the site and supports preservation and maintenance; also, the opportunity to observe and participate in religious activities is an important part of the tourist’s personal and cultural experience:

The ideal situation is when a visit to a sacred site is an essentially spiritual experience, uncontaminated by technical and commercial realities. Visiting a sacred site should be an emotive experience and site managers are also charged with the task of preserving the spiritual quality referred to as a ‘spirit place’. A sacred site should offer the attendee a window on infinity . . . At the same time [site managers] must facilitate the religious use of the site and cater for the frequently conflicting demands of worshippers and visitors. Site managers may have to cope with heavy but uneven visitor flows, or with special festivals and events that may attract crowds running into the millions. Providing opportunities for authentic experiences of sacred places and the spiritual culture of region management strategies should ensure sustainable tourism that benefits both the tourist and the community. (Goral 2011, p. 55)

It remains to be noted, however, that the fundamental expressions of religious freedom within heritage religious sites, i.e. the actual acts of worship, rituals, celebrations and associated activities, are not unlimited. Particularly in the case of ‘non-functional’ sacred sites, special attention must be paid to the preservation of the physical condition, the historical background and the unique cultural character of each and every such site, by carefully weighing the religious demands of the interested communities, the ‘secular’ approach of the visitors, as well as the responsibilities and obligations of the competent authorities regarding the protection and preservation of cultural heritage regardless of denominational origins. This is the case, for instance, for the standing stones and environs of *Stonehenge* “one of the noblest antiquities now left upon earth”,²² which has been a recurrent, and

²² Stukeley W. (1740) *Stonehenge, a temple restored to the British druids*, W. Innys & R. Monby, London, p. ii.

increasingly religious, source of conflict in England (Aitchison et al. 2000, pp. 102 f.; Edge 2002, pp. 370 f.; English 2002). As it has been noted:

[T]he contested nature of this particular landscape becomes very obvious as it annually transmutes into a physical and ideological battleground. Tensions between an array of users – archaeologists, stewards, historians, interpreters, day-trippers, educational groups and more alternative users – suggest that this is not a site that can be presented as a one-dimensional monument to the past. A host of histories, both scientific and mythical are embedded in the site and the challenge to represent its multi-vocality and the contested nature of both its past and its present, is very clear. (Aitchison et al. 2000, p. 104)

Stonehenge, which is an ancient monument protected under the Ancient Monuments and Archaeological Areas Act of 1979, has been linked *inter alia* to Druidism and has been described as a ceremonial place related to rituals of birth, death and fertility (Aitchison et al. 2000, p. 105).²³ In this context, the issue of access to the monument and its environs has been raised in relation to the site's function as a place of worship. According to § 4 (c) of the relevant *Stonehenge Regulations* of 1997: "The following acts are prohibited unless the prior consent in writing of English Heritage has been obtained: . . . organising or taking part in any assembly, display, performance, representation, review, theatrical event, festival, ceremony or ritual within the site of the monument".²⁴ Taking into account this domestic margin of appreciation and statutory protection, the European Commission of Human Rights found in two similar cases, that restrictions on the 'functionality' of *Stonehenge* as an 'actively' sacred site, were justified on public-order grounds. In the case of *Chappell v. United Kingdom* the applicant complained that the decision to close Stonehenge during the midsummer solstice and prevent Druids from practicing their relevant ceremony was a violation of Article 9 ECHR. The Commission found that even if Article 9 had been indeed violated, the relevant action taken by the authorities was justified as 'a necessary public safety measure' protecting 'the unique historical and archaeological importance of Stonehenge'. More precisely, according to the Commission:

²³ According to the historical background provided by the European Commission of Human Rights in the case of *Pendragon v. the United Kingdom* (no. 31416/96, Commission decision of October 19, 1998): "Stonehenge is a monument that predates the Iron Age and consists of a circle of stones which are aligned to the midsummer sunrise. The sun rises above the Hele Stone on the date of the summer solstice. It is accepted by prehistorians that the original purpose of Stonehenge was as a scene of gatherings at the moment of the midsummer sunrise. The Iron Age Druids of Britain were highly-respected healers, judges, prophets and teachers of mystical philosophy. Whilst it appears that there is no evidence that Iron Age Druids built or presided at Stonehenge, it is likely that the tribes of the Stonehenge period (about two thousand years before the Iron Age Druids) had Druid-like figures amongst their number. The modern Druid Orders have been reconstructing rituals, that are favoured by academics as possibly having been performed by the builders of Stonehenge, since the beginning of this century. These reconstructed rituals have taken place continuously for approximately the last 100 years at Stonehenge, prior to such assemblies being forbidden in the late 1980s".

²⁴ *Stonehenge Regulations* 1997, *Statutory Instruments* No. 2038/1997. See the full text of the *Regulations* online at: <http://www.legislation.gov.uk>. Accessed on March 31, 2014.

[T]he relevant authorities were under a duty to protect Stonehenge and the surrounding area and genuinely sought a solution for the holding of the midsummer solstice ceremony. However, in view of the geographical setting of Stonehenge and the absence of a suitable site in the vicinity where a festival could be held without threatening the monument and the risk of harm to the public through disruption, the authorities ultimately found that there was no practical alternative but to close the area. This decision reflected the unique historical and archaeological importance of Stonehenge.²⁵

In the similar case of *Pendragon v. the United Kingdom*, which also concerned the ban of religious celebrations at Stonehenge, the Commission preferred to found its decision exclusively on the need to keep public order (Edge 2002, pp. 57, 340 f.). The Commission examined the applicant's claim 'to use the site for the purpose for which it was in all likelihood originally indented', primarily under Article 11 ECHR. The key question was whether the restriction in relation to the site's original (sacral) function was proportionate (Edge 2002, p. 340). The Commission accepted that a possible assembly of religious nature would have been legitimate, however noted that general concerns regarding previous disorder at the site, due to such unlimited celebrations, justified 'steps of a preventive nature' in order to protect the site. In addition the Commission noted that the applicant had not suggested any alternative solution to the ban (i.e. the restriction to use *Stonehenge* as a place of worship), which could accommodate his religious needs without attracting massive groups of visitors likely to endanger the site; hence, the Commission found that there was no evidence of discrimination against the applicant in the enjoyment of his Convention rights.²⁶

5.2 Tangible and Intangible Elements

The diverse array of the aforementioned conventions, declarations, recommendations, policies and guidelines, makes abundantly clear that there are two basic (although in many cases overlapping) types of religious cultural elements, whether functional (from the perspective of 'living' sacredness) or not: *tangible* and *intangible*. Although the international instruments protecting cultural heritage initially focused primarily on the former, such protection has now been frequently extended also to the latter (*see* Yu 2008, pp. 443 f.). The 2003 UNESCO *Convention on the Safeguarding of the Intangible Cultural Heritage*, for instance, covers the religious "practices, representations, expressions, knowledge, skills— as well as the instruments, objects, artefacts and cultural spaces associated therewith",²⁷ which religious communities and groups recognize as part of their cultural heritage. Likewise, the 2001 Universal *Declaration on Cultural Diversity* broadly defines culture to

²⁵ *Chappell v. United Kingdom*, no. 12587/86, Commission decision of July 14, 1987 (Decisions and Reports, 53, p. 241).

²⁶ *Pendragon v. the United Kingdom*, op. cit.

²⁷ *Standard-setting in UNESCO*, op. cit., p. 298.

cover “the set of distinctive spiritual, material, intellectual and emotional features of society or a social group”, and that it encompasses, in addition to art and literature, “traditions and beliefs”.²⁸

Even before the aforementioned 2003 Convention, which provides that member states ratifying and implementing its provisions should compile an inventory of instances of intangible cultural heritage to be recognized, commemorated, and safeguarded within their territories,²⁹ UNESCO had already launched in 1993 the ‘*Living Human Treasures Systems*’ and in 1998 the ‘*Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity*’. In the framework of the latter, member states were free to submit candidates to this list of masterpieces and an international jury was created to review and approve such proposals.³⁰ From 2001 until 2005, a total of three proclamations occurred, encompassing several forms of intangible heritage around the world. Within the framework of this inventory of masterpieces, “nineteen forms of cultural spaces or expression were proclaimed ‘Masterpieces of Oral and Intangible Heritage’ by the Director-General of UNESCO in 2001, another set of twenty-eight ‘Masterpieces’ gained international recognition in November 2003, and forty-three in 2005” (Fairchild Ruggles and Silvermann 2009, p. 161). These proclamations provided a useful indication of the types of intangible heritage that different states wish to safeguard (Bouchenaki 2007, p. 107). In 2008 the competent Intergovernmental Committee incorporated 90 elements (formerly proclaimed masterpieces) into the ‘*Representative List of the Intangible Cultural Heritage of Humanity*’.³¹ During the period from 2009 to 2012, the Committee also inscribed more than 100 new elements on the same List. Among these elements, which are extremely varied, covering all sorts of sociocultural phenomena ranging from sacral items to chants and traditional rituals, there are several intangible elements that maintain a unique ‘religious character’, located within member states of the European Union or the Council of Europe. Typical such examples, that reflect respectively the cultural and social identity of their religious origin, are *inter alia*:

5.2.1 Sacred Items

Items which are considered tangible cultural heritage may also be protected as intangible cultural heritage (Yu 2008, p. 444). The cultural meaning of these materials goes hand in hand with the meaning of the relevant religious process

²⁸ *Ibid.*, p. 707.

²⁹ Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, UNESCO, ITH/07/2.COM/CONF.208/14, July 23, 2007. UNESCO, Paris.

³⁰ *Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity: Guide for the Presentation of Candidature Files*. July 9, 2007. UNESCO.

³¹ See the above List online at: <http://www.unesco.org/culture/ich>. Accessed on March 31, 2014.

that produces them. Therefore, it is this particular process that needs to be preserved, rather than merely the items produced, in order to ensure the continued creation of these valued religious products. This is the case, for example, for the unique symbolism and traditional craftsmanship of the Armenian *Khachkar*, which has been inscribed in the UNESCO ‘Representative List’ since 2010:

Khachkar is an outdoor, vertically erected flat stele, reaching 1.5m, with an ornamentally carved cross in the middle, resting on the symbol of the sun, or of the wheel of eternity, accompanied by vegetative-geometric motifs, animals and carvings of people. . . Cross-stones very often have date-palm leaves symbolizing Christ’s resurrection. The cross incorporates both victorious and savior philosophy, and is presented in the center of universe as a tree of life on the paradise mountain, referencing future and eternity. Historically, the most common reason for erecting a khachkar was salvation of the soul of either a living or deceased person. Nowadays, its main functions are social: focal point for worship, relic that facilitates communication between secular and divine, provides help and protection and serves as a memorial stone. The Armenian cultural environment is impossible to imagine without khachkar, which is considered to be holy and by its very presence, it becomes an indicator, defender and consecrator of the terrain: this explains khachkar’s placement on crossroads, edges of roads, borders, hills dominating the terrain and near springs. . . There is a specific religious ceremony associated with placement of khachkar, which is the blessing of khachkar (prayer, reading, make the sign of the cross) and anoint (‘cleaning’ with chrism or water and wine). The basis of the ritual is the perception that an inanimate subject cannot have any power if God is not living in it. Particularly interesting is the practice of anointing with wine: in the case of those khachkars on which the ‘wine-providing’ grape rods and pomegranate are required elements of the composition . . . this practice has been viewed as an anointing with the blood of God. After being blessed and anointed, khachkar already possesses holy powers and can provide help, protection, victory, long life, remembrance, mediation toward salvation of the soul. By virtue of its open air placement and by the invitation to worship the cross, each khachkar is open to any believer. One of the primary features of khachkar is precisely the assurance of a direct (unmediated) connection of believers with the holy power and its symbol.³²

A similar example is that of the Lithuanian cross-crafting tradition (*Kryždirbystė*). The latter, which has been enrolled into the ‘List of Masterpieces of the Oral and Intangible Heritage of Humanity’ since 2001 and has been inscribed in the ‘Representative List’ since 2008, refers to the art of making crosses and altars, as well as the consecration of these crosses and the rituals associated with them; the carved oak crosses are linked to Catholic ceremonies and harvest celebrations. Once the cross is consecrated by a priest, it acquires an inalienable sacred significance:

[T]he most prevalent and perhaps finest form of Lithuanian folk sculpture is the cross, whose ubiquity has earned this heavily forested country its reputation as a Land of Crosses. By the nineteenth century folk crosses became intrinsic to local culture as local customs began to be expressed in ways that were in line with official Church practices; thus older pagan motifs merged with Christian symbols to create uniquely Lithuanian folk-art forms.

³² Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, UNESCO, Fifth Session Nairobi, Kenya, November 2010. *Nomination File No. 00434* for Inscription on the Representative List of the Intangible Cultural Heritage, pp. 4–6.

Iron graveyard crosses, for example, usually incorporate a sun, which is traditionally depicted as a circle surrounded by a six-pointed star, while the wooden crosses found outside farmsteads often feature a crucifix located within or atop a sun. The Hill of Crosses near Šiauliai features what is possibly the world's largest and most surreal collection of crosses, ranging in size from the miniscule to a height of five meters.³³

These sacred items became the symbol of national and religious identity of Lithuania with its incorporation into the orthodox Russian Empire in the nineteenth century. Their symbolic role was reinforced under the Soviet regime, despite the fact that the crosses were officially banned. Today, the crosses are placed on roadsides, at the entrance to villages, near monuments and in cemeteries. A range of types of offerings are made, especially items of food, rosaries, money or colored scarves (e.g. for a wedding) or aprons, asking for fertility; the crosses are also an important meeting place in a village and a symbol of the unity of the community.

5.2.2 *Religious Music*

Music is often said to be the closest of the arts to religion, since what we call its 'language' cannot be intellectually articulated, and thus "may put us in touch with the numinous, and therefore presumably with the divine, or at least with the forces we call spiritual" (Mellers 2002, p. xi). This sense of 'spirituality' is evident in copious examples of European sacred music such as Monteverdi's *Vespro della Beata Vergine* (1610), Bach's *Mass in B minor* (1747), Mozart's *Requiem Mass in D minor* (1791), Beethoven's *Missa Solemnis* (1819–1822), Berlioz's *Grande Messe des Morts* (1837), Verdi's *Messa da Requiem* (1868), Rachmaninoff's *Liturgiy of St John Chrysostom* (1910), Janáček's *Glagolitic Mass* (1926), and Stravinsky's *Symphony of Psalms* (1930). Obviously, the notion of 'spirituality' is not confined to the famous musical masterpieces of European heritage. Equally important parts of this intangible legacy are, for instance, the Gregorian chant, which is usually anonymous in order to "ban the intrusive ego" (Mellers 2002, p. xii) and the Byzantine Church music, which is also usually anonymous and always functional. Indeed, 'spirituality' is not limited to the elaborate musical compositions of the great artists of the past, but can be traced also in the living heritage of the ritual chanting of *cantillation*:

The magical character of religious cantillation is inseparable from its purely melodic and rhythmic nature. A single melodic line tends to be independent of metrical stress, moving in irregular rhythms that come as the wind listeth often associated with the declaimed word. The monody of Byzantine chant, in descent from Greek monody, absorbed elements of oriental cantillation by way of Judaic synagogue music. In Gregorian chant itself the heart of the line is the modal patterns that, almost as 'natural' as breathing, become, like the *raga* of classical Indian music, a fount of creation (Mellers 2002, p. 4).

³³ O'Connor K. (2006) *Culture and customs of the Baltic States*, Greenwood Publishing, pp. 229–230.



Fig. 5.1 *Kyrie Eleison* [Abbaye Saint-Pierre de Solesmes (ed.) (1961) *The Liber usualis: with introduction and rubrics in English*. Tournai: Desclée & Co, p. 81. Full edition (which belongs in the public domain) available online: <https://archive.org/stream/TheLiberUsualis1961>. Accessed on March 31, 2014]

The variety of the sacred musical ‘languages’ of Europe, forms an integral part of the common cultural heritage of its religious communities. The latter, according to the Council of Europe, should “*build on their long traditions of . . . music . . . an understanding of spirituality and the role that intangible values have in the cultural heritage*”.³⁴ This musical unity within diversity, is best illustrated by the familiar and venerated Greek phrase ‘*Kýrie eléison*’ (i.e. ‘Lord, have mercy’) which is one of the most oft-repeated phrases in Christianity. The same phrase can be found across the European cultural spectrum within a vast variety of oral traditions and musical settings, in terms of notation, composition and rhythm. Indeed, it seems rather obvious, even to the non-expert, that the exact same phrase appears as an entirely different *melisma* within, for instance, the Gregorian and the Byzantine musical contexts. According to the Gregorian notation and musical setting, the said phrase (written in Latin) appears in a specific melodic structure of ‘Kyrie altissime’ (Fig. 5.1).

The exact same phrase (written in Greek), on the basis of the Byzantine notation and musical setting, is depicted, as a quite different, yet aesthetically marvelous, sequence of symbols and signs (Fig. 5.2).

The diversity of religious musical patterns and tones in Europe is intertwined with the diversity of its spoken languages. In the words of Nietzsche: “*Die innigste und häufigste Verschmelzung von einer Art Geberdensymbolik und dem Ton nennt man Sprache* [It is the most intimate and common mixture of a sort of gestural symbolism and tone that we call language]”.³⁵ In this rationale, the 1982 *Recommendation* ‘concerning modern languages’ of the Committee of Ministers to the Member States of the Council of Europe, emphasizes correctly that the “rich heritage of diverse [musical] languages and cultures in Europe is a valuable

³⁴ Recommendation 1484 (2000) *Management of cathedrals and other major religious buildings in use*, that was adopted by the Standing Committee, acting on behalf of the Assembly, on November 9, 2000.

³⁵ Nietzsche F. (1928) *Die dionysische Weltanschauung* in: Colli G. & Montinari M. (eds.) (1988) *Friedrich Nietzsche. Die Geburt der Tragödie: Unzeitgemäße Betrachtungen I-IV: Nachgelassene Schriften 1870–1873* (Vol. 1), Nördlingen: Deutscher Taschenbuch Verlag de Gruyter, p. 575 [=translation by Allen I. J (2013) *The Dionysian Vision of the World*, Minneapolis: Univocal Publishing, p. 55].

5.2.3 *Rituals*

Several European sacred rituals, religious performances and spiritual ceremonies have been included into the ‘*Representative List of the Intangible Cultural Heritage of Humanity*’. Among them, the “*Procession of the Holy Blood in Bruges*” (Heilig Bloedprocessie):

According to a legend, Derrick of Alsace (Diederik van den Elzas) Count of Flanders, brought the Relic of the Holy Blood (of Jezus Christ) from Jerusalem to the Flemish city of Bruges in the middle of the 12th century, after the second crusade. The first written evidence of the presence of such a relic dates from 1256. The relic is at present preserved and worshipped in the St. chapel on the Burg square (in the centre of Bruges). The legal owner has been the city since the Middle Ages. The first mention of a procession (possibly with the relic) is made in a charter of the Unloaders’ Corporation Guild (pijnders) (1291). From 1303 onwards, there are written traces of a Holy Blood procession going round the city walls, as a collective protection rite involving guilds of master artisans and of archers, clergy and city officials that participated in the parade. Religious and civil features, sacred and festive profane elements and a ritual and symbolic appropriation of the urban space and strengthening of its identity would be characteristic for the procession the next seven centuries.³⁸

A similar religious procession takes place today on the Dalmatian island of Hvar in southern Croatia. A long-established and inalienable part of Hvar religious and cultural identity, the procession of *Za križem* (‘following the cross’), which has been inscribed into the Representative List since 2009, connects the communities of the island to each other and to the world Catholic community:

“Following the Cross” Procession is the central point of Easter-related customs on the island of Hvar, which most powerfully marks the religious, cultural and social identity of the island people. The Procession cherishes the singing of Lamentations of the Virgin Mary, which evokes a special experience with its musical and poetic contents, unique in Croatian traditional musical practice. The main characteristic of the Procession is its popular, processional and Passion character. The Procession is not organized by the church, but the worshippers, i.e. brotherhoods, communities which have had a powerful charitable, economic and social importance, in addition to their religious significance, from the Middle Ages to this day. Following the Cross is a procession, which passes through 6 villages on the island of Hvar on the night between Maundy Thursday and Good Friday: Jelsa, Pitve, Vrisnik, Svirče, Vrbanj and Vrboska. After the evening mass on Maundy Thursday, six processions start at the same time from six parish churches, headed by cross-bearers, and visit churches with decorated God’s graves in the neighbouring villages, moving clockwise. The Procession ends at the dawn of Good Friday by closing the circle, i.e. returning of the processions to their parish churches after 25 kilometres and 8 hours of walking and praying. The Procession commemorates Jesus’ suffering, expresses affective compassion of Croatian believers for Jesus’ pain and suffering and Mary’s grief . . . As a part of preparation for celebrating the greatest Christian holiday, Easter, the Procession is not just a link between small island communities that it physically connects, but also a link between the Adriatic island, Croatia, pilgrims from around the world with the entire Catholic community in the

³⁸ Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, UNESCO, Fourth Session Abu Dhabi, United Arab Emirates, October 2009. *Nomination File No. 00263* for Inscription on the Representative List of the Intangible Cultural Heritage, p. 3.

time of ecumenism and the whole world. For pilgrims, “Following the Cross” is a pilgrimage of faith, pious meditation on God but also their own attitude towards people, thus inciting respect between communities, groups and individuals in the sincerest way of all.³⁹

It should be stressed that very often religious rituals revolve around sacred music. In these cases the intangible element of rituality overlaps with the element of musicality. In the aforementioned case of *Za križem*, for instance, the core substance of the procession is the singing of the *Lamentations of the Virgin Mary*, which is sang in the form of a musical dialogue by chosen singers, (*kantaduri*), on predetermined places (*stacije*), such as churches and chapels:

Two singers sing the tune in perfect unison combining thus their voices into a unique voice. Although singers sing identical melody lines their functions are divided; while one is leading the melody, dictates the forming of melodic and poetic structure, leads dynamic toning and creates a balance between singing and dramatic pauses, the other singer follows his lead. Singing a complex song such as the Lamentations of the Virgin Mary requires considerable psycho-physical disposition of the singer – an extremely good ear, the ability to concentrate and a good and strong voice (mid range-baritone). Singers are chosen precisely for the characteristics of their voices-timbre and dynamic disposition of the voice are the critical elements in choosing duets and the singers are descendants of older *kantaduri*. The melody of the Lamentations of the Virgin Mary verses is a chorus formulated in a series of sequences, which are progressing dynamically and melodically up the scale towards the middle of the song to gradually go down the scale to the original tones. Non-timed tone sequence, characteristic ornaments and many melismas on one syllable are the main distinguishing features of this song. The text of the Lamentations of the Virgin Mary is an octosyllabic verse, Passion-related text dating from the 15th century. The subject of lamentations, drawing on the history of Christ’s suffering, according to the reports of four Gospels, was inspired by Passion sermons and meditations of medieval authors. Except for the Lamentations of the Virgin Mary, the cross-bearer’s party and pilgrims also chant many other songs and prayers.⁴⁰

5.3 Elements of Public and Private Property

While the greatest part of the overall cultural (movable or immovable) property in Europe is owned by the respective States, religious cultural property in particular, is owned, in most cases, by other non-governmental organizations such as religious entities and private foundations or individuals. In a relevant *Report on ‘the private management of cultural property’* which was issued in 2005 by the Committee on Culture, Science and Education of the Council of Europe,⁴¹ and was followed by a

³⁹ Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, UNESCO, Fourth Session Abu Dhabi, United Arab Emirates, October 2009. *Nomination File No. 00242* for Inscription on the Representative List of the Intangible Cultural Heritage, pp. 2–4.

⁴⁰ *Ibid.*, pp. 3–4.

⁴¹ See Parliamentary Assembly of the Council of Europe, Doc. 10731, on October 24, 2005.

relevant *Recommendation*,⁴² it was noted that the most usual form of management of cultural property is by private persons, trusts, associations, foundations and other non-governmental organizations: according to the wording of the *Report*, “[t]he most significant of these NGOs in terms of historic cultural property are the established churches”. The legal protection of this ‘historic cultural property’ is for each and every religious community, a way of ensuring the exercise of its right, as a collective body, to manifest religion.⁴³ In the case of places of worship, their legal regime correlates not only with the fundamental distinction between public and private law system, but also with the distinction between public and private space. In philosophical terms, according to Formerod (2012, p. 324):

The uncertainty surrounding the possible similarities between the traditional understanding of the public/private distinction and public space would lead us to recall that the criteria for defining the latter are ‘functional, not organic: regardless of the type of entity which owns the place, what matters is that is used collectively’. Seen from this perspective, all places of worship may fall within public space from the moment when worship takes on, by definition, a collective dimension.

From a legal point of view, pursuant to Article 1 of Protocol No. 1 of the European Convention of Human Rights and Fundamental Freedoms, every natural or legal person is entitled to the peaceful enjoyment of his property; no one can be deprived of his property except “in the public interest” and “subject to the conditions provided for by law and by the general principles of international law”.⁴⁴ This substantial protection against arbitrary or disproportionate forms of interference, cannot, however, impair the right of a State “to enforce such laws as it deems necessary to control the use of property in accordance with the general interest. . .” (Art. 1, Prot. No 1 *in finem*). As it has been clarified by the ECHR in the case of the *Holy Monasteries v. Greece*, the protection of the right of property, comprises three distinct rules:

The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule.⁴⁵

⁴² Recommendation 1730 (2005) adopted by the Standing Committee, acting on behalf of the Assembly, on November 25, 2005.

⁴³ Renucci J. F. (2005) *Article 9 on the European Convention on Human Rights: Freedom of Thought, Conscience and Religion* (Vol. 20), Strasbourg: Council of Europe Publishing.

⁴⁴ Cf. Sermet L. (1998) *The European Convention on human rights and property rights* (Vol. 11), Strasbourg: Council of Europe Publishing. In relation to the notion of ‘public interest’ see: Merryman, *The Public Interest in Cultural Property*, op. cit.

⁴⁵ *Holy Monasteries v. Greece*, ECHR Series A: Judgments and Decisions 301. 1994, § 56.

It should be noted that in the aforementioned case, the Greek State expropriated, without any compensation, property belonging to Orthodox monasteries.⁴⁶ The property of these “ascetic religious institutions whose members live according to monastic principles, the sacred rules of asceticism and the traditions of the Christian Orthodox Church”,⁴⁷ constitutes an integral part of their historical heritage and a basis for further achieving objectives, which are essentially ecclesiastical and spiritual, “but also cultural and social ones”.⁴⁸ This is also the case for the Christian Orthodox monasteries in Bulgaria, which are widely regarded as “sanctuaries of national consciousness, cultural continuity and tradition”.⁴⁹ A significant number of these sites are in urgent need of repair, restoration and maintenance works:

The reason behind the declining state of Bulgarian monasteries can be partly attributed to the non-existence of adequate government support. Currently, the financing structure for monasteries is unclear even for those working in the sector. There is no unique mechanism to finance conservation and repair works. Most financial support is linked to the state budget, either directly or indirectly through the Ministry of Culture the National Institute of Cultural Monuments, the Directory of Religious Affairs and the regional municipalities . . . The economic rationale for the use of state grants is the theory of public goods.⁵⁰

Whether public goods or private assets, the elements of religious cultural heritage may belong, according to the provisions of the 1970 UNESCO *Convention ‘on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property’*, to a wider network of *national cultural patrimony* “specifically designated by each State”.⁵¹ In this case, individual States act as the final arbiters of what is deemed worthy of protection and preservation and as the

⁴⁶ According to the Decision (§§ 6–7) “The applicant monasteries, which were founded between the ninth and thirteenth centuries, accumulated a considerable amount of property, in particular through donations made before the creation of the Greek State in 1829, but a large part of this property was expropriated during the early years of the State’s existence. The monasteries themselves also gave away whole tracts of land to the State or to individuals who had none. During the Byzantine and Ottoman empires the monasteries and religious institutions in general were almost the only institutions discharging important social, cultural and educational functions; even in the nineteenth century after the creation of the modern Greek State, they still discharged some of these functions. The State never challenged their ownership, and the monasteries always relied on adverse possession as a subsidiary means of establishing it, particularly in cases where Byzantine or Ottoman title deeds were lacking or had been destroyed. On several occasions the State published decrees in the Official Gazette in which their ownership was acknowledged . . . Apart from property thus amassed over the centuries, the monasteries acquired numerous plots of land and buildings more recently, either as gifts or legacies or through purchase.”

⁴⁷ *Ibid.*, § 15.

⁴⁸ *Ibid.*, § 49.

⁴⁹ Mourato S., Kontoleon A. & Danchev A. (eds.) (2002) *Preserving cultural heritage in transition economies: a contingent valuation study of Bulgarian monasteries* in: Navrud S. & Ready R. (eds.) *Valuing cultural heritage: Applying environmental valuation techniques to historic buildings, monuments and artifacts*, Edward Elgar Publishing, p. 68.

⁵⁰ *Ibid.*

⁵¹ *Standard-setting in UNESCO*, op. cit., p. 298.

gatekeepers of their territorial cultural property interests.⁵² In the same context, the Council of the European Union encourages the respective States to safeguard their sacred treasures (as basic elements of their national culture) and particularly “ensure the protection of religious heritage sites and places of worship”.⁵³

Hence, the central question regarding religious cultural property is how to ensure a balance between the need for assessment of its artistic, spiritual and historical importance (for example by its listing in ‘ecclesiastical inventories’), its devotional function (wherever still active), and the need for respect of the relevant right of ownership (including its commercial exploitation).

For the parties involved [the above necessary balance] very often implies reaching an agreement on the practical modalities of state intervention, be it for works of conservation and/or the organisation of the cultural use of such places. This kind of partnership already exists [in Europe], either through the agreement of specific competent bodies or through appropriate conventions/agreements. Opening to cultural visits would look to be the most appropriate solution before the other extreme of the definitive closing of the place, or indeed its demolition. (Formerod 2010, p. 12)

According to the aforementioned *Report* of the Council of Europe, there are many good examples of outstanding care taken by private owners for the preservation of cultural property. However, very often, private ownership is vulnerable because of the costs involved. There is a great difficulty, for instance, in maintaining religious structures in the face of mounting operational and maintenance costs and increasing taxation⁵⁴; the same applies also to collections of religious cultural objects. As stated in the relevant *Report*:

The collapse of many churches is similarly linked to the disappearance of a congregation prepared to pay for their upkeep. In such cases alternative use or rescue by an institution concerned for protection of heritage is necessary. The Assembly touched on this in its Resolution 916 (1989) on redundant religious buildings. Examples of Trusts looking after redundant churches as historic buildings are: in the United Kingdom the Churches Conservation Trust, the Historic Chapels Trust, the Scottish Redundant Churches Trust and also the Friends of Friendless Churches, in the Netherlands the Stichting Oude Kerken particularly that for the Province of Groningen and in Germany the Förderkreis Alte Kirchen.

Historically, the processes of secularization and expropriation of the ecclesiastical property that took place in various European countries in the nineteenth century, coincided with the development of an administrative activity dedicated to heritage protection. The raise of monument conservation policies allowed European States to place major restrictions on the property rights of religious

⁵² Fishman J. (2010) *Locating the International Interest in Intranational Cultural Property Disputes*, The Yale Journal of International Law, Vol. 35, p. 358.

⁵³ Council of the European Union (2013) *EU Guidelines on the promotion and protection of freedom of religion or belief*, Foreign Affairs Council meeting, Luxembourg, June 24, 2013.

⁵⁴ Cf. Recommendation 1634 (2003) ‘*Tax incentives for cultural heritage conservation*’, adopted by the Standing Committee, acting on behalf of the Assembly, on November 25, 2003 (see Doc. 9913, Report of the Committee on Culture, Science and Education; and Doc. 9980, Opinion of the Committee on Economic Affairs and Development).

communities, as well as individuals, in the name of a wider interest in ‘national culture’. It is no coincidence that cathedrals, chapels and church buildings “occupied such an important place on the first lists of monuments presenting such a cultural public interest in the nineteenth century. Therein could lie the explanation why religious buildings very often made up a major part of national heritage” (Fornerod 2010, p. 12).

In France, for example, as a result of the separatist legislation, the Catholic worship sites built before 1905, along with their movable property, became ownership of the State and the local communities: the high-ranking ‘*monument classé*’, such as cathedrals, became the responsibility of the central Government, while the ‘*monument inscrit*’, such as regional parishes, became the responsibility of the respective Municipalities (Haynes 2008, pp. 14 f.; Cavana 2012, pp. 10 f.); nowadays the great majority of Catholic edifices of artistic-historical interest are owned by the Government. Similarly, in Italy, the State is the owner of many artistic elements of religious patrimony: the assets of the *Fondo Edifici per il Culto* comprises over 700 buildings (including abbeys, monumental *basiliques* and world-renowned churches)⁵⁵ confiscated from the Church in the nineteenth century and today run by the Ministry of Interior Affairs, at the central level, or the Prefectures, at the regional level. Through this legal entity of the Ministry of Interior, administered by the Central Directorate of the Religious Buildings Foundation (*Dipartimento per le libertà civili e l’immigrazione*), the Italian State manages a great part of its religious heritage.⁵⁶ According to the Foundation’s position:

The [Foundation’s] heritage, mostly made up of sacred buildings and works of art kept inside them, dates back to the end of the 19th century when, in compliance with the so-called ‘subversive legislation’, religious orders were dissolved and most of their assets allocated to the State. The Fund is responsible for the preservation, the renovation, the protection and the enhancement of its assets. Sacred buildings, in particular, are freely loaned to the Catholic Church and open to public worship.⁵⁷

⁵⁵ Some of the most outstanding examples are: in Rome, *Santa Maria del Popolo*, hosting two famous paintings by Caravaggio ‘*The conversion of Saint Paul*’ and ‘*The Crucifixion of Saint Peter*’ and *Santa Maria in Aracoeli*; in Florence, *Basilica di Santa Croce*’s series of frescoes illustrating the life of Saint Francis painted by Giotto and the wooden crucifix by Donatello; in Naples, the church of *Santa Chiara*, with the annexed cloister of the *Clarisses*, decorated by majolica tiles illustrating 64 landscapes in the 18th century, the church of *San Gregorio Armeno* and the *Basilica di San Domenico Maggiore*; in Palermo and Monreale (in the province of Palermo), the church of *Santa Maria dell’Ammiraglio*, called ‘*La Martorana*’, the abbey of *San Martino alle Scale* in Monreale. See Direzione Generale Degli Affari Dei Culti (ed.) (1997) *Il Fondo Edifici di Culto. Chiese Monumentali, storie, immagini, prospettive*, Roma: Ministero dell’interno.

⁵⁶ See Title III of Law No 222/1985 “*Disposizioni sugli enti e beni ecclesiastici in Italia e per il sostentamento del clero cattolico in servizio nelle diocesi*” [Legge 20 maggio 1985, n. 222] in: *Gazzetta Ufficiale* n. 129, 3.6.1985.

⁵⁷ http://www.interno.gov.it/mininterno/export/sites/default/en/references/related/Church_owing_fund_of_the_Italian_Ministry_of_Interior_xFecx/. Accessed on March 31, 2014.

The legal person or entity associated, in terms of ownership, with a religious cultural asset, determines, in many cases, the relevant protective legislation. In Denmark, for example, the 2,344 Evangelical Lutheran church buildings are not protected by the cultural heritage legislation, rather by the administrative mechanisms of the Danish National Evangelical Lutheran Church itself (Haynes 2008, p. 22), the latter being governed by the Ministry of Ecclesiastical Affairs (*Kirkeministeriet*); church buildings which are under the ownership of other religious denominations, are being protected under the cultural heritage legislation on the basis of the relevant Act of 2007 ‘on Listed Buildings and Preservation of Buildings and Urban Environments’.⁵⁸

In Germany, the conservation and financial support of all religious cultural monuments exists as a constitutional duty of the *Länder* (Heckel 1987); conventions and concordats are being signed between the competent *Länder* and the respective church authorities regarding the maintenance and preservation of their historical places of worship, even though, in many cases, their maintenance is funded through church taxation and donations by the church members.⁵⁹ Similar conventions between religious and local public authorities have been also signed in Spain, where the Catholic Church is bound to ensure the conservation of its built heritage, while the State is responsible under Art. 46 of the 1978 Constitution to ensure the conservation of the various (religious) elements of national cultural heritage “*regardless of their legal status and their ownership*” [cualquiera que sea su régimen jurídico y su titularidad]. In this context, the Spanish government, in collaboration with the autonomous religious communities, has developed a comprehensive and systematic policy of historical heritage conservation through National Plans. This policy on religious cultural property is mainly expressed in the National Plan for Cathedrals (*Plan Nacional de Catedrales*)⁶⁰ through which a significant number of Spanish Cathedrals have been restored, as well as in the National Plan for Abbeys, Monasteries and Convents (*Plan Nacional de Abadías*,

⁵⁸ Consolidated Act No. 1088 of 29 August 2007 on Listed Buildings and Preservation of Buildings and Urban Environments (*Lovbekendtgørelse No. 1088 af 29. August 2007 om bygningsfredning og bevaring af bygninger og bymiljø*).

⁵⁹ Robbers G. (2009) *Financing Religion in Germany*, in: Basdevant B. & Berlingo S. (eds.) *Financing of Religious Communities in the European Union*, Leuven: Peeters, 2009, pp. 169–76 (p. 175).

⁶⁰ Further information about the Plan available online at the official site of the *Instituto del Patrimonio Cultural de España*: <http://ipce.mcu.es/conservacion/planesnacionales/catedrales.html>. Accessed on March 31, 2014; see also Solís Z. (1997) *Plan Nacional de catedrales: comentario al Acuerdo de colaboración entre el Ministerio de Educación y Cultura y la Iglesia Católica de 25 de Febrero de 1997*, in: *Ius canonicum*, Vol. 37 No. 74, pp. 685–699; Benito F., Fernández Posse d. & Navascués P. (2002) *El Plan Nacional de Catedrales*, *Bienes culturales: Revista del Instituto del Patrimonio Histórico Español*, Vol. 1, pp. 11–32; Rodríguez Blanco M. (2003) *El Plan nacional de catedrales: contenido y desarrollo*, in: *Revista Española de Derecho Canónico*, No. 60, pp. 711–733; Sánchez R. T. (2008) *Confesiones religiosas y patrimonio cultural*, Ministerio de Justicia: Secretaría General Técnica, p. 241 f.

Monasterios y Conventos)⁶¹ for the purposes of which the Spanish Ministry of Culture and the Catholic Church signed in 2004 an important Partnership Agreement (*Acuerdo de Colaboración entre el Ministerio de Educación, Cultura y Deporte y la Iglesia Católica para el Plan Nacional de Abadías, Monasterios y Conventos*).⁶² Very much alike partnerships exist also in Scotland, where the principal source of funding for major works to outstanding protected buildings belonging to the respective religious denominations, is the ‘Repair Grants for Places of Worship’ scheme, operated by the *Heritage Lottery Fund* and the agency of *Historic Scotland*. The latter supports also the ‘Church Buildings Maintenance in Scotland Project’ in conjunction with the Church of Scotland, the Scottish Episcopal Church and the Roman Catholic Bishops’ Conference of Scotland (Haynes 2008, p. 7). In Belgium, where numerous Catholic buildings belong to the public authorities, the conservation and maintenance of the various elements of religious cultural heritage are a compulsory part of the State ownership; places of worship, which are considered to be monuments of national and historical significance, are subsidized by the State and additional financial assistance is extended via the tourism budget.⁶³ Likewise in Bulgaria, various elements of religious cultural heritage are owned by the State (Fornerod 2010, p. 3). A plethora of cultural properties, however, remain under the ownership of the respective religious communities, such as the Mosque of *El Haj Hüseyin Aga* in Belogradchik, which is under the ownership of the Central Muftiship (“Muftijstvo”) of the Islamic Community,⁶⁴ or the former so-called *Black Mosque* in Sofia, converted in the early twentieth century into a Christian Church (*Свети Седмочисленици*) and fully restored during the years following the fall of the Communist Party dictatorship, which is nowadays under the ownership of the Bulgarian Orthodox Church.⁶⁵ In Greece, a very strict legal framework acknowledges the priority of cultural heritage and justifies drastic restrictions on the relevant rights of ownership of the religious legal persons, associations or entities (Tsivolas 2013, pp. 255 f.).

⁶¹ See <http://ipce.mcu.es/conservacion/planesnacionales/abadias.html>. Accessed on March 31, 2014; see also Campos F. J. & de Sevilla F. (2003) *La adecuación del espacio monástico: sugerencias para un debate en torno al Plan Nacional de Conventos, Monasterios y Abadías*, Cistercium: Revista cisterciense, No. 231, pp. 313–32; Losada J. (2006) *Plan national pour les abbayes, les monastères et les couvents* in: Basdevant-Gaudemet B., Cornu M. & Fromageau J. (eds.) *Le patrimoine culturel religieux, enjeux juridique et pratiques culturelles* [Collection Droit du patrimoine culturel et naturel], Paris: L’Harmattan, pp. 277–85; Sánchez, op. cit., p. 247 f.

⁶² *Boletín de la Conferencia Episcopal Española*, No. 72, 2004, pp. 3–6.

⁶³ See Husson, J. F. & Mahiels J. (2009) *Le financement des cultes reconnus et des organisations laïques en Belgique*, in: Basdevant B. & Berlingo S. op. cit., pp. 97–110 (p. 105). It should be noted that the responsibility for cultural heritage in Belgium is fragmented among the various regional governments (the Flemish Minister of Culture, the Walloon Minister of Heritage and the Minister of Culture of the French Community of Belgium). Each community and region has its own legislation, co-existing with the federal government’s legislation.

⁶⁴ Gruber S. (2010) *Selected Muslim Historic Monuments and Sites in Bulgaria*, Syracuse University. School of Architecture, p. 18 f.

⁶⁵ *Ibid.*, p. 67 f.

On the basis of the aforementioned examples, it becomes quite obvious that, in broad terms, there is a widespread consensus in Europe regarding the States' primary obligation to maintain the integrity of religious cultural heritage regardless of the type of ownership (Fornerod 2010). It should be noted that this commitment has not been affected by the relevant European development towards the privatization of cultural heritage, which has been initiated in order to 'lighten the burden of State responsibility'.⁶⁶ This process, which echoes the change of régime in central and eastern Europe, was highlighted by the move of the Italian Government in 2002 to introduce legislation enabling the sale of State-owned cultural property: the relevant legislation enabled the privatization of artistic and cultural assets or their fiscal utilization as security loans.⁶⁷ It is self-evident that in case the relevant asset-based lending entails the utilization of a religious asset, the functional aspect of the latter should be preserved and respected by all means.

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⁶⁶ Cf. Council of Europe, Report on 'the private management of cultural property', Doc. 10731, op. cit.

⁶⁷ See the 'Tremonti' Law No. 112/2002 [Legge 15 giugno 2002, n. 112] in: *Gazzetta Ufficiale* n. 139, 15.6.2002. Cf. Benedikter R. (2004) *Privatisation of Italian cultural heritage*, *International Journal of Heritage Studies*, Vol. 10, No 4, pp. 369–89; Zan L., Bonini Baraldi S. & Gordon Ch. (2007) *Cultural Heritage Between Centralisation and Decentralisation*, *International Journal of Cultural Policy*, Vol. 13 No 1, pp. 49–70.

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Chapter 6

Criteria of Protection

Even though there is a wide and unarguably justified agreement in Europe on the necessity of protecting the (functional and non-functional, tangible and intangible, private and public) elements of religious cultural heritage, there is no general consensus regarding the criteria of the relevant legal protection.

There is a number of ways sovereign States can protect their religious heritage assets in order to ensure that the latter are passed onto future generations. One way is through national designation: typical examples are the current federal law in Germany on the protection of movable cultural property (Hipp 2000), which requires a formal comprehensive list of ‘nationally valuable cultural goods’ in every State (*Verzeichnis national wertvollen Kulturgutes*),¹ and the Austrian *Denkmalverzeichnis*,² kept by the Federal Monuments Office (*Bundesdenkmalamt*), which includes only those works of man, which are of historical, artistic or other cultural significance (Wieshaider 2002). Similar statutory bodies maintaining lists of protected elements exist also in England, in Wales, in Scotland and in Northern Ireland. In Scotland lists of protected elements are being compiled by the *Historic Scotland* (an executive agency of the Scottish Government), while in Northern Ireland by the *Department of the Environment for Northern Ireland* (Mynors 2006, pp. 19 f. and 57 f.). In England, while churches account for just 5 % of listed buildings, almost half of the very best listed buildings are owned by the Church of England.³ On the basis of the *Ancient Monuments and Archaeological Areas Act* of

¹ *Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung* of 6.8.1955, revised in 1999 (*Bundesgesetzblatt* I S. 1754) and 2007 (*Bundesgesetzblatt* I S. 757).

² The protected elements are listed according to the relevant Monument Protection Act (*Bundesgesetz betreffend den Schutz von Denkmalen wegen ihrer geschichtlichen, künstlerischen oder sonstigen kulturellen Bedeutung; Denkmalschutzgesetz - DMSG*) published in: *Bundesgesetzblatt* No 533/1923 and recently amended (*Bundesgesetzblatt* I No. 170/1999 & 92/2013).

³ According to English Heritage (2013) *Listing Selection Guide. Places of Worship*, p. 20.

1979, various criteria are used for assessing the ‘national importance’ of scheduled religious monuments⁴:

Period: all types of monuments that characterise a category or period should be considered for preservation. Periods about which particularly little is known will be of particular importance, and this is especially the case for most religion and ritual sites in use between AD 410 and the Norman Conquest, and for sites associated with particular forms of observance or religious groups and monastic orders in the post-Conquest period. If a site is particularly representative of a period, this will enhance consideration.

Rarity: some monument categories are so scarce that all surviving examples that still retain some archaeological potential should be preserved. In general, however, a selection must be made which portrays the typical and commonplace as well as the rare. This process should take account of all aspects of the distribution of a particular class of monuments, both in a national and a regional context. . .

Documentation: the significance of a monument may be enhanced by the existence of records of previous investigation or, in the case of more recent monuments by supporting evidence of contemporary written or drawn records. Conversely, the absence of documentation can make the archaeological potential of a site more important, as that will be the only means of understanding it. Well-recorded modern studies of a site including excavation reports may provide a level of documentation which enhances our understanding of it and its potential. . .

Group Value: the value of a single monument may be greatly enhanced by its association with related contemporary monuments or with monuments of different periods. . .

Survival/Condition: sites that are physically intact will generally be selected over those which have been damaged or diminished. *Potential*: the potential of a site or monument, both above and below ground, to yield further information is an important factor in assessment. In many cases, it is possible to predict if a site is likely to contain as-yet undiscovered archaeological evidence. If this appears to be of a quality, quantity or character which will enhance understanding, designation will be more likely.⁵

In addition, on the basis of the *Planning (Listed Buildings and Conservation Areas) Act* of 1990, various considerations and parameters contribute to the process of designating places of worship, as listed heritage assets:

Understanding: Places of worship can be extremely complex buildings, with multiple layers of history and meaning. As understanding is developed it can add to an appreciation of the buildings, and should be reflected in designations that are appropriate and helpful in assigning significance.

Character: The overwhelming majority of places of worship are Christian churches and chapels, and this is reflected in the lists. Different faith groups may have distinctive characteristics not shared by others, and these characteristics may change or develop over time. For example, whilst highly-regarded national architects or high-quality architectural embellishments are likely to be important considerations in a church of an Anglo-Catholic tradition, the things that make a Quaker building distinctive (simplicity, and architecture and furnishings of modest, vernacular, character) are very different. These differences, and others such as variations in plan form to reflect customs in worship and liturgy, need to be fully recognised in designation assessments. Furthermore, it should be borne in mind that most denominations have been characterised by schisms and mergers; again, exemplars and important examples

⁴See Department for Media, Culture and Sport (2010) *Scheduled Monuments. Identifying, protecting, conserving and investigating nationally important archaeological sites under the Ancient Monuments and Archaeological Areas Act 1979*, London, pp. 18–19.

⁵English Heritage (2013) *Scheduling Selection Guide. Religion and Ritual post-AD 410*, p. 14.

of particular denominational sub-sets which display these particular characteristics in their built form may be strong candidates for designation. In summary, it would be wrong to judge a Primitive Methodist chapel against the standards for a Catholic church.

Intactness: Intactness of a building and its fixtures can be an important consideration. Especially with buildings after 1840, where the number of surviving buildings is large, the issue of completeness, especially of interiors, becomes a major consideration when considering designation and grading. A set of fixtures contemporary with the main phase of the building will often possess particular interest. Conversely, some places of worship possess considerable architectural interest which transcends the removal of its fixtures (through conversion into domestic use, perhaps): intactness is not an essential for listing.

Alteration: More typically places of worship have been subject to successive changes resulting from growth, changing liturgy and patterns of worship – a process that continues today. Sometimes this results in structural change; more often, furnishings, fittings and decoration provide the only evidence of these successive phases. Alteration can tell us much about the evolution of a place of worship and thus have a positive value in itself. It can reflect the growth of a congregation or community; the development of patterns of worship; changes in taste and patronage; and the desire to embellish sacred spaces. Alteration, in this positive sense, can possess positive value.

Fixtures, fittings and decoration: These can be of great importance in defining the character of a place of worship, and are sometimes regarded as the most important elements of all. Liturgical fittings which reflect the nature of worship in that building, and changes in that through time, may be of particular interest, while other more secular fixtures such as memorials can add greatly to the historic interest of a church. In some cases, the artistic or design interest of these elements may be enough in themselves to warrant a higher grade for the church than would be justified by its architectural aspects alone.

Historic interest: The association of a particular site with a leading cleric, architect, significant patron, or development in worship will add to its interest. This is especially true if the association is reflected in the form or appearance of the building itself – for example where internal layout reflects an innovation in liturgical practice.⁶

In this fashion, the elements of religious heritage are included and categorized on lists or schedules compiled by the State; in those lists, various structures, objects and complex sites are identified as being of significant cultural (architectural, historical etc.) interest and, therefore, ‘national importance’, and, thus, merit special protection measures. In this rationale, the elements of religious cultural heritage are not protected *ex lege*, but only after they have been designated, scheduled or registered accordingly.

By way of contrast, there are national legislative patterns according to which the concept of religious cultural heritage is not limited to designated catalogues, but it is *a priori* broadened to encompass almost all religious cultural goods situated in a country, including immovable monuments, sites and objects, as well as intangible

⁶ *Listing Selection Guide*, op. cit., pp. 19–20. A set of criteria is being used also within the context of the *Heritage at Risk* programme; see English Heritage (2013) *The Heritage At Risk Register 2013. Criteria For Inclusion On the Register*, p. 4: “Places of worship considered for inclusion on the Register must be listed grade I, II* or II and be used as a public place of worship at least six times a year. Places of worship are assessed on the basis of condition only. If the place of worship is in ‘very bad’ or ‘poor’ condition it is added to the Register. Once on the Register, places of worship can move through the condition categories (e.g. from very bad to poor, to fair, even good) as repairs are implemented and the condition improves until they are fully repaired and can be removed from the Register”.

religious elements regardless of origin or tradition. A typical example thereof, is that of the aforementioned Greek law on antiquities and cultural heritage: the scope of the law covers religious heritage elements of all periods, irrespective of their inscription on lists; a different degree of protection, however, is afforded for different classes of cultural heritage objects (Tsvolas 2013, pp. 118 f.). A similar chronological criterion is partly followed by the 2007 Danish *Consolidated Act* ‘on Listed Buildings and Preservation of Buildings and Urban Environments’: according to the relevant provisions, all religious buildings (with the exception of those belonging to the Danish National Evangelical Lutheran Church) erected before the year 1536 are protected under the *Act* without a special resolution.⁷

In the international sphere, the legal protection of the assorted elements of religious cultural heritage would be impossible without a prior assessment of their cultural value on the basis of comprehensive criteria. Following this rationale, the UNESCO World Heritage system for places of ‘universal value’ has established, according to the relevant *Operational Guidelines*,⁸ a list of ten fundamental criteria to be used during the process of inscribing properties on the *World Heritage List*,⁹ such as the identification of “a masterpiece of human creative genius” or “monumental arts”, the existence of outstanding architectural qualities or the level of correspondence to a direct or tangible association “with events or living traditions . . . or with beliefs”.¹⁰ In Europe, a great many religious sites have been thus inscribed on the List. Illustrative examples (in chronological order of inscription) are: the Church and Dominican Convent of *Santa Maria delle Grazie* in Milan, Italy, that was inscribed as an architectural complex on the basis of criteria (i) and (ii). The inscription included *The Last Supper* (1495–1497), the unrivalled fresco painted by Leonardo da Vinci¹¹; the *Pilgrimage Church of Wies* (*Wieskirche*) near the Austrian border in Germany, an exuberant and colorful

⁷ *Lovbekendtgørelse No. 1088 af 29. August 2007 om bygningsfredning og bevaring af bygninger og bymiljø*, Title 2, § 4 (1). The buildings of the Danish National Evangelical Lutheran Church are subject to *ad hoc* legislation.

⁸ *Operational Guidelines for the Implementation of the World Heritage Convention* (last revised in July 2013): official text available online at: <http://whc.unesco.org/en/guidelines>.

⁹ Cf. the ‘*International Register of Cultural Property under Special Protection*’ within the framework of the 1954 Hague Convention (for the Protection of Cultural Property in the Event of Armed Conflict), which is the only worldwide agreement for the protection of cultural property during military conflicts, providing (in Art. 8) for a special level of protection for a *limited* number of centres which contain monuments and other immovable cultural property of very great importance. According to WHC-94/CONF.003/INF.12 (November 16, 1994) “To date, only one monumental complex, *the whole of the territory of the Vatican City State*, has been entered in the Register” (official document available online at: <http://whc.unesco.org/>. Accessed on March 31, 2014; for an indicative list of registered cultural properties see CLT/CIH/MCO/2008/PI/46, also available online at: <http://unesdoc.unesco.org/>. Accessed on March 31, 2014).

¹⁰ Criteria (i), (ii), (iv) and (vi) respectively. See *Operational Guidelines*, op. cit., p. 20 f. The full list of the relevant criteria is available online at: <http://whc.unesco.org/en/criteria/>. Accessed on March 31, 2014.

¹¹ UNESCO (1980) *Report*, CC-80/CONF.016/10, p. 3.

architectural masterpiece of Bavarian Rococo, which was inscribed under criteria (i) and (iii)¹²; the *Abbaye de Saint-Savin-sur-Gartempe* in France, which was inscribed on the basis of cultural criteria (i) and (iii) as “part of the series of important groups of Romanesque mural paintings”¹³; the *Convento de Cristo* in Tomar, the *Mosteiro de Santa Maria da Vitória* in Batalha, and the *Mosteiro dos Jerónimos* in Lisbon, the latter exemplifying “Portuguese art at its best”,¹⁴ which were respectively inscribed under criteria (i)–(vi), (i)–(ii), and (iii)–(vi)¹⁵; the *Convent of St Gall (Fürstabtei St. Gallen)*, in Switzerland, a perfect example of a great Carolingian monastery, which was inscribed under criteria (ii) and (iv): this remarkable architectural complex, reflecting 12 centuries of continuous activity, was one of the most important monasteries in Europe from the eighth century until its secularization in AD 1805, while its library is one of the richest and oldest in the world and contains precious manuscripts such as the earliest-known architectural plan drawn on parchment¹⁶; the *Canterbury Cathedral, St Augustine’s Abbey*, and *St Martin’s Church* in the United Kingdom, which were jointly inscribed on the basis of cultural criteria (i), (ii) and (vi): Canterbury in Kent, which has been the seat of the spiritual head of the Church of England for nearly five centuries, includes the modest Church of St Martin, the oldest church in England, the ruins of the Abbey of St Augustine, a reminder of the saint’s evangelizing role in the Heptarchy from AD 597, and the Christ Church Cathedral, a breathtaking mixture of Romanesque and Perpendicular Gothic, where Archbishop Thomas Becket was murdered in AD 1170¹⁷; the *Conjunto Monumental* in Spain, i.e. the group of historic buildings encompassing the *Catedral de Santa María de la Sede*, along with its bell tower (*Giralda*), the *Reales Alcázares de Sevilla* (originally a Moorish fort) and the *Archivo General de Indias* in Seville:

Criterion (i): ... the *Giralda* constitutes a unique artistic achievement, a masterpiece of Almohad architecture. The immense Cathedral [the largest Gothic temple in Europe] with five naves which replaced the mosque is the largest Gothic edifice in Europe. The elliptical space of the *Cabildo*, created by Hernán Ruiz, is one of the most beautiful architectural works of the Renaissance. Criterion (ii): The *Giralda* influenced the construction of numerous towers in Spain, and, after the conquest, in the Americas. Criterion (iii): The *Cathedral* and the *Alcázar* of Seville bear exceptional testimony to the civilization of the Almohads and to that of Christian Andalusia dating from the re-conquest of 1248 to 16th century, which was thoroughly imbued with Moorish influences. Criterion (vi): The *Cathedral*, the *Alcázar* and the *Lonja* [General Archive of the Indies] are directly and tangibly associated with a universally important event: the discovery of the New World by Christopher Columbus in 1492–1493 and the colonization of Latin America. The tomb of Christopher Columbus is in the *Cathedral*.¹⁸

¹² UNESCO (1984) *Report*, SC/83/CONF.009/8, p. 6.

¹³ *Ibid.*, p. 7.

¹⁴ <http://whc.unesco.org/en/list/263>. Accessed on March 31, 2014.

¹⁵ UNESCO (1984) *Report*, SC/83/CONF.009/8, p. 9.

¹⁶ *Ibid.*, p. 10.

¹⁷ UNESCO (1988) *Report*, SC-88/CONF.001/13, Paris, p. 18.

¹⁸ ICOMOS (1987) *Evaluation and Recommendation Document*, No. 383, p. 3. See UNESCO (1988) *Report*, SC-87/CONF.005/9, p. 8.

Further examples of inscribed religious complexes in Europe are the Orthodox monasteries of *Daphni*, *Hosios Loukas* and *Nea Moni of Chios* in Greece, which were jointly inscribed on the basis of criteria (i) and (iv), all characteristic of the golden age of Byzantine art¹⁹; the *Church Village of Gammelstad*, Luleå in Sweden, which was inscribed on the basis of cultural criteria (ii), (iv) and (v), considering that the site is a remarkable example of the traditional church town of northern Scandinavia, and illustrates the adaptation of conventional urban design to the special geographical and climatic conditions of a hostile natural environment: the 424 wooden houses of the complex, huddled round the early fifteenth century stone church, were used only on Sundays and at religious festivals to house worshippers from the surrounding countryside who could not return home the same day because of the distance and difficult traveling conditions²⁰; the Episcopal complex of the *Euphrasian Basilica* (*Eufrazijeva bazilika*) in the historic centre of Poreč in Croatia on the basis of criteria (ii)–(iv), considering that it constitutes the most complete surviving religious complex of its type: the basilica, atrium, baptistry and Episcopal palace are outstanding examples of religious architecture, while the basilica itself combines classical and Byzantine elements in an exceptional manner.²¹ Inscribed edifices, extremely valuable to the history of the European peoples, include also: the *Notre-Dame de Tournai*, in Belgium, which was inscribed on the basis of criteria (ii) and (iv), as it bears witness to a considerable exchange of influence between the architecture of the Ile de France, the Rhineland, and Normandy during the short period at the beginning of the twelfth century that preceded the flowering of Gothic architecture, and it is an outstanding example of the great edifices of the school of the north of the Seine, precursors of the vastness of the Gothic cathedrals²²; the *Churches of Peace* in Jawor and Świdnica, Poland, which were inscribed under criteria (iii), (iv), and (vi) as being outstanding testimonies to an exceptional act of tolerance on the part of the Catholic Habsburg Emperor towards Protestant communities in Silesia in the period following the 30 Years' War in Europe, and, at the same time, exemplify pioneering constructional and architectural solutions of a scale and complexity unknown ever before or since in wooden architecture; these religious edifices bear exceptional witness to a particular political development of “great spiritual power and commitment”,²³ which took place in Europe during the seventeenth century.

Unlike the World Heritage system for heritage sites, the Intangible Heritage Convention at the beginning contained no criteria—no prescription about which elements within cultures should be regarded as significant and worthy of protection. Today, some broad criteria have been set on the basis of the Convention's *Operational Directives* (adopted by the General Assembly of the States Parties to the

¹⁹ UNESCO (1990) *Report*, CLT-90/CONF.004/13, p. 5.

²⁰ UNESCO (1997) *Report*, WHC-96/CONF.201/21, pp. 72–3.

²¹ UNESCO (1998) *Report*, WHC-97/CONF.208/17, p. 42.

²² UNESCO (2001) *Report*, WHC-2000/CONF.204/21, Paris, p. 41.

²³ UNESCO (2001) *Report*, WHC-01/CONF.208/24, p. 45.

Convention in 2008 and amended in 2010 and 2012)²⁴ for inscribing intangible heritage on two relevant lists: the aforementioned ‘*Representative List of the Intangible Cultural Heritage of Humanity*’ (Criteria R.1 to R.5) and the ‘*List of Intangible Cultural Heritage in Need of Urgent Safeguarding*’ (Criteria U.1 to U.4).²⁵ Among the European intangible elements that have been included in the second List, is the ‘liturgical oral tradition of Corsica’ (*Cantu in paghjella*), which is performed during various church services. The relevant decision made by the competent Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, was based on the following criteria:

U.1: ... the *Cantu in paghjella* is essential to the transmission of local cultural knowledge, an integral part of the social fabric of communities; U.2: While continuing to retain its character as an oral tradition and musical practice, and despite the persistence of traditional modes of transmission, the *Cantu in paghjella* is threatened by changes in the contexts of its performance and oral transmission, musical standardization and an impoverishment of its repertoire ... U.3: An urgent safeguarding plan has been elaborated that underlines the priority of transmission, as well as activities of research, protection, promotion and raising awareness, demonstrating the will for an integrated intervention to benefit the viability of the *Cantu in paghjella*; U.4: The element has been nominated thanks to an active commitment and large participation of the community of practitioners, local officials and civil society during the process of elaborating the nomination file, based on the knowledge of several families of singers and supported by the awareness-raising of local media, and many practitioners have offered evidence of their free, prior and informed consent; U.5: The *Cantu in paghjella* is inscribed in the inventory of intangible cultural heritage present on the territory of France, managed and updated by the Direction for Architecture and Heritage of the Ministry of Culture.²⁶

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²⁴ *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, 4th Session (Paris, June 4–8, 2012) available online at: <http://www.unesco.org/culture/ich/en/directives>. Accessed on March 31, 2014.

²⁵ The relevant Lists of intangible elements and associated criteria available online at: <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011>. Accessed on March 31, 2014. A constructive criticism on the relevant UNESCO Lists in: Logan W. (2007) *Closing Pandora's box: Human Rights Conundrums in Cultural Heritage Protection*, in: Silvermann H. & Fairchild Ruggles D. (eds.) *Cultural Heritage and Human Rights*, Springer, pp. 33–52 (p. 37 f.).

²⁶ Decision 4.COM 2, 4th Session Abu Dhabi, United Arab Emirates 28 September to 2 October 2009, ITH/09/4.COM/CONF.209/Decisions, p. 95.

Chapter 7

The Status of *Res Mixtae*

According to the Roman (and later Byzantine) law, things sacred, religious, and holy, were exempted from commerce, and held to be the property of no one. “Temples, churches, altar-pieces, communion-cups, and whatever was consecrated according to the forms prescribed by law, were held *sacred*, and could not be applied to profane uses”.¹ These sacred things, which considered to be of ‘divine jurisdiction’ (*res divini iuris*), comprised three subcategories: *res sacrae* solely devoted to religious purposes such as churches and relics, *res religiosas* such as burial grounds and cemeteries, and *res sanctae* such as city walls and gates (Mainusch 1995, pp. 8 f.; Weidner 2001, pp. 15 f.; von Campenhausen and de Wall 2006, pp. 260 f.).

The above classification of *res sacrae*, *religiosae* and *sanctae*, somewhat obscure even within the Roman system, today may seem rather pointless, except in so far as “*res religiosas* remind us that things associated with death are of a peculiar nature even in modern law”.² Nevertheless, even today, in cases of ‘living’ heritage elements still devoted to religious purposes (such as functional religious edifices, sacred places and sacral objects), their ‘sanctity’ entails a very important consequence from a legal point of view: these cultural *res sacrae*, precisely because of their sacred character and function, are subject to the internal laws and norms of their religious origins. For instance, according to the ecclesiastical norms (*Sacred Canons*) of the Orthodox Church³:

¹ Mackenzie L. (1865) *Studies in Roman Law, with Comparative Views of the Laws of France, England, and Scotland*, Edinburgh and London: W. Blackwood & Sons, p. 163. See also Mainusch R. (1995) *Die öffentlichen Sachen der Religions- und Weltanschauungsgemeinschaften: Begründung und Konsequenzen ihres verfassungsrechtlichen Status* [=Jus Ecclesiasticum 54], Tübingen: Mohr, p. 8 f.

² Allen C. (1940) *Things*, California Law Review, Vol. 28 No. 4, pp. 421–41 (p. 432).

³ An introductory overview of the relevant ecclesiastical Canons in: Rodopoulos P. (2007) *An overview of Orthodox Canon Law* [=Orthodox Theological Library 3], Orthodox Research Institute, p. 39 f.

Heilige Sachen (*πράγματα ιερά*) werden jene Sachen genannt, welche ausschließlich auf den Gottesdienst und die ordnungsmäßige Verrichtung desselben Bezug haben . . . Diese Sachen unterscheiden sich in solche, welche unmittelbar für die heilige Eucharistie gebraucht werden, u. z. die heiligen Gefäße (*άγια σκεύη*) und das Antimensium (*αυτιμύσιον*), und in solche, welche bei kirchlichen Funktionen, unabhängig von der heiligen Eucharistie, verwendet werden; hierher gehören die geistlichen Bücher, Gewänder, Glocken u. s. w. Die Sachen der ersten Art werden geweihte (*καθιερωμένα*) Sachen genannt und dürfen nur von den Geistlichen der höheren Grade berührt werden. Nach dem 21. Kanon der Synode von Laodicea ist es auch den Subdiakonen untersagt, diese Sachen zu berühren, am wenigsten aber das Antimensium, den Kelch und die Patene. Die Sachen der zweiten Art heißen gesegnete (*ηγιασμένα*) Sachen.⁴

According to the above classical analysis, there is a clear distinction between the various ecclesiastical items of Church property: the *sacred*, i.e. those which are used exclusively for worship (further divided into those sanctioned for special rites and consecrated accordingly, such as the building of church and the sacred vessels, and those merely sanctified with a blessing or through being located in a particular holy place, such as liturgical books, vestments and icons) and the *holy*, i.e. all the rest (furniture, non-movable items etc.); sacred items may not form any part of transactions, though holy ones are not considered *res extra commercium*.⁵ Similar providence can be found among the provisions of the *Codex Iuris Canonici* (Canons 1269–1270):

If sacred objects are privately owned, private persons can acquire them through prescription, but it is not permitted to employ them for profane uses unless they have lost their dedication or blessing; if they belong to a public ecclesiastical juridic person, however, only another public ecclesiastical juridic person can acquire them. . . If they belong to the Apostolic See, immovable property, precious movable objects, and personal or real rights and actions are prescribed by a period of a hundred years; if they belong to another public ecclesiastical juridic person, they are prescribed by a period of thirty years. [Can. 1269 – Res sacrae, si in dominio privatorum sunt, praescriptione acquiri a privatis personis possunt, sed eas adhibere ad usus profanos non licet, nisi dedicationem vel benedictionem amiserint; si vero ad personam iuridicam ecclesiasticam publicam pertinent, tantum ab alia persona iuridica ecclesiastica publica acquiri possunt. Can. 1270 – Res immobiles, mobiles pretiosae, iura et actiones sive personales sive reales, quae pertinent ad Sedem Apostolicam, spatio centum annorum praescribuntur; quae ad aliam personam iuridicam publicam ecclesiasticam pertinent, spatio triginta annorum].⁶

A similar, *mutatis mutandis*, statutory framework, in relation to the care of ecclesiastical edifices and objects, is provided by the *Care of Cathedrals Measure* (Hill 2007, pp. 299 f.) adopted by the General Synod of the Church of England⁷:

⁴ Milasch N. (1905) *Das Kirchenrecht der Morgenländischen Kirche. Nach den allgemeinen Kirchenrechtsquellen und nach den in den autokephalen Kirchen geltenden Spezial-Gesetzen*, Mostar: Pacher & Kisić.

⁵ Cf. Rodopoulos, op. cit., p. 182.

⁶ See Beal J., Coriden J. & Green Th. (eds.) (2000) *New commentary on the Code of Canon Law*, New York: Paulist Press, pp. 1471–2.

⁷ In 2011 the *Measure* consolidated, with corrections and minor improvements, the *Care of Cathedrals Measure 1990*, the *Care of Cathedrals (Supplementary Provisions) Measure 1994*

Subject to subsection (2) and to sections 5 and 6 the Chapter of a cathedral shall not, unless it has been approved under this Measure, implement or consent to the implementation of any proposal... for the sale, loan or other disposal of any object the property in which is vested in the corporate body or which is in the possession or custody of the corporate body or to whose possession or custody the corporate body is entitled, being an object of architectural, archaeological, artistic or historic interest...⁸

These ‘sacred things’ (*res sacrae*), which are identified and venerated in accordance with the doctrines and norms of the respective religious communities, fall *prima facie* within the autonomous sphere of the communities’ internal affairs. This crucial religious sphere seems quite separated from the ‘secular’ approach of monument protection laws and building planning regulations. When it comes to places of worship and sacred sites for example, as it has been noted by Carmichael et al. (1998, p. 3):

To say that a specific place is a sacred place is not simply to describe a piece of land, or just locate it in a certain position in the landscape. What is known as a sacred site carries with it a whole range of rules and regulations regarding people’s behaviour in relation to it, and implies a set of beliefs to do with the non-empirical world, often in relation to the spirits of the ancestors, as well as more remote or powerful gods or spirits.

An autonomous “range of rules and regulations” (such as the aforementioned provisions of the ecclesiastical *Canons* and *Measures*) determines, in essence, the internal life of a community, and serves as a prerequisite for setting a necessary framework of its own “religious rites, cultural traditions and... heritage”.⁹ Subsequently, the unrestricted development of an authentic ‘sacred heritage’ constitutes the basis for an unlimited variety of “form[s] of property with religious or spiritual associations: churches, monasteries, shrines, sanctuaries, mosques, synagogues, temples, sacred landscapes, sacred groves, and other landscape features”¹⁰ that reflect “the liturgical, theological, spiritual and disciplinary patrimony, culture and circumstances of history of a distinct people, by which its own manner of living the faith, is manifested... *sui iuris*”.¹¹ Above all, the various liturgical objects, i.e. those which are used in the course of the divine services, are woven into the fabric of the internal devotional matters (*gottesdienstliche Belange*) associated with worship (Heckel 1968, pp. 176 f.; Odendahl 2005, p. 335).¹² Hence, from a legal

and the Care of Cathedrals (Amendment) Measure 2005, and related enactments. Original document available online at: www.legislation.gov.uk. Accessed on March 31, 2014.

⁸ *Ibid.*, s 2 (1) (b).

⁹ *Treaty on the functioning of the European Union*, Art. 13.

¹⁰ Jokilehto J. (2005) *The World Heritage List: Filling the Gaps – An Action Plan for the Future* [=Monuments and Sites XII], International Council of Monuments and Sites, p. 33.

¹¹ *Codex Canonum Ecclesiarum Orientalium*, Canon 28 § 1 “*Ritus est patrimonium liturgicum, theologicum, spirituale et disciplinare cultura ac rerum adiunctis historiae populorum distinctum, quod modo fidei vivendae uniuscuiusque Ecclesiae sui iuris proprio exprimitur*”; cf. Beal, Coriden & Green, op. cit., p. 32.

¹² Cf. Hammer F. (1995) *Die geschichtliche Entwicklung des Denkmalrechts in Deutschland* [=Jus Ecclesiasticum 51], Tübingen: Mohr, p. 309.

point of view, these functional *res sacrae*, being in essence mediums of worship, are located at the very heart of the ‘autonomy of internal management’ of the respective religious organizations. The latter can be capable of administering their own internal religious affairs, and *ipso facto* their sacred things, only if they can determine and implement the rules that govern their functioning. According to the relevant jurisprudence of the ECtHR:

Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers’ right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members...¹³

One fundamental aspect of both religious freedom and ‘autonomy of internal management’ is the right to the peaceful enjoyment of property (Doe 2011, pp. 164 f.). The ECtHR has recognized the importance of the free enjoyment of property to the exercise of the right to manifest one’s religion or beliefs; however, both rights are subject to limitations prescribed by law, according to the ECHR. More precisely, as the Grand Chamber of the ECtHR noted in the case of *Beyeler v. Italy*:

[T]he Court recognises that, in relation to works of art lawfully on its territory and belonging to the cultural heritage of all nations, it is legitimate for a State to take measures designed to facilitate in the most effective way wide public access to them, in the general interest of universal culture ... The concern to achieve a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights is reflected in the structure of Article 1 [of Protocol No 1] as a whole and entails the need for a reasonable relationship of proportionality between the means employed and the aim sought to be realized.¹⁴

In this rationale, those cultural elements of religious patrimony, in the protection of which the European countries have a direct interest, are, in principal, subject to the system of State (or local authorities) control. The latter may require religious organizations to satisfy rules which, albeit “underscore the limits of the [ir] autonomy” (Doe 2011, p. 187), ensure that all those *res sacrae* which are deemed to be of national (or international) importance, ranging from simple burial sites, through retreats and hermitages to great monasteries and cathedrals, are protected for enjoyment and public access as integral parts of a wider heritage network. This means in effect, that, within the ambit of the State’s heritage policy and legislation fall even those protected *res sacrae* that remain vested in their respective owner(s). For instance, the aforementioned eastern *Canons* could not abrogate the definitions provided by the legislator, nor supersede the relevant

¹³ *Hassan and Chaush v. Bulgaria*, Reports of Judgments and Decisions 2000-XI, § 62.

¹⁴ *Beyeler v. Italy*, Reports of Judgments and Decisions 2000-I, § 113–114.

heritage provisions relating to the delimitation of immovable monuments and their surroundings.¹⁵ In the same vein, the aforementioned *Care of Cathedrals Measure* could not override the need for cathedral Chapters to obtain secular consent for works to scheduled monuments, or planning permission for works to listed buildings within the cathedral precinct.¹⁶

Therefore, the right of each faith community to regulate and administer its cultural property *sui iuris*, is limited by the States' laws governing the maintenance and upkeep of this property (e.g. the various places of worship) as part of national heritage. As it has been noted by Professor Doe (2011, p. 168):

States employ a variety of mechanisms which seek to strike a balance between the free use of [places of worship] by religious organizations and their protection by the State as part of the national heritage. For example, State sometimes formally require religious organizations to make available to society their historic, artistic, and documentary patrimony. In some States religious buildings of cultural significance may be altered only with the consent of the relevant public authority, on which religions may be represented. In others, religious organizations may enjoy limited exemptions from planning law with regard to work on their places of worship; this is the position in Ireland and the United Kingdom—in England and Wales places of public religious worship may be registered, and there is a limited exemption from the requirement for listed building consent in relation to ecclesiastical buildings which are used for ecclesiastical purposes.

Insofar as the same 'sacred' cultural objects and places of worship are interlinked with both *Ius publicum* and *Ius sacrum*, the issue of their protection and management can be a potential source of (practical and legal) disputes between heritage stakeholders, i.e. the competent State authorities and the relevant religious institutions (Messner 2006). According to Merryman (1989, p. 363):

[T]here is a public interest in [religious] cultural property because people care deeply about it for a variety of natural and laudable reasons. Since there is such a degree of public interest, and cultural property touches on so many public concerns, the development of some kind of public policy toward [religious] cultural objects is both desirable and unavoidable To translate awareness of a public interest in [religious] cultural property into a substantively responsive public policy draws attention . . . to the general goals of preservation, truth, and access. People may perceive and weigh these goals differently, and in practice the goals can often conflict As a result, one who approaches the enterprise of [religious] cultural property police formation must expect to deal with complexity and to encounter controversy.

Hence, in order to avoid such controversy, and eventually strike a 'balance' (in compliance with the principle of 'including' Neutrality' and in the light of the "*Kyiv Statement on the Protection of Religious Properties within the Framework of*

¹⁵ See e.g. Art. 10 § 1 Greek Law 3028/2002 'on the Protection of Antiquities and Cultural Heritage in General' in: *Government Gazette* issue A 153/28.6.2002.

¹⁶ See: Ancient Monuments (Applications for Scheduled Monument Consent) Regulations 1981, in: *Statutory Instruments* No. 1301/1981; Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010 in. *Statutory Instruments* No. 1176/2010 (Amendment in: *Statutory Instruments* No. 1806/2010).

the World Heritage Convention”¹⁷) between the demands of the public interest and the requirements of the protection of the religious communities’ fundamental rights, the best possible approach would be that of understanding and characterizing these ambiguous cultural elements, as *res mixtae*. The term reflects the complexity and importance of these elements and signifies the status of ‘*gemeinsame Angelegenheiten*’ (issues of common interest), where the public responsibility of the State is coordinated with the autonomous activity of the respective religious communities (Isensee 1999; Kalb et al. 2003, p. 69; von Campenhausen and de Wall 2006, p. 52; Doe 2011, pp. 35 f.). The proposed consensus model of *res mixtae* could be depicted as the common area (*vesica piscis*), which is molded by the overlapping spheres of the internal religious affairs on the one hand, and the general welfare on the other (Fig. 7.1). In essence, it is the outcome of the equation $\alpha \cap \beta = \gamma$, where α is the internal legal system of a religious community, β is the general legal system of a State relating to the protection and maintenance of its cultural heritage, and γ is the intersection of the two systems.

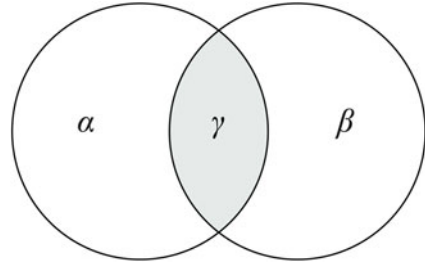
The above status of *res mixtae* corresponds to the need for co-operation between the States of Europe and the faith communities, as well as the right of the latter to retain their religious identity, history and values; being more than just a theoretical structure, the above approach provides an additional legal foundation for the proper handling of religious heritage assets. Defining the respective elements of religious cultural heritage as *res mixtae* protects the identity of religious communities and, at the same time, justifies State intervention.

Namely, the above model acknowledges and combines the public function (*öffentliche Funktion*) with the potential liturgical function (*liturgische Funktion*) of the various ‘sacred’ elements of religious heritage (Heckel 1968, pp. 242–243; von Campenhausen and de Wall 2006, p. 193). Within this context, the State respects the religious autonomy and collective freedom of faith communities (*kollektive Religionsfreiheit*)¹⁸ and, at the same time, protects efficiently the distinct elements of religious cultural heritage. In this way, the responsible stakeholders gain ability to understand the continuing nature of religious and sacred heritage, and ultimately protect its authenticity and integrity, thereby weaving its particular spiritual significance and unique history into all relevant actions and initiatives. As it was recently expressed, for example, by the *Bratislava Statement* (2009) on Jewish heritage in Europe:

¹⁷ See the full text of the *Kyiv Statement* in: <http://whc.unesco.org/en/religious-sacred-heritage/>. Accessed on March 31, 2014.

¹⁸ See: Muckel St. (1997) *Religiöse Freiheit und staatliche Letztentscheidung, Die verfassungsrechtlichen Garantien religiöser Freiheit unter veränderten gesellschaftlichen Verhältnissen*, Berlin: Dunker & Humblot, p. 169 f.; Jeand’ Heur B. & Corioth St. (2000) *Grundzüge des Staatskirchenrechts*, Stuttgart, München, Hannover, Berlin, Weimar, Dresden: Richard Boorberg Verlag, p. 72 f.; Weber H. (2002) *Die individuelle und kollektive Religionsfreiheit im europäischen Recht einschließlich ihres Rechtsschutzes*, Zeitschrift für evangelisches Kirchenrecht Vol. 47, p. 265 f.

Fig. 7.1 The consensus model of *res mixtae*



Synagogue and former synagogues should retain a Jewish identity and or use whenever possible, though each one does not necessarily need to be restored or fully renovated. Former synagogues, no matter what their present ownership or use, should be sensitively marked to identify their past history. As part of the effort to reconstitute communal and religious property, when a property of historic value – such as a synagogue – in disrepair or otherwise in a ruined condition (while in the government’s possession) is returned, States should help either by modifying laws which impose penalties for not maintaining properties in reasonable condition, or by providing financial and material assistance to undertake necessary repairs and restoration.¹⁹

According to the above *Statement* on Jewish heritage in Europe, the element of co-operation (between the community *per se*, as well as between the latter and the competent State institutions) lies at the foundation of the “handling of all matters concerning Jewish property, which is held as a communal trust”:

Jewish communities should manage their properties to maximize their use for present and future generations. Jewish communities and institutions should work together as much as possible to share existing information, methodologies and technologies, and they should work together to develop new and compatible goals and strategies to optimize the care and management of historic Jewish properties. . . . Wherever possible, proceeds from the sale or development of some properties should be allocated to the care and maintenance of other properties including, but not exclusively, cemeteries. Jewish communities and museums should work together to develop historic, descriptive and exhibition materials that can be shared. Jewish communities and local heritage, cultural and tourist bodies *should work together* to develop regional, national and trans-border heritage routes.²⁰

It should be noted that in the case of sacred elements which have been additionally inscribed on the World Heritage List, the status of *res mixtae* reflects also the relevant proclamations of the UNESCO *Initiative on Heritage of Religious Interest*:

[T]hese World Heritage properties – especially living religious and sacred sites – require specific policies for protection and management that take into account their distinct spiritual nature as a key factor in their conservation and that such policies cannot be sustainable without in-depth consultation with the appropriate stakeholders. The [latter]

¹⁹ See the full text of the ‘Final Statement of Principles and Procedures’ from the Seminar on the Care, Conservation and Maintenance of Historic Jewish Property (Bratislava March 17–19, 2009) at: <http://www.jewish-heritage-europe.eu/bratislava-declaration>. Accessed on March 31, 2014.

²⁰ *Ibid.*

need to work together to preserve sacred heritage while regarding the modernization and development of society in a culturally and historically sensitive manner, with a view to strengthening identity and social cohesion. Stakeholders include religious communities. . . as well as State Party authorities, professionals and experts in relevant fields, property owners, funding bodies and other interested partners.²¹

It is also prudent to note that the dedication of ‘sacred’ patrimony to the general welfare and public enjoyment as part of national patrimony, and, therefore, its conceptual delimitation as *res mixta* and preservation under heritage legislation, should not affect, let alone alter, its prior dedication to religious purposes,²² unless the latter jeopardize its physical survival and maintenance. In the words of Heckel (1968, pp. 248–249), “cultural heritage law leaves the public [religious] function of *res sacrae*, as well as their dedication pursuant to the law on administrative assets, intact [Das Denkmalschutzgesetz läßt die öffentliche kirchliche Funktion der *res sacrae* und ihre Widmung nach öffentlichem Sachenrecht unangetastet]”.²³ Conversely, those *res sacrae* that today maintain a primary cultural function which is not ‘liturgical’ in nature, should be appropriately preserved under a maintenance process that best reflects their current status and dedication to other public uses, even though they may still have affiliations with religious institutions.

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²¹ See: <http://whc.unesco.org/en/religious-sacred-heritage/>. Accessed on March 31, 2014.

²² Within the context of English Ecclesiastical Law, Hill (2007, p. 220) clarifies that “Consecration is not coterminous with dedication, even though both expressions import the hallowing of land for godly purposes. Dedication is, in law, merely a declaration of intent as to the purpose for which land is to be put. Consecration, however, is the setting aside of land solely for sacred use in perpetuity”.

²³ For a discussion on the relationship between public law things (*öffentliche Sachen*) and *res sacrae*, according to the relevant German jurisprudence, see Schütz D. (1995) *Res sacrae*, in: Listl J. & Pirson D. (eds.) *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland*, Band II, Berlin: Mohr.

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Chapter 8

European and International Legislation

It is common knowledge that the basic concept of protecting religious cultural heritage in Europe is enshrined in the ‘founding texts’ (Pickard 2001, p. 1) of the *Convention for the Protection of the Architectural Heritage of Europe*,¹ as well as the revised *European Convention on the Protection of the Archaeological Heritage*.² This legal structure, which was broadly based on the relevant international legislation (namely the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*,³ the *Convention concerning the Protection of the World Cultural and Natural Heritage*,⁴ and the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*),⁵ has been expanded by the later legal instruments of the *European Landscape Convention*,⁶ the *Convention on the Safeguarding of the Intangible Cultural Heritage*⁷ and the, recently enforced, *Framework Convention on the Value of Cultural Heritage for Society*.⁸

In addition, the provisions of the 1954 Hague *Convention for the Protection of Cultural Property in the Event of Armed Conflict*,⁹ and the Protocols I and II (1977) to the 1949 *Geneva Conventions*,¹⁰ enshrining the contemporary principles of international humanitarian law, reaffirmed the international precepts concerning

¹ Council of Europe Treaty Series (CETS) No 121.

² Council of Europe Treaty Series (CETS) No 143.

³ *Standard-setting in UNESCO, Conventions, Recommendations, Declarations and Charters adopted by UNESCO (1948–2006)* (2007) Leiden – Boston: UNESCO Editions/Martinus Nijhoff Publishers, p. 103 f.

⁴ *Ibid.*, p. 135 f.

⁵ *Ibid.*, p. 326 f.

⁶ Council of Europe Treaty Series (CETS) No. 176.

⁷ *Standard-setting in UNESCO*, op. cit., p. 297 f.

⁸ Council of Europe Treaty Series (CETS) No. 199.

⁹ *Standard-setting in UNESCO*, op. cit., p. 65 f.

¹⁰ UN Treaty 17512 in. United Nations, Treaty Series (1979) Volume 1125-1.

the protection of (religious) cultural property—whether international or otherwise—in times of crisis or conflict. Moreover, the above protective framework has been thoroughly specified through several secondary legal instruments, such as Regulations, Recommendations, Directives and Resolutions, issued by the competent international bodies of (a) the European Union, (b) the Council of Europe and (c) the United Nations Educational, Scientific and Cultural Organization:

8.1 European Union

At the Community level, the preservation of the principle of the free movement of goods remains a top priority of EU policy. However, the Single Market legislation has repeatedly recognized the need to protect a shared cultural heritage and has identified religion as a key element of national cultures (McCrea 2010, pp. 171 f.). According to the case law of the Court of Justice, the term ‘nation’ has been described as “the totality of individuals linked by the fact of sharing traditions, culture, ethnicity, religion”.¹¹

In this context and in the light of Art. 36 TFEU, the protection of religious heritage assets rests on two basic legislative acts: the codified version of the Council *Regulation* (EC) No 116/2009 (of December 18, 2008) ‘on the export of cultural goods’ and the Council *Directive* 93/7/EEC (of March 15, 1993) ‘on the return of cultural objects unlawfully removed from the territory of a Member State’.¹² Although both legal instruments declare their applicability by reference to Annexes listing categories of cultural objects falling within their scope (for instance, ‘elements forming an integral part of artistic, historical or religious monuments’ or included *inter alia* in ‘inventories of ecclesiastical institutions’), the aim of the *Regulation* is to introduce uniform controls preventing national treasures (of religious origin also) from being taken out of the European Community territory, while the *Directive* deals with the arrangements for restoring such treasures to the Member State of origin after they have been unlawfully removed from it (Odendahl 2005, p. 327; Hoffman 2006). Both legal instruments, however, according to McCrea (2010, pp. 171–172)

recognize the role of religion in national culture by including church records and religious objects as parts of national heritage, the preservation of which the Union acknowledges as a legitimate ground for departure from normal rules of the free market. Thus, the Union

¹¹ Cases C-300/04 & C-145/04, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland supported by Commission of the European Communities and Case C-300/04 M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag*, Opinion of Advocate General A. Tizzano, delivered on April 6, 2006 (available online at: <http://eur-lex.europa.eu>. Accessed on March 31, 2014).

¹² See: Official Journal L 39, 10.02.2009 pp. 1–7 and Official Journal L 74, 27.03.1993 pp. 74–9 respectively. Both documents available online at the EU portal: <http://eur-lex.europa.eu>. Accessed on March 31, 2014.

attempts to shelter certain elements of national culture, including religion, from the impact of the exercise of its powers to regulate the Single Market. In doing so it recognizes specific religious heritage as part of the collective identity of the state, which the institutions of the state are entitled to promote and protect on grounds of cultural autonomy.

Religious artefacts are particularly vulnerable to illegal trafficking. Therefore, the preservation of such cultural goods is closely linked to the issue of control over their circulation via inventory and identification mechanisms. It is true that the possession and transfer of religious cultural goods, when the latter are identified as protected parts of national heritage, is basically safeguarded by national legislation and it is subject to instruments of monitor and control. However, outside the protected—and hence identified and listed—heritage, such control could not function in the absence of identification or prior knowledge. As it was recently noted in a *Report ‘on preventing and fighting illicit trafficking in cultural goods in the European Union’*, drawn up by the *Centre d’Etudes sur la Coopération Juridique Internationale* for the European Commission, in the case of religious objects such as icons present in churches and monasteries, which have not been inventoried or documented, the risk of illegal trafficking is not remote at all. In addition, the risk is compounded by the lack of adequate security arrangements (as in Cyprus) as well as the scattered and isolated nature of such places of worship (as in Malta). According to the aforementioned *Report*:

Religious . . . property forming part of the [national, cultural] heritage is particularly vulnerable to trafficking and to the difficulty of mobilizing legal instruments to determine whether it is circulating legally or illegally in cases where it has not been inventoried or documented. Information on the provenance of the goods will depend on the measures taken by the owner or possessor, always provided the theft has been noticed. This category of goods shares some features with ancient archaeological collections. Religious artefacts and private collections are by nature ancient in origin and may have been little documented or not at all and may not have been described or displayed prior to being placed on the market.¹³

It should be reiterated that apart from the regulatory provisions of the aforementioned legal instruments, the legitimate circulation of religious cultural goods within the boundaries of the EU should be also reconciled with the respective norms and regulations of the relevant religious institutions. In the case of the Church of England, for example, the disposal, within the country or abroad, of objects that belong to the church, is null and void without the prior authority of a faculty and the consent of the Parochial Church Council, due to the doctrine *nemo dat quod non habet* (Hill 2007, p. 266). Similarly, in the case of the Catholic Church, according to Canon 1292 § 2 of CIC:

The permission of the Holy See is also required for the valid alienation of goods whose value exceeds the maximum amount, goods given to the Church by vow, or goods precious for artistic or historical reasons [Si tamen agatur de rebus quarum valor summam maximam

¹³ Centre d’Etudes sur la Coopération Juridique Internationale (2011) *Study on preventing and fighting illicit trafficking in cultural goods in the European Union*, European Commission Directorate-General Home Affairs, p. 212.

excedit, vel de rebus ex voto Ecclesiae donatis, vel de rebus pretiosis artis vel historiae causa, ad validitatem alienationis requiritur insuper licentia Sanctae Sedis].¹⁴

Besides, pursuant to Canon 1296 of CIC:

Whenever ecclesiastical goods have been alienated without the required canonical formalities but the alienation is valid civilly, it is for the competent authority, after having considered everything thoroughly, to decide whether and what type of action, namely, personal or real, is to be instituted by whom and against whom in order to vindicate the rights of the Church [Si quando bona ecclesiastica sine debitis quidem sollemnitatibus canonicis alienata fuerint, sed alienatio sit civiliter valida, auctoritatis competentis est decernere, omnibus mature perpensis, an et qualis actio, personalis scilicet vel realis, a quonam et contra quemnam instituenda sit ad Ecclesiae iura vindicanda].¹⁵

As far as the immovable religious elements are concerned (mainly the architectural and archaeological assets of the religious environment, as well as the various, tangible and intangible, elements of religious landscape), according to the *Directive* 2011/92/EU of the European Parliament and of the Council ‘on the assessment of the effects of certain public and private projects on the environment’,¹⁶ the environmental impact assessment must describe and assess, *inter alia*, the direct and indirect effects of each project on the relevant landscape and cultural heritage assets (Gillies 1999, p. 22). More precisely, pursuant to the relevant provisions of the *Directive*, the environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to the absorption capacity of the natural environment, paying particular attention to “*landscapes of historical, cultural or archaeological significance*”.¹⁷ The relevant assessment must contain “a description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, [...] material assets, including the architectural and archaeological heritage, landscape and the interrelationship between the above factors”.¹⁸

In relation to materials for “use in religious celebrations” or “use of works such as [religious] architecture or sculpture, made to be located permanently in public places”, *Directive* ‘on the harmonization of certain aspects of copyright and related rights in the information society’¹⁹ enables Member States to make relevant exceptions for reproductions by the press or communication to the public (Doe 2010, p. 151; Doe 2011, pp. 256–257). Although these exceptions seem to constitute “minor reservations” that concern *de minimis* uses (such as uses in religious

¹⁴ Beal J., Coriden J. & Green Th. (eds.) (2000) *New commentary on the Code of Canon Law*, New York: Paulist Press, p. 1497; cf. Canon 1190 in *ibid.*, p. 1415.

¹⁵ *Ibid.*, p. 1505 f.

¹⁶ See: Official Journal L 26, 28.1.2012 pp. 1–21. Directive 2011/92/EU codified the initial EIA Directive of 1985 (85/337/EEC) and its three amendments (Directive 97/11/EC; Directive 2003/35/EC; Directive 2009/31/EC). For further information visit the official web page of the Directive at: <http://ec.europa.eu/environment/eia/eia-legalcontext.htm>. Accessed on March 31, 2014.

¹⁷ Directive 2011/92/EU (Annex III), op. cit., p. 15.

¹⁸ *Ibid.* (Annex IV), p. 16.

¹⁹ Directive (EC) 2001/29, Official Journal L 167, 22.6.2001, pp. 10–19. See Art. 5 (3) (g) and (h).

celebrations),²⁰ they serve, in fact, the public interest by enabling the cultivation of religious practices and promoting ways of “learning and culture”.²¹

8.2 Council of Europe

As far as the architectural environment of European religious cultural heritage is concerned, the *Convention for the Protection of the Architectural Heritage of Europe* explicitly stipulates that each Party undertakes to foster “the use of protected properties in the light of the needs of contemporary life; the adaptation when appropriate of old buildings for new uses” (Art. 10). The said provision is quite similar to the wording of *Resolution 916 (1989) on Redundant Religious Buildings*, that requires the preservation and protection of redundant religious buildings “through their sensitive adaptation to new uses”.²² According to the *Resolution*, which should be interpreted in the light of the aforementioned *Convention*, when a building consecrated for worship is no longer viable as such, efforts should be made to ensure a future use, whether religious or cultural, “as far as possible compatible with the original intention of its construction”. In addition, the *Resolution* calls upon all the responsible stakeholders (i.e. Churches, governments and local authorities) to co-operate with interested organizations and experts, with a view to:

- taking effective measures to preserve redundant religious buildings and secure wherever possible their appropriate future use;
- consolidating (in compatible computerized form) surveys of redundant religious buildings, of their architectural and historical significance, and of their current use, and regularly updating such surveys which should also reflect contemporary interest and include nineteenth and twentieth century buildings;
- ensuring effective protection for the survival of the original fabric and fittings of such buildings pending future re-adaptation;
- avoiding, except in cases of exceptional architectural, historic or commemorative interest, the preservation of religious buildings as ruins;
- promoting projects for reuse and re-adaptation which are not incompatible with the original function of the building and do not cause irreversible alteration to the original fabric;
- providing funds or tax benefits for the restoration, repair and maintenance of religious buildings, whether in use or redundant, in order to ensure they are not abandoned;

²⁰ Institute for Information Law (2007) *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. Final Report*, University of Amsterdam, The Netherlands, p. 43.

²¹ Directive 2001/29, op. cit., p. 11.

²² See the relevant provisions of the *Resolution* online at: <http://assembly.coe.int>.

- encouraging a more imaginative use of existing religious buildings;
- assuring the supply of appropriate building materials, and encouraging the research, crafts and support work necessary for the continuous upkeep of religious buildings;
- encouraging the inclusion of redundant religious buildings in the redevelopment of cultural itineraries throughout Europe, and ensuring that the proceeds of cultural tourism are channeled into the preservation of the buildings tourists visit.²³

Furthermore, according to second paragraph of the Appendix of the Committee of Ministers' *Recommendation* 'On measures to promote the integrated conservation of historic complexes composed of immovable and moveable property',²⁴ protected historic complexes used for religious purposes should remain subject to the existing legislation; however, according to the same *Recommendation*, which should be interpreted in the light of the Granada Convention and in conjunction with the *Resolution* 'on the Reviving of Monuments',²⁵ and the *Recommendation* 'on co-ordinating documentation methods and systems related to historic buildings and monuments of the architectural heritage',²⁶:

- given the nature of these complexes and their function, any alterations required by changes in the form of worship and other factors of a religious nature may be authorized, taking account of the coherence of the complex, after co-ordination with the competent civil and religious authorities.
- where a church or a religious community has its own set of rules on religious complexes conservation, there should be regular co-ordination and consultation with the competent authorities of the State with a view to these being implemented, in harmony with existing laws and regulations.

²³ On the subject of 'cultural tourism' see also the *Recommendation 266 (2009) on the future of cultural tourism – towards a sustainable model* (adopted by the Congress of local and regional authorities of the Council of Europe on 5 March 2009) as well as the previous *Recommendation No. R (2003) 1 on the promotion of tourism to foster the cultural heritage as a factor for sustainable development* (adopted by the Committee of Ministers on 15 January 2003); cf. *International Charter on Cultural Tourism: Managing Tourism at Places of Heritage Significance*, adopted by ICOMOS at the 12th General Assembly in Mexico, October 1999. From the relevant bibliography see Rinschede G. (1992) *Forms of religious tourism*, *Annals of Tourism Research* Vol. 19, pp. 51–67; Schulz A. (2006) *Religiöser Tourismus, Gezielte wirtschaftliche Vermarktung religiöser Orte und die Auswirkungen am Beispiel des Kloster Andechs*, München: Grin; Olsen D. (2006) *Management issues for religious heritage attractions*, in: Timothy D. & Olsen D. (eds.) (2006) *Tourism, Religion and Spiritual Journeys*, London-New York: Rutledge, pp. 104–18; Raj R. & Morpeth N. (eds.) (2007) *Religious Tourism and Pilgrimage Festivals Management*, Cambridge: Cabi.

²⁴ Recommendation No. R (98) 4, Adopted by the Committee of Ministers on 17 March 1998 at the 623rd meeting of the Ministers' Deputies.

²⁵ Resolution (66) 20, Adopted by the Committee of Ministers on 20 March 1966 at the 150th meeting of the Ministers' Deputies.

²⁶ Recommendation No R (95) 3, Adopted by the Committee of Ministers on 11 January 1995 at the 525th meeting of the Ministers' Deputies.

In the same vein, the Parliamentary Assembly of the Council of Europe has issued *Recommendation 1484 (2000)* regarding the ‘*Management of cathedrals and other major religious buildings in use*’.²⁷ The *Recommendation* calls the Committee of Ministers to:

- examine the various models for the maintenance, conservation and repair of major religious buildings still in use in Europe and draw up a code of good practice for their effective management while recognizing the rights and responsibilities of the religious communities;
- organize from time to time conferences at which experience in the management of cathedrals and other major religious buildings in use can be exchanged, and promote the creation of a database on that subject;
- ask the governments of member States to: ensure that adequate and appropriate lists are drawn up of major religious buildings and sites of cultural and historical importance (according to the general criteria applied for monument listing); draw up conservation plans for each major religious monument or site in consultation with the religious authorities involved; encourage partnerships between the religious authorities, local interest groups, conservation firms and tourist organizations and co-ordinate such initiatives on a broader national basis; draw on the code of practice and encourage the multifunctional use of religious buildings wherever appropriate; make sure that adequate funding is available and control provided for the proper maintenance of the major religious monuments.²⁸

According to the above *Recommendation* cathedrals and other major religious buildings are “*amongst the most significant constructions of the European architectural heritage*”: a wealth of works of art and furnishings are often associated with them, and, in most cases, they possess a significant historical past that embraces different religions. The latter have very different attitudes to the physical heritage; some (such as the Orthodox and Roman Catholic Churches) regard the buildings and their contents as sacred. Others (such as most Protestant Churches) are very much open to multifunctional use of the premises. As stated in the *Recommendation*, “[t]hese differing attitudes should be respected for major religious buildings that are still in use”.

²⁷ Recommendation 1484 (2000) *Management of cathedrals and other major religious buildings in use*, that was adopted by the Standing Committee, acting on behalf of the Assembly, on November 9, 2000.

²⁸ *Ibid.*

8.3 UNESCO

According to the principles set by the *Recommendation* ‘concerning the Preservation of Cultural Property Endangered by Public or Private works’,²⁹ protective inventories of important religious immovables as defined in Art. 1 (a), whether scheduled or unscheduled, should be maintained; where such inventories do not exist, priority should be given in their establishment to the thorough survey of religious cultural property in areas where such property is endangered by public or private works. In the same line, measures for the preservation or salvage of religious cultural property should be preventive and corrective, aimed at protecting or saving such property from public or private works likely to damage or destroy it.³⁰ In addition, Member States should give due priority to measures required for the preservation *in situ* of religious cultural property endangered by public or private works “*in order to preserve historical associations and continuity*”.³¹ When overriding economic or social conditions require that religious cultural property be transferred, abandoned or destroyed,

the salvage or rescue operations should always include careful study of the cultural property involved and the preparations of detailed records . . . The results of studies having scientific or historic value carried out in connexion with salvage operations, particularly when all or much of the immovable cultural property has been abandoned or destroyed, should be published or otherwise made available for future research . . . Important structures and other monuments which have been transferred in order to save them from destruction by public or private works should be placed on a site or in a setting which resembles their former position and natural, historic or artistic associations.³²

Moreover, in the case of international exchanges of religious objects, on the basis of the provisions of the *Recommendation* for the ‘Protection of Movable Cultural Property’,³³ Member States should:

- take the necessary measures to ensure that appropriate conditions of protection and care during transport and exhibition as well as adequate coverage of risks are specified and agreed on between the parties concerned. Governments through whose territory religious cultural property will transit should provide assistance, if so requested;

²⁹ *Standard-setting in UNESCO*, op. cit., p. 402 f.

³⁰ Indicative (public or private) works likely to damage or destroy religious cultural property are being described in Art. 8 of the above *Recommendation* (*ibid.*, pp. 404–5).

³¹ *Ibid.*, p. 405.

³² Art. 9–12, *ibid.*, p. 405.

³³ *Ibid.*, p. 549 f. According to the General Principles of the *Recommendation* (*ibid.*, p. 551): “The growing perils which threaten the movable cultural heritage should incite all those responsible for protecting it, in whatever capacity, to play their part: staff of national and local administrations in charge of safeguarding cultural property, administrators and curators of museums and similar institutions, private owners and those responsible for religious buildings, art and antique dealers, security experts, services responsible of crime, customs officials and the other public authorities involved”.

- encourage the institutions concerned to: (i) ensure that religious cultural property is transported, packed and handled in accordance with the highest standards. The measures to be taken to this effect could include the determination by experts of the most appropriate form of packaging, as well as the type and timing of transport; it is recommended that, where appropriate, the responsible curator of the lending religious institution or museum accompany the property during transport and certify its conditions; the religious institutions responsible for the shipping and packing of the objects should attach a list describing their physical appearance, and the receiving institutions should check the objects against those lists; (ii) take appropriate measures to prevent any direct or indirect damage which might arise from the temporary or permanent overcrowding of the exhibition premises; (iii) agree, where necessary, on the methods to be used for measuring, recording and regulating the degree of humidity in order to maintain the relative humidity within definite limits, and on the measures to be taken to protect light-sensitive objects (exposure to daylight, type of lamp to be used, maximum level of illumination *in lux*, methods used to measure and control this level);
- simplify the administrative formalities relating to the lawful movement of religious cultural property and arrange for appropriate identification of crates and other forms of packaging containing cultural property;
- take steps to protect cultural property in transit or temporarily imported for the purpose of cultural exchanges, and in particular facilitate rapid customs clearance in suitable premises, which should be situated close to, and if possible on, the premises of the institution concerned, and ensure that clearance is effected with all the desirable precautions; and
- whenever necessary, give instructions to their diplomatic and consular representatives to enable them to take effective action to accelerate customs procedures and ensure the protection of cultural property during transport.³⁴

In relation to the preservation of objects present inside religious buildings or temporarily stored inside other similar facilities (*see* also De Beyer and Takke 2012, p. 24) according to Art. 15 (entitled ‘*Movable cultural property situated in religious buildings . . .*’) of the aforementioned *Recommendation*:

To ensure that movable cultural property situated in religious buildings . . . is suitably preserved and protected against theft and plunder, Member States should encourage the construction of installations for storing it and the application of special security measures. Such measures should be in proportion to the value of the property and the extent of the risks to which it is exposed. If appropriate, governments should provide technical and financial assistance for this purpose. In view of the special significance of movable cultural property situated in religious buildings, Member States and the competent authorities should endeavour to provide for the proper protection and presentation of such property where it is located.³⁵

³⁴ Cf. *ibid.*, pp. 554–5.

³⁵ *Ibid.*, p. 554.

Likewise, Member States should facilitate, *inter alia*, the protection of private collections of *non-functional* objects, in conformity with their legislation and constitutional system, by inviting the respective owners to make inventories of their collections, to communicate such inventories to the official services responsible for the protection of the religious cultural heritage and, if the situation requires, to grant access to the competent official curators and technicians in order to study and advise on safeguarding measures.³⁶

Furthermore, the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970),³⁷ seeks also to raise awareness about the protection of the elements of cultural heritage, which “*on religious ... grounds*”³⁸ are specifically designated by each State as being of importance for archaeology, history, literature, or art (*see Clément 1995*). It should be noted that the provisions of the aforementioned Convention, have been underpinned and supplemented by the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*,³⁹ which enshrines the principle that the possessor of a (religious) cultural object that has been stolen, must return it whatever the circumstances (Vrellis 2003). Pursuant to Art. 3 § 4, a claim for restitution of a cultural object forming an integral part of an identified religious monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of 3 years from the time when the claimant knew the location of the cultural object and the identity of its possessor⁴⁰; for the purposes of the *Convention*, a ‘public collection’ consists of a group of inventoried or otherwise identified cultural objects owned, *inter alia*, by “*a religious institution in a Contracting State*”.⁴¹ According to the Convention, the court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the object is of ‘significant cultural importance’ or that the removal of the object from its territory significantly impairs, among other interests: the physical preservation of an object or of its *context*; the integrity of a complex object, such as an ivory Byzantine triptych or a religious mosaic composition (Grammatikaki Alexiou 2002,

³⁶ *Ibid.*

³⁷ *Standard-setting in UNESCO*, op. cit., p. 103 f.

³⁸ *Ibid.*, p. 104 (Art. I).

³⁹ The UNIDROIT’S (International Institute for the Unification of Private Law) work has served as the basis for a number of international instruments adopted under the auspices of other international Organisations, such as the UNESCO; the Institute’s Statute has been joined by all major European countries. *See* the official document of the UNIDROIT Convention online at: <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm>.

⁴⁰ According to § 5 Art. 3: “Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation”.

⁴¹ Art. 3 § 7 (c).

p. 265); the traditional or ritual use of an object by a (religious) community, and, moreover, its liturgical function within a cult (religious practice).

Regarding the elements of intangible religious heritage, and, in particular, the elements of religious tradition and folklore, as forms of cultural expression of the respective religious groups, according to the *Recommendation* ‘on the Safeguarding of Traditional Culture and Folklore’,⁴² in so far as the latter constitute manifestations of intellectual creativity, whether it be individual or collective, they must be protected in a manner inspired by the protection provided for intellectual productions; such protection of religious folklore “has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests”.⁴³

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⁴² *Standard-setting in UNESCO*, op. cit., p. 605 f.

⁴³ See paragraph F “*Protection of Folklore*” (*Standard-setting in UNESCO*, op. cit., p. 608). Moreover, according to the same provisions: “Member States should: (a) regarding the ‘intellectual property’ aspects, call the attention of relevant authorities to the important work of UNESCO and WIPO in relation to intellectual property, while recognizing that this work relates to only one aspect of folklore protection and that the need for separate action in a range of areas to safeguard folklore is urgent; (b) regarding the other rights involved: (i) protect the informant as the transmitter of tradition (protection of privacy and confidentiality); (ii) protect the interest of the collector by ensuring that the materials gathered are conserved in archives in good condition and in a methodical manner; (iii) adopt the necessary measures to safeguard the materials gathered against misuse, whether intentional or otherwise; (iv) recognize the responsibility of archives to monitor the use made of the materials gathered”.

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Chapter 9

Select National Legislations

Mapping the plethora of national legislations that correlate to the protection of religious cultural heritage in Europe is, of course, an arduous task. The cultural and linguistic diversity of the European continent, the individual variations of the national legal systems, the contrasting status of State-Church relationship existing in each particular country, as well as the ‘ephemeral’ nature of legal statutes, are only some of the many factors that make it extremely difficult to provide a rigorous account of the relevant legislative patterns. Nevertheless, the following paragraphs, by no means being an exhaustive report on the European heritage laws nor a detailed study of each country’s profile (e.g. in relation to Belgium the spotlight is mainly on the region of Flanders), provide evidence of the European States’ active involvement with their sacred/cultural treasures, on the basis of the political and legal foundations of neutrality and pluralism. Thus, they serve purely as indicators of a shared European legal ethos. In fact, the following paragraphs corroborate one of the general *Principles of Religion Law Common to the States of Europe*, according to which ‘the States may impose such restrictions on the preservation of religious sites or objects, as are necessary to protect their national and cultural heritage’.¹ The selection of the respective national legislative instruments, taking into consideration that they are subject to a constant revision process,² has been made on account of their current significance to the aforementioned principle. The references listed at the end of this chapter provide an additional incentive for further reading on the subject matter.

¹ Doe N. (2011) *Law and Religion in Europe. A Comparative Introduction*, Oxford University Press, p. 264.

² See, for example, the recent article of Eriksson Kockum L. (2103) *Revision of legislation concerning the ecclesiastical cultural heritage in Sweden* at: <http://www.frh-europe.org/featured-article-revision-of-legislation-concerning-the-ecclesiastical-cultural-heritage-in-sweden/>. Accessed on March 31, 2014.

9.1 Austria

To begin with, according to Art. 10 § 13 of the *Federal Constitutional Act*, the national government has powers of legislation and execution in the preservation of monuments and religious affairs (“*Denkmalschutz; Angelegenheiten des Kultus*”).³ Pursuant to the constitutional provision of Art. 15 § 1, all matters not assigned to the Federation, including matters relating to culture, are to be handled by the *Bundesländer* (Ratzenböck and Lungstarß 2013, p. 35), whereas, on the basis of Art. 102 § 2, within the framework of the constitutionally established sphere of competence, the preservation of monuments (*Denkmalschutz*) can be directly performed by Federal authorities. Thus, the protection of cultural heritage rests on a two-tier structure: the Federal Office of Monuments (*Bundesdenkmalamt*), under the Federal Ministry for Education, the Arts and Culture, and the Provincial Conservators (*Landeskonservatoren*) charged with the practical implementation of the policy on monument protection, attached to the provincial governments.

As far as religious heritage is concerned, the above structure balances on the principle of ‘including’ Neutrality (Kalb et al. 2003, pp. 42–43; Pesendorfer 2009, p. 139; Potz 2009) and the need for co-operation between the State and the legally recognized proprietors of major monuments, namely the recognized churches and religious societies which enjoy a position of corporations of public law (*Körperschaft des öffentlichen Rechts*) within the Austrian legal system (Wieshaider 2002, pp. 135 f.; Potz 2005). This means in effect, that the legal protection of religious heritage entails the respect of both the sacred and the social function of its various elements; the latter must be developed and preserved in terms of cultural and religious freedom (*Kunstfreiheit und Religionsfreiheit*) and, therefore, must be recognized as *lebendige Kunstwerke*, i.e. as ‘living works of art’ (Heckel 1968, p. 85). In other words, according to Professor Potz (2007, pp. 57–58):

[S]taatliches Handeln der Tatsache Rechnung tragen muss, dass religiöse Denkmale im Regelfall unmittelbar höchsten religiösen Zielen dienen und daher auf einen letzten Sinn verweisen, den nur die Gläubigen erfassen können. Das rechtsstaatliche System verlangt, dass die sich daraus ergebende spezifische Eigengesetzlichkeit sakraler Kunstdenkmale jeder kulturschützerischen Regelung zu Grunde zu legen ist. Dies hat selbstverständlich Konsequenzen für den Schutz der freien Wirkung des Denkmals nicht nur vor Zerstörung sondern auch vor Verfälschung. Dies bedeutet weiters, dass die Berücksichtigung sich wandelnder kultisch- liturgischer Bestimmungen nicht als störendes Element staatlichen Kulturgüterschutzes zu betrachten sind, sondern als eine zu beachtende Sachgesetzlichkeit funktionalen Denkmalschutzes.

In the light of the above, the Federal Act on the Protection of Monuments in regard to their Historical, Artistic or Cultural Value (*Monument Protection Act*)⁴

³ *Bundes-Verfassungsgesetz* (in: *Bundesgesetzblatt* No 1/1930), as it has been repeatedly amended over the years.

⁴ *Bundesgesetz betreffend den Schutz von Denkmalen wegen ihrer geschichtlichen, künstlerischen oder sonstigen kulturellen Bedeutung; Denkmalschutzgesetz*, in: *Bundesgesetzblatt* No 533/1923 and recently amended (see *Bundesgesetzblatt* I No. 170/1999 & 92/2013).

stipulates that the destruction, as well as any alteration of a religious monument, the protection of which qualifies as a matter of public interest according to the relevant provisions of the Monument Protection Act,⁵ requires the consent of the *Bundesdenkmalamt*, except in cases of danger in delay (Wieshaider 2002, pp. 16 f.; Kalb et al. 2003, pp. 201 f.). Consequently, pursuant to § 5 par. 4 of the Act,⁶ the application for alteration of protected immovable religious heritage (together with pertinent adjacent sacred objects) is to be granted only if a monument is used for worship of a legally recognized church or religious society, and the alteration is necessary for the exercise of worship on the basis of compelling, or at least generally applied, liturgical instructions (*see* Heckel 1968, pp. 151 f.). The same applies also in the case of a disposal of a monument, on the basis of § 6 of the Act: except for the consent of the competent *Bundesdenkmalamt*, the relevant liturgical provisions must be also observed. The latter may include regulations regarding both immovable and movable assets, on the basis of the internal laws set autonomously by the religious communities (*see* Wieshaider 2002, p. 17; Kalb et al. 2003, pp. 202; cf. Gampl 1971, p. 180).

As ‘compelling’, pursuant to the wording of § 5 and in the meaning of the above provisions, are to be considered liturgical instructions that must be observed in

⁵The legal presumption of *Denkmalschutzgesetz* § 2 par. 1, regarding the *a priori* ‘public interest’ and, therefore, the *ex lege* automatic protection of religious monuments owned by recognized churches and religious communities, ended, according to § 2 par. 4 of the same Act, in 31.12.2009. Since 1.1.2010 the *Bundesdenkmalamt* determines whether a religious monument qualifies as a matter of ‘public interest’ (*see* § 3 par. 1). In any case, §2a of the Act provides an alternative ‘Preliminary protected status by Regulation’ (Vorläufige Unterschutzstellung durch Verordnung) for all the relevant (immovable) religious monuments that were previously (i.e. until 31.12.2009) protected by virtue of § 2 par. 1: the respective owners must be given the opportunity to comment on the relevant reviewing process (Begutachtungsverfahren) pursuant to § 2a par. 3.

⁶*Denkmalschutzgesetz* § 5 par. 4: “Unbeschadet der sonstigen Bestimmungen dieses Paragraphen ist dem Antrag auf Veränderung eines dem Gottesdienst gewidmeten Denkmals (samt zugehöriger Nebenobjekte) einer gesetzlich anerkannten Kirche oder Religionsgesellschaft einschließlich ihrer Einrichtungen auf jeden Fall so weit stattzugeben, als die Veränderung für die Abhaltung des Gottesdienstes und der Teilnahme der Gläubigen daran nach den zwingenden oder zumindest allgemein angewandten liturgischen Vorschriften der gesetzlich anerkannten Kirche oder Religionsgesellschaft notwendig ist. Als notwendig gelten jedenfalls alle Vorschriften, ohne deren Beachtung die regelmäßige Abhaltung allgemeiner Gottesdienste nicht gestattet wäre und auch jene Umstände, die den Gläubigen die regelmäßige Teilnahme am Gottesdienst in ausreichendem Maße und in zumutbarer Weise ermöglicht. Art und Umfang der Notwendigkeit ist auf Verlangen des Bundesdenkmalamtes durch eine von der zuständigen Oberbehörde der betreffenden Kirche oder Religionsgesellschaft ausgestellte Bescheinigung nachzuweisen. Um dem Bundesdenkmalamt Gelegenheit zu geben, Gegenvorschläge zu erstatten, ist in dieser Bescheinigung auch darzulegen, welche Konsequenzen sich daraus ergeben würden, wenn den Veränderungen nicht in der beantragten Weise oder im beantragten Umfang entsprochen würde und ist in dieser Bescheinigung auch zu allfällig bereits gemachten Gegenvorschlägen des Bundesdenkmalamtes Stellung zu nehmen”; cf. Kandler Mayr E. (2004) *Schützen und verwalten Kirchliche Güter und Denkmalschutz. Eine Untersuchung der kirchlichen Rechtsnormen und der staatlichen österreichischen und bayrischen Gesetze* [=Dissertationen Kanonistische Reihe 19], EOS Verlag Erzabtei St. Ottilien, p. 32 f. Katzinger G. (2004) *Kirchliches Baurecht* [=Wissenschaft und Religion 6] Wien: Peter Lang, p. 225 f.

order to permit regular practice of worship as well as those circumstances which enable the faithful to attend church to a sufficient degree and in a reasonable and dignified way. The kind and extension of this necessity is to be proved with a certificate of the competent supreme authority of the church or religious society concerned, on demand by the *Bundesdenkmalamt*; the certificate has to include the consequences that are to be expected if the application for the alteration would not be granted in the way or extension that has been asked for in the application. If the *Bundesdenkmalamt* makes an alternative proposal or suggestion, the religious authority concerned has to provide an opinion (Wieshaider 2002, pp. 139–140; Kalb et al. 2003, pp. 202–203). The viewpoint of the legally recognized churches and religious communities is also necessary in shaping the opinion of the Advisory Board for the Preservation of Monuments (*Denkmalbeirat*), which consults with the *Bundesdenkmalamt*. According to § 15 of the Act,⁷ when the focus of the *Denkmalbeirat* is on a religious monument, a representative of the relevant Church or religious community participates at the Board as a non-permanent (*ad hoc*) member (Wieshaider 2002, pp. 141–142; Kalb et al. 2003, pp. 203–204).⁸

In relation to the prevention of the illicit trafficking of religious cultural goods, § 6 of the *Monument Protection Act* stipulates that the export of protected (movable) monuments without prior license (§§ 17, 19 and 22) or relevant confirmation by the competent authorities (§ 18) is not permitted (Kalb et al. 2003, p. 202). Similar protection, regarding the return of religious cultural objects unlawfully removed from the territory of Austria, is provided by the *Regulation* of the Federal Minister for Education and Cultural Affairs,⁹ which defines the categories of cultural goods within the meaning of the Federal Act transposing Directive 93/7/EEC ‘on the return of cultural objects and unlawfully removed from the territory of a Member State’ (Wieshaider 2002, p. 141; Kalb et al. 2003, p. 203). Although there is an official general ‘Database on export of cultural goods’ (*Ausfuhrdatenbank*), which is managed by the competent Department of the *Bundesdenkmalamt*, there is no relevant database dedicated to monitoring religious cultural property.¹⁰

⁷ See also *Verordnung der Bundesminister für Bildung, Wissenschaft und Kultur über den Denkmalbeirat* in: *Bundesgesetzblatt*, II No. 572/2003 (cf. *Verordnung des Bundesministers für Wissenschaft und Forschung vom 26. Mai 1979 über den Denkmalbeirat* in: *Bundesgesetzblatt*, No. 328.1979).

⁸ *Verordnung der Bundesminister*, *Ibid.*, § 7: “Steht das Denkmal im Eigentum einer gesetzlich anerkannten Kirche oder Religionsgesellschaft, so ist auch diese einzuladen, einen Vertreter zu entsenden”.

⁹ *Verordnung des Bundesministers für Unterricht und kulturelle Angelegenheiten, mit welcher Kategorien von Kulturgütern im Sinne des Bundesgesetzes zur Umsetzung der Richtlinie 93/7/EWG über die Rückgabe von unrechtmäßig aus dem Hoheitsgebiet eines Mitgliedstaates der Europäischen Gemeinschaft verbrachten Kulturgütern festgestellt werden*, in: *Bundesgesetzblatt*, II No. 483/1999 (see also KGRückgG in *Bundesgesetzblatt*, I No. 170/1999 and KunstGRückgG in relation to museum objects and private collections in: *Bundesgesetzblatt*, I No. 181/1998).

¹⁰ Centre d’Etudes sur la Coopération Juridique Internationale (2011) *Study on preventing and fighting illicit trafficking in cultural goods in the European Union. Annex*, European Commission Directorate-General Home Affairs, pp. 3–4.

9.2 Belgium

The relevant political and territorial division of Belgium affects, accordingly, its religious and legislative landscape. Several layers of legislation exist within a complex administrative structure: federal legislation, community legislation (the Flemish, the French and the German-speaking community) and regional legislation (Brussels, Flemish and Walloon Region). In broad lines, the movable heritage is managed by the competent communities, while the immovable heritage is managed by the respective regions; the buildings of public worship are owned by the municipalities or the relevant church councils,¹¹ while the various abbeys and convents are privately owned by the individual religious communities. As Professor Coomans (2006, p. 62) emphasizes, in relation to the religious built heritage:

Il existe différents types de protections. Un bâtiment peut être entièrement ou partiellement classé comme monument; il peut faire partie d'un ensemble architectural, villageois ou urbain, ou même d'un site classé; il peut enfin être accompagné d'un périmètre de protection ou simplement faire partie de la zone légale de protection d'un autre monument.

The aforementioned classification of religious edifices (“*classé comme monument*”) exists in all three regions.¹² Various provisions on monument protection exist in the Walloon region (e.g. the provisions included in the relevant *Code for regional planning, town planning, cultural heritage and energy*),¹³ as well as in the Brussels-Capital region (e.g. the provisions included in the *Brussels spatial planning code*).¹⁴

Nevertheless, the Flemish legislation on the protection of monuments is the most elaborate one (Torfs 2005, p. 675). The Flemish region enacted in 2012 a *Decree*

¹¹ Church councils in Belgium (*Kerkfabriek, Fabrique d'église*) are official institutes that maintain a public statute according to the law; see the relevant legislation collected in: Bourgeois G. (2011) *Conceptnota: Een toekomst voor de Vlaamse parochiekerk*, p. 3; document available online at: http://crkc.be/sites/default/files/conceptnota_toekomst_parochiekerk.pdf. Accessed on March 31, 2014.

¹² Relevant agencies are the *Koninklijke Commissie voor Monumenten en Landschappen* in Flanders and the *Institute du Patrimoine* in the Walloon region.

¹³ *Code Wallon de l'Aménagement du Territoire, de l'Urbanisme, du Patrimoine et de l'Énergie* [CWATUPE]; see for example Art. 185: “En préalable à toute décision de construction d'un immeuble nouveau, pour assurer la conservation intégrée de leur patrimoine, l'Etat, les Régions, les Communautés, la Société régionale wallonne du logement, les sociétés immobilières de service public agréées par celle-ci, les Provinces, les Communes et les Intercommunales, les Fabriques d'église et les Centres publics d'aide sociale produisent une étude démontrant l'impossibilité d'affecter à l'activité en vue de laquelle un permis d'urbanisme est sollicité le ou les biens relevant du patrimoine dont ils sont propriétaires lorsqu'il est classé, inscrit sur la liste de sauvegarde, en voie de classement après notification de la décision du Gouvernement d'entamer la procédure de classement, ou repris à l'inventaire du patrimoine visé par l'article 192”. The *Code* is available online at: <http://wallex.wallonie.be/index.php?doc=1423>. Accessed on March 31, 2014.

¹⁴ *Code bruxellois de l'Aménagement du Territoire (COBAT)* available online at: <http://www.monument.irisnet.be/fr/legis/intro.htm>. Accessed on March 31, 2014.

‘on the Flemish cultural heritage policy’ (*Cultureel-erfgoeddecreet*)¹⁵ which replaced the earlier legislation of 2008. According to the ‘Explanatory Memorandum’ of the said *Decree*: “Both the cultural heritage and the architectural heritage are testimonies of cultural developments, developments in the field of social relations [and] religion”.¹⁶ Therefore, among the Flemish policy priorities, specifically formulated in order to subsidize local cultural heritage policy of the municipalities of Antwerp, Ghent, Bruges, Leuven and Mechelen, is the financial support and maintenance of religious built heritage.¹⁷ In principle, only listed architectural heritage may benefit from regional grants, whereas inventoried and safeguarded assets are not eligible (Goblet et al. 2001, pp. 33 f.); however, grants may be awarded also to privately owned listed groups of buildings or listed sites, such as monasteries and abbeys. According to the *Regulatory Impact Assessment* annexed to the ‘Explanatory Memorandum’ of the recent *Decree* of July, 2013 ‘on immovable cultural heritage’¹⁸:

Since municipalities are responsible for the maintenance and restoration of their own (protected) heritage, as well as the ecclesiastical patrimony located in their territory, they can also request premiums under the present regulation. Coupled federal and provincial subsidies [*koppelsubsidie*] that the municipalities must provide, is the only share that the latter contribute to this heritage. Especially church restorations represent a considerable proportion of the current matter. . . therefore, the municipalities gain a (limited) benefit from the existing system [Aangezien gemeenten ook verantwoordelijk zijn voor het onderhoud en de restauratie van hun eigen (beschermd) patrimonium en verantwoordelijk zijn voor het kerkelijk patrimonium op hun grondgebied, kunnen gemeenten onder de huidige regeling ook premies aanvragen. De koppelsubsidie die de gemeente moet verstrekken, is dus het eigen aandeel dat zij zal dragen voor haar patrimonium. Vooral kerkrestauraties vertegenwoordigen een flink aandeel van de huidige vraag . . . De gemeente heeft dus een (beperkte) baat bij het bestaande systeem].¹⁹

A typical such example of Flemish policy on religious heritage, is the Governmental *Decision* of 2004, as it has been repeatedly amended over the last decade, on ‘determining subsidies for protected monuments’²⁰; the latter includes, *inter alia*,

¹⁵ *Decreet van 6 juli 2012 houdende het Vlaams cultureel-erfgoedbeleid*, in: *Moniteur Belge*, 27.03.2013.

¹⁶ “Zowel het cultureel erfgoed als het onroerend erfgoed zijn getuigenissen van culturele ontwikkelingen, ontwikkelingen op het vlak van maatschappelijke verhoudingen, religie. . .” in: *Memorie van toelichting* (Available online at: <http://www.kunstenenerfgoed.be>. Accessed on March 31, 2014).

¹⁷ *Besluit van de Vlaamse Regering houdende de formulering van de Vlaamse beleidsprioriteiten voor het Cultureel-erfgoeddecreet*, 14.9.2012.

¹⁸ The official text of the *Assessment* is available online at: <http://www.vlaamsparlement.be>; see also the relevant *Decreet betreffende het onroerend erfgoed* in: *Moniteur Belge*, 17.10.2013 (online at: <https://www.onroenderfgoed.be>). Further information available at: <http://crkc.be/wetgeving-betreffende-het-onroerend-kerkelijk-erfgoed>. Accessed on March 31, 2014.

¹⁹ *Reguleringsimpactanalyse voor het decreet betreffende het onroerend erfgoed*, p. 624.

²⁰ *Besluit van de Vlaamse Regering van 14 juli 2004 tot het vaststellen van een onderhoudspremie voor beschermde monumenten en stads- en dorpsgezichten*, in: *Moniteur Belge*, 29.12.2004 (last amended in 2011: see *Wet-, Decreet- en Regelgeving 2013*, pp. 50 f.).

monuments existing under the management of episcopal seminaries and cathedral church councils (Coomans 2012). These religious institutions, which are subject to the *Decree* ‘on the material organization and operation of recognized religions’,²¹ co-operate with the relevant municipal and governmental authorities in all matters relating to the restoration of protected monuments,²² the protection of archaeological heritage²³ and the preservation of cultural ‘landscape’.²⁴ Also, since 2011, the Flemish Minister for Internal Administration and Immovable Heritage has presented an important *Concept Paper* in relation to the preservation and maintenance of parish churches,²⁵ formulating accordingly a solid policy framework.²⁶

Furthermore, the *Decision* of the Flemish Government of November 17, 1993 ‘laying down general rules on the conservation and maintenance of monuments . . .’,²⁷ has stipulated a whole series of obligations relating to the interior, exterior and perimeter of (religious) monuments located within a protected ensemble (Goblet et al. 2001, p. 26); the *Decision* sets forth, *inter alia*, specific requirements that govern certain categories of protected religious assets, such as church bells and organs (*Hoofdstuk v. bijkomende voorschriften voor orgels, beiaarden, klokken en torenuurwerken*).²⁸

In addition, pursuant to the *Decree* ‘on the protection of movable cultural heritage of exceptional importance’ (*Topstukkendecreet*)²⁹ the Flemish

²¹ *Decreet van 7 mei 2004 betreffende de materiële organisatie en de werking van de erkende erediensten*, in: *Moniteur Belge*, 6.9.2004.

²² *Besluit van de Vlaamse Regering van 14 december 2001 houdende vaststelling van het premiestelsel voor restauratiewerkzaamheden aan beschermde monumenten* (last amended in 2011) in: *Moniteur Belge*, 19.1.2002 = Wet-, Decreet- en Regelgeving 2013, pp. 66 f.

²³ *Decreet van 30 juni 1993 houdende bescherming van het archeologisch patrimonium* (last amended in 2011) in: *Moniteur Belge*, 15.9.1993 = Wet-, Decreet- en Regelgeving 2013, pp. 103 f.

²⁴ *Besluit van de Vlaamse Regering van 4 april 2003 tot instelling van een premiestelsel voor beschermde landschappen* (last amended in 2011) in: *Moniteur Belge*, 20.06.2003 = Wet-, Decreet- en Regelgeving 2013, pp. 180 f.

²⁵ Important guidelines in relation to the proper use of parish churches have been set by the Flemish Bishops: De Vlaamse Bisschoppen (2012) *Richtlijnen van de Vlaamse Bisschoppen voor het Gebruik van de Parochie Kerken* at: http://crkc.be/sites/default/files/richtlijnen_vlaamse_bisschoppen_01.pdf.

²⁶ Bourgeois G. (2011) *Conceptnota: Een toekomst voor de Vlaamse parochiekerk*; document available online at: http://crkc.be/sites/default/files/conceptnota_toekomst_parochiekerk.pdf.

²⁷ *Besluit van de Vlaamse Regering van 17 november 1993 tot bepaling van de algemene voorschriften inzake instandhouding en onderhoud van monumenten en stads- en dorpsgezichten*, in: *Moniteur Belge*, 10.3.1994 = Wet-, Decreet- en Regelgeving 2013, pp. 33 f.

²⁸ Wet-, Decreet- en Regelgeving 2013, pp. 37 f.

²⁹ *Decreet houdende bescherming van het roerend cultureel erfgoed van uitzonderlijk belang*, in: *Moniteur Belge*, 14.3.2003; (amendement:) *Decreet tot wijziging van het decreet van 24 januari 2003 houdende de bescherming van het roerend cultureel erfgoed van uitzonderlijk belang*, in: *Moniteur Belge*, 8.6.2009; the relevant governmental decision regarding the implementation of the Decree: (*Besluit van de Vlaamse regering ter uitvoering van het decreet van 24 januari 2003 houdende bescherming van het roerend cultureel erfgoed van uitzonderlijk belang*) has been

Government is responsible for drawing up a list of the movable cultural heritage of the Flemish Community (the ‘*list of masterworks*’); the list describes all movable properties and collections which must be conserved by virtue of their particular archaeological, historic, historico-cultural, artistic or scientific interest for the Flemish Community (Art. 2). Their rarity, and therefore the need for their protection, is basically related to the (public) position of these assets: movable religious goods situated inside religious monuments are regarded as ‘immovable by destination’ and, consequently, are being protected as such (Pooter 2000, pp. 23 f.; Torfs 2005, p. 675). These objects, if they are located within a public religious setting (*religieuze instellingen*),³⁰ are considered as cultural elements of greater value and importance than their counterparts ‘hidden’ inside private collections.³¹ It should be noted that, pursuant to the aforementioned *Decree* ‘on the material organization and operation of recognized religions’, a similar ecclesiastical inventory (*inventaris*) of sacred objects is prepared by the competent church authorities.³² It should be noted that sacred objects are also protected under the rule of Belgian criminal law: according to Art. 144 of the current *Code pénal*, issued in 1867 and modified several times, anyone who desecrates (through acts, words, gestures or threats) religious objects, either in places for religious practice or during public religious ceremonies, is punishable with imprisonment for 15 days to 6 months and a fine:

Toute personne qui, par faits, paroles, gestes ou menaces, aura outragé les objets d’un culte, soit dans les lieux destinés ou servant habituellement à son exercice, soit dans des cérémonies publiques de ce culte, sera punie d’un emprisonnement de quinze jours à six mois et d’une amende de vingt-six [euros] à cinq cents [euros].³³

Among the various norms regarding the maintenance of the Flemish religious heritage, one should also include the *Governmental Circular* of 2002 regarding the maintenance and repair of the electrical and heating systems inside protected religious monuments. According to the *Circular*, improper use of these

published in: *Moniteur Belge*, 6.2.2004. It should be noted that, according to the *Centre d’Etudes sur la Coopération Juridique Internationale*, Belgium is the only country in the world that has a complete photographic record of its religious heritage; See the *Study on preventing and fighting illicit trafficking in cultural goods in the European Union*, op. cit., pp. 6–7. Further information available at: www.kikirpa.be (the web site of the Royal Institute for Cultural Heritage, which is committed since 1948 to the inventory, the scientific study, the conservation and the promotion of the country’s artistic and cultural property. Accessed on March 31, 2014).

³⁰ *Memorie Van Toelichting* (bij ontwerp van decreet houdende bescherming van het roerend cultureel erfgoed van uitzonderlijk belang), 7.10.2002.

³¹ Two centers exist in Leuven with the purpose of preserving the elements of religious movable heritage: the Documentation and Research centre for Religion, Culture and Society (KADOC), focusing on archives and libraries (<http://kadoc.kuleuven.be/eng/index.php>), and the Center for Religious Art and Culture (CRKC), focusing on objects and furniture (<http://www.crkc.be>).

³² *Decreet van 7 mei 2004*, op. cit., Art. 35; cf. *Codex Iuris Canonici*, Can. 1283 § 2.

³³ Cf. Nypels J. S. G. (1868) *Le code pénal Belge interprété, principalement au point de vue de la pratique, par ses motifs, par la comparaison des nouveaux textes avec ceux du Code de 1810; et pour les textes anciens conservés, par la doctrine et par la jurisprudence des cours de Belgique et de France*, Vol. II, Bruxelles: Bruylant-Christophe et cia, p. 363 f.

mechanisms may cause substantial damage to immovable assets, such as old musical instruments, furniture, wooden sculptures and paintings (“*oude orgels, het meubilair, het houten beeldhouwwerk en de schilderijen*”)³⁴; therefore the *Circular* sets specific standards and detailed instructions (e.g. acceptable levels of temperature) regarding the proper function and, if necessary, renewal of the electrical/heating systems inside all those religious edifices, which have been classified as protected monuments.

9.3 Cyprus

On the war-torn island of Cyprus, since the 1974 Turkish invasion, which resulted, *inter alia*, in the continuing occupation of hundreds of churches, chapels, temples and monasteries (Demosthenous 2000), many of these heritage elements are still in poor condition or ruined after they have been looted or plundered. Hence, the European Parliament issued in 2006 a written *Declaration* ‘on the protection and preservation of the religious heritage in the northern part of Cyprus’ condemning, in the light of Article 151 of the EC Treaty, “*the pillage of Greek Orthodox churches and monasteries and the removal of their ecclesiastical items*”.³⁵ One of the most infamous such cases, was the removal of the Kanakaria Mosaics (priceless frescoes sanctified as holy relics), which were stolen from a church situated at the occupied territory of Cyprus (Muir 1992; Gerstenblith 1995). As the United States Court of Appeal ruled:

As Byron’s poem laments, war can reduce our grandest and most sacred temples to mere “fragments of stone.” Only the lowest of scoundrels attempt to reap personal gain from this collective loss. Those who plundered the churches and monuments of war-torn Cyprus, hoarded their relics away, and are now smuggling and selling them for large sums, are just such blackguards. The Republic of Cyprus, with diligent effort and the help of friends, has been able to locate several of these stolen antiquities; items of vast cultural, religious (and, as this case demonstrates, monetary) value. Among such finds are the pieces of the Kanakaria mosaic at issue in this case. Unfortunately, when these mosaics surfaced they were in the hands not of the most guilty parties, but of Peg Goldberg and her gallery. Correctly applying Indiana law, the district court determined that Goldberg must return the mosaics to their rightful owner: the Church of Cyprus . . . the [latter] has a valid, superior

³⁴ *Omzendbrief ML/11 van 19 november 2002 betreffende de kerkverwarmingen van beschermde monumenten*, in: *Moniteur Belge*, 20.12.2002 = Wet-, Decreet- en Regelgeving 2013, pp. 96 f.

³⁵ Document No P6_TA(2006)0335, *The protection and preservation of the religious heritage in the northern part of Cyprus. Declaration of the European Parliament on the protection and preservation of the religious heritage in the northern part of Cyprus*. Document available online at: www.europarl.europa.eu. Accessed on March 31, 2014. According to the relevant Document of the European Parliament: “more than 133 churches, chapels and monasteries that are located in the northern part of Cyprus and have been controlled by the Turkish army since 1974 have been desecrated, 78 churches have been converted into mosques, 28 are used as military depots and hospitals and 13 are used as stockyards, and whereas their ecclesiastical items, including more than 15,000 icons, have been illegally removed and their location remains unknown”.

and enforceable claim to these Byzantine treasures, which therefore must be returned to it.³⁶

The Autocephalous Greek Orthodox Church of Cyprus, which, pursuant to Art. 110 § 1 of the Constitution, has the exclusive right of regulating “*its own internal affairs and property in accordance with the Holy Canons and its Charter in force for the time being*”,³⁷ continues its attempts to repatriate religious relics on an international basis. In fact, the Church of Cyprus has been functioning as a Centre for the Maintenance of Icons and Manuscripts since 1972, in view of documenting and preserving its archaeological and cultural treasures. Moreover, a competent Office of the Church, responsible for the documentation of the cultural religious history of the island, functions in collaboration with the Antiquities Department of the Republic of Cyprus (Emilianides 2011, pp. 535–536).

On a legislative basis, according to the consolidated Antiquities Law,³⁸ every “*church, mosque or site used for religious observances, being the property of a religious community*”³⁹ is exempted from the provisions related to the ancient monuments included in a ‘First Schedule’ and owned by the State; however, should a religious monument be included in the relevant ‘Second Schedule’ of protected monuments, its owner⁴⁰ shall not make “*any alterations, additions or repairs affecting its architectural character . . . or shall do any other act which might damage or destroy the archaeological importance and stratification of the ancient monument*”,⁴¹ unless there is a written permission obtained by the competent Director of Antiquities; the latter, on the other hand, may grant to any person beneficially interested in a religious ancient monument, financial support for its maintenance, preservation or restoration.

In the field of religious cultural goods’ trafficking, the Republic of Cyprus and the United States Government amended in 2006, pursuant to the provisions of

³⁶ *Autocephalous Greek-Orthodox Church Of Cyprus And The Republic Of Cyprus v Goldberg And Feldman Fine Arts Inc. and Peg Goldberg*, No. 89-2809, United States Court Of Appeals for the Seventh Circuit (917 F.2d 278, 1990 U.S. App. Decision).

³⁷ Cf. Emilianides A. (2005) *The Constitutional Position of the Charter of the Orthodox Church of Cyprus* [in Greek], *Nomokanonika*, Issue 2, pp. 41–4.

³⁸ See the official English text of the Cypriot ‘Antiquities Law’ (Cap. 31) at: <http://www.mcw.gov.cy>. Accessed on March 31, 2014; the relevant legislation has been amended by Law No. 103 (1) 2012.

³⁹ Antiquities Law, Art. 24. In relation to the legal status of the various legal communities in Cyprus see: Emilianides A. (2002) *Religious Entities as Legal Entities – Cyprus*, in: Friedner L. (ed.) *Churches and Other Religious Organisations as Legal Persons* [=Proceedings of the 17th Meeting of the European Consortium for Church and State Research, Höör (Sweden), 17–20 November 2005], pp. 49–54.

⁴⁰ According to Art. 2 (1) the notion of “owner” includes: “(a) in the case of property in the occupation of any See, Monastery or Church, the Bishop of the Diocese, the governing body of the monastery or the duly constituted committee of management of the church, for the time being, as the case may be; (b) in the case of property in the occupation of any Mosque, Tekye or other Moslem religious body or institution, the High Council of Evcaf or other person administering the trusts of the same for the time being, as the case may be”.

⁴¹ Antiquities Law, Art. 8 (1).

19 U.S.C. 2602, a bilateral Agreement of July 16, 2002, which imposed certain import restrictions on archaeological material from Cyprus,⁴² by including a list of protected ecclesiastical and ritual objects. More precisely, the ‘Import Restrictions on Byzantine Ecclesiastical and Ritual Ethnological Material From Cyprus’, which amended the earlier Bureau of Customs and Border Protection (CBP) *Regulations*, established import restrictions, previously imposed on an emergency basis, for certain Byzantine period ecclesiastical and ritual ethnological material, dating from approximately the fourth century AD through the fifteenth century AD; the relevant (representative) list includes, *inter alia*:

Ceremonial vessels and objects used in ritual and as components of church treasure . . . censers (incense burners), book covers, liturgical crosses, archbishop’s crowns, buckles, and chests. These are often decorated with molded or incised geometric motifs or scenes from the Bible, and encrusted with semi-precious or precious stones. The gems themselves may be engraved with religious figures or inscriptions. Church treasure may include all of the above, as well as rings, earrings, and necklaces (some with ecclesiastical themes), and other implements (e.g. spoons) . . . painted icons, painted wood screens (iconostasis), carved doors, crosses, painted wooded beams from churches or monasteries, thrones, chests and musical instruments. Religious figures (Christ, the Apostles, the Virgin, and others) predominate in the painted and carved figural decoration. Ecclesiastical furniture and architectural elements may also be decorated with geometric or floral designs . . . Dating to the Byzantine period, wall mosaics are found in ecclesiastical buildings. These generally portray images of Christ, Archangels, and the Apostles in scenes of Biblical events. Surrounding panels may contain animal, floral, or geometric designs . . . Floor mosaics from ecclesiastical contexts. Examples include the mosaics at Nea Paphos, Kourion, Kouklia, Chrysopolitissa Basilica and Campanopetra Basilica . . . Wall paintings from the Byzantine period religious structures (churches, monasteries, chapels, etc.) Like the mosaics, wall paintings generally portray images of Christ, Archangels, and the Apostles in scenes of Biblical events.⁴³

9.4 Denmark

In the Kingdom of Denmark, where the Evangelical Lutheran Church is the established national Church (*Folkekirken*) according to the current Constitutional Act,⁴⁴ the Evangelical Lutheran church heritage remains under the responsibility of

⁴² Cultural Property Memorandum of understanding concerning the imposition of import restrictions on Pre-Classical and Classical archaeological objects and Byzantine and Post-Byzantine period ecclesiastical and ritual ethnological materials. Signed at Washington July 16, 2002. Entered into force July 16, 2002. TIAS 02-716.1. Extension and Amendments August 17, 2006 (TIAS 02-716.1); July 3 and 6, 2007 (TIAS 02-716.1); July 10, 2012 (TIAS 12-710). See Treaty Affairs Staff, Office of the Legal Adviser. U.S. Department of State (2013) *Treaties in Force. A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013*, p. 68.

⁴³ Federal Register Notice Department of Homeland Security. Bureau of Customs and Border Protection, Department of The Treasury. 19 CFR Part 12 [CBP Dec. 06-22] RIN 1505-AB72.

⁴⁴ *Danmarks Riges Grundlov* (1953), § 4: “Den evangelisk-lutherske kirke er den danske folkekirke og understøttes som sådan af staten”; cf. § 66, which stipulates that the constitution of the Established Church shall be laid down by statute.

the Ministry of Ecclesiastical Affairs and the protection of the administrative mechanisms of the Church itself (Lunn and Lund 2001, p. 80; Sørmoen 2006, p. 330; Haynes 2008, p. 22). On the basis of the relevant legislation, namely the Act 'on Church Buildings and Cemeteries of the Danish National Evangelical Lutheran Church' and the related *Executive Order*,⁴⁵ church heritage is subject to regular supervision and maintenance by the Parochial Church Councils (*Menighedsråd*) in co-operation with the National Museum (Kirkeministeriet 2001, pp. 30 f.), which is the principal cultural heritage museum in Denmark.⁴⁶

More precisely, in view of preserving "the best possible setting for worship" ("*den bedst mulige ramme om menighedens gudstjenester*"),⁴⁷ the competent parish councils have the responsibility of taking care of all their movable and immovable ecclesiastical assets (edifices, frescoes and furnishings),⁴⁸ as well as of making a yearly survey in relation to possible defects or necessary repairs (Kirkeministeriet 2001, pp. 56–57).⁴⁹ When a project is going to be carried out, it has to be presented before the competent authorities of the local Diocese (*Stiftsøvrigheden*); the latter may approve alterations or necessary repairs to buildings or objects more than 100 years old and the approval is validated only after a compulsory consultation with experts appointed by the National Museum.⁵⁰ Regarding other (less than 100 years old) religious heritage assets, the National Museum assists the Church with suggestions, advice and guidance (Kirkeministeriet 2001, p. 47). In any case, the relevant construction projects and maintenance works are funded by the competent parish on the basis of a special tax, which is paid by the members of the Church and is collected via the public tax system (Kirkeministeriet 2001, pp. 66 f.; Haynes 2008, p. 22; Vinding and Christoffersen 2012, p. 84).

Religious buildings belonging to other denominations can be protected under the general cultural heritage legislation, especially the *Consolidated Act* 'on Listed Buildings and Preservation of Buildings and Urban Environments',⁵¹ as well as the related *Executive Order* 'on the designation of buildings worthy of preservation in the local plan'.⁵² All alterations to the interior or exterior of listed buildings must be

⁴⁵ *Lov om folkekirkens kirkebygninger og kirkegårde No. 454 af 11. juni 1992* (as it is in force); Executive Order: *Bekendtgørelse af lov om folkekirkens kirkebygninger og kirkegårde No. 527 af 19. juni 1992* (all relevant legislation available online at: www.retsinformation.dk. Accessed on March 31, 2014).

⁴⁶ Consolidated Act on Museums: *Bekendtgørelse af museumsloven*, § 5 (1).

⁴⁷ *Lov om folkekirkens*, op. cit., § 1 (1).

⁴⁸ *Ibid.*, § 3.

⁴⁹ *Bekendtgørelse*, op. cit., § 24 f.

⁵⁰ *Ibid.*, § 2.

⁵¹ *Lovbekendtgørelse No. 1088 af 29. August 2007 om bygningsfredning og bevaring af bygninger og bymiljø*, as it has been recently amended by Laws No. 474/2010 and 1247/2012; see also the relevant Executive Order: *Bekendtgørelse af lov om bygningsfredning og bevaring af bygninger og bymiljøer* (No. 685/2011).

⁵² *Bekendtgørelse om udpegning af bevaringsværdige bygninger i kommuneplanen* (No. 838/2002).

authorised by the Heritage Agency.⁵³ In addition, religious buildings designated as worthy of preservation (“*Bevaringsværdige bygninger*”)⁵⁴ cannot be demolished without allowing the local authority to decide whether it will impose an injunction against demolition (Haynes 2008, p. 22).

Pursuant to the relevant provisions (Art. 3–4) of the aforementioned *Consolidated Act*, the Minister of Culture may list buildings of special architectural or cultural heritage value, which are more than 50 years old, whereas buildings erected before the year 1536 are listed under the *Act* without a special resolution. However, irrespective of their age, buildings may be listed on grounds of their outstanding value or other special circumstances (“*deres fremragende værdi eller i andre særlige omstændigheder*”)⁵⁵; the listing may include the immediate surroundings to the extent that they form part of a whole to be protected as such. In any case, the *Act* explicitly stipulates (in Art. 5 § 1) that the above provisions do not apply to church buildings, which are subject to the aforementioned *Act* on the Danish National Evangelical Lutheran Church.

9.5 France

The legal separation of religions and State implemented in 1905,⁵⁶ which had been preceded by a broader campaign of secularization against the influence of Catholicism in France (Leniaud 2006, pp. 75 f.; Daly 2013, p. 5), generated a legal framework that unilaterally terminated the Concordat of 1801 between Napoleon and Pope Pius VII, privatized the formerly recognized Catholic, Protestant, and Jewish denominations (*établissements publics de culte*)⁵⁷ and provided the transfer of certain categories of religious edifices (cathedrals, churches, chapels, synagogues, archbishop’s palaces, bishops’ houses, presbyteries, seminaries)⁵⁸ to the public domain. More precisely, in relation to the Catholic Church, due to the

⁵³ Cf. *Executive Order* on delegation of tasks and powers to the Heritage Agency of Denmark (*Bekendtgørelse om henlæggelse af opgaver og beføjelser til Kulturarvsstyrelsen* No. 1513/2006).

⁵⁴ *Lovbekendtgørelse* No. 1088, op. cit., Art. 17 f.

⁵⁵ *Ibid.*, Art. 3 § 1 in finem.

⁵⁶ *Loi du 9 décembre 1905 concernant la séparation des Églises et de l’Etat* (amended, *inter alia*, by *Loi no 98-546 du 2 juillet 1998 portant diverses dispositions d’ordre économique et financier*) in: *Journal Officiel*, 11.12.1905.

⁵⁷ See Basdevant-Gaudemet B. (1998) *Droit et religions en France* in: *Revue Internationale de Droit Comparé*, Vol. 50 No 2, pp. 335–66 (p. 344 f.).

⁵⁸ *Loi du 9 décembre 1905*, op. cit., Art. 12: “Les édifices qui ont été mis à la disposition de la nation et qui, en vertu de la loi du 18 germinal an X [April 8, 1802] servent à l’exercice public des cultes ou au logement de leurs ministres (cathédrales, églises, chapelles, temples, synagogues, archevêchés, évêchés, presbytères, séminaires), ainsi que leurs dépendances immobilières et les objets mobiliers qui les garnissaient au moment où lesdits édifices ont été remis aux cultes, sont et demeurent propriétés de l’Etat, des départements, des communes et des établissements publics de coopération intercommunale ayant pris la compétence en matière d’édifices des cultes. . .”.

Church's refusal to establish private law religious associations (*associations cultuelles*), it was decided, on the basis of the *Act* of January 2, 1907,⁵⁹ that the religious purpose of Catholic places of worship should be preserved and, subsequently, on the basis of the *Act* of April 13, 1908,⁶⁰ that the ownership of the Catholic edifices was to be transferred to the *communes*. However, only places of worship entered into the public domain; all other buildings serving the housing of clergymen or religious leaders were excluded. Thus, the vast majority of pre-1905 Catholic churches were vested in public ownership, being legally dedicated to worship (as a sort of public utility) and owned by public entities (*communes*). By way of contrast, religious edifices belonging to the disestablished (in 1905) Jewish and Protestant denominations were divested to the newly formed (private) denominational associations, which were organized in conformity with their internal rules.⁶¹

Today, all the religious edifices built after 1905 are considered private constructions that belong to private entities (such as the *associations diocésaines* formed in 1924 by the Catholic Church) and, therefore, fall primarily under the relevant legislation on housing and urban development (Fornerod 2012, p. 327; Messner et al. 2013, pp. 514 f.). However, since 1942, following an amendment to Art. 19 § 6 of the basic *Act* of 1905 (Fornerod 2013, p. 73),⁶² the relevant denominational associations have been considered eligible for public funding in relation to the repair of their places of worship regardless of their status as classified 'historical monuments' (Messner 2007, p. 60; Fornerod 2010). The foundations of the system of 'classification' of (religious) buildings or objects, as well as of the relevant system of inscription in the *Inventaire Supplémentaire des Monuments Historiques*, was laid by the respective provisions of the *Historical Monuments Acts* of 1887 and 1913,⁶³ which have been incorporated in the current *Heritage Code*.⁶⁴ The latter

⁵⁹ *Loi du 2 janvier 1907 concernant l'exercice public des cultes*, Art. 5 in: *Journal Officiel*, 3.1.1907; the *Act* of 1907 authorized *inter alia* all those public authorities who owned religious buildings, to lend them, free of charge, to religious ministers for worship.

⁶⁰ *Loi du 13 avril 1908 relative à la protection temporaire de la propriété industrielle dans les expositions internationales étrangères officielles ou officiellement reconnues, et dans les expositions organisées en France ou dans les territoires d'outre-mer avec l'autorisation de l'administration ou avec son patronage*, in: *Journal Officiel*, 14.4.1908.

⁶¹ *Ibid.*, Art. 4 *en fin*.

⁶² *Loi no 1114 du 25 décembre 1942, portant modification de la loi du 9 décembre 1905 sur la séparation des Églises et de l'État*, in: *Journal Officiel*, 2.1.1943.

⁶³ *Loi du 31 décembre 1913 sur les monuments historiques*, in: *Journal Officiel*, 4.1.1914; regarding the *Historical Monuments Act* of 1887 see § 1 above.

⁶⁴ *Code du Patrimoine* (Version consolidée au 29 janvier 2014) *Livre VI: Monuments Historiques, Sites Et Espaces Protégés*, available online at: <http://www.legifrance.gouv.fr>. Accessed on March 31, 2014. Classified religious buildings are protected, in whole or in part, because of their national, artistic or historical interest: any intervention work can only be undertaken under the authority of the *Direction Régionale des Affaires Culturelles* (DRAC); religious buildings included in the supplementary inventory of historical monuments are also protected, in whole or in part, on the grounds of their national artistic or historical, interest: any intervention work can only be undertaken under the authority of the competent *Architecte des Bâtiments de France* (ABF) and

establishes today two categories of historical monuments: listed monuments (“*classes*”) and registered monuments (monuments “*inscrits au titre des monuments historiques*”). When a religious edifice or a movable object is classified accordingly as a historical monument, all maintenance works or alterations are subject to the relevant provisions of the *Code*.⁶⁵ As it has been mentioned by Longuet and Vincent (2001, p. 95):

A classification of historic monuments by type shows that religious buildings are in the majority (35 per cent of the total). This high percentage can be ascribed in particular, to Act of 1905 separating Church and State. That Act deprived municipal-owned parish churches of the funding provided by the former Ministry of Religions, which it abolished. The protection systems established under the Act of 1913 offered a substitute source of funds, wherever justified by a building’s interest.⁶⁶

The legal basis for the funding of public religious edifices in general, whether officially registered as historical monuments or not, is still encapsulated in the provisions of the aforementioned 1905 *Act* (modified and amended on several occasions); according to Art. 13 of the *Act*:

L’État, les départements et les communes pourront engager les dépenses nécessaires pour l’entretien et la conservation des édifices du culte dont la propriété leur est reconnue par la loi [The State, the Departments and the local authorities (municipalities) will be free to meet the expenses for the upkeep and the conservation of the religious edifices of which they are the lawful owners].

The above legal framework was interpreted and further analyzed by the *Conseil d’État* in 2011⁶⁷; according to the relevant jurisprudence, the competent public authorities, apart from the upkeep and maintenance of their own religious edifices, are permitted, under the framework of the 1905 *Act*, to support the various private denominational associations in the installation, repair, or improvement of their facilities, insofar as the expenditure is justified by a local public interest (“un intérêt public local”). This was the case, for instance, for the *Basilique Notre Dame de Fourvière* in Lyon, which is a private religious edifice; the Court held that the financial support given by the competent municipal council for the installation of an

the mayor of the town where the edifice is located. A perimeter of 500 meters is also protected by law in cases of classified or inscribed monuments or in cases where monuments are located inside a *zone de protection du patrimoine architectural, urbain et paysager* (Architectural, Urban and Landscape Protection Area); see *Code du Patrimoine*, Art. L621-30-1 and *Code de l’environnement* Art. L341-2.

⁶⁵ *Code du Patrimoine*, Art. L.621-9 and L.622-7.

⁶⁶ According to the data presented by Haynes N. (2008) *Research Report on Church-State Relationships in Selected European Countries*, Commissioned by the Historic Environment Advisory Council for Scotland (HEACS), p. 15: “Overall, 55 % of the listed buildings and 44 % of the second tier ‘inventory’ buildings are owned by the 36,000 communes. Church buildings form a large part of this estate: 90 % of church buildings are owned inalienably by the communes, with the remaining 10 % owned by diocesan associations”.

⁶⁷ See also the relevant *Circulaire* du Ministre de l’Intérieur du 29 juillet 2011 (NOR/IOC/D/11/21246C).

elevator inside the basilica serves a legitimate purpose, as it is adjunct with the local public interest for economic development in view of the cultural influence of the structure (“*présente un intérêt public local, lié notamment à l’importance de l’édifice pour le rayonnement culturel ou le développement touristique et économique de son territoire*”).⁶⁸ However, even in the case of public religious edifices, on the basis of the ‘principle of non-subvention’ established by the *Act* of 1905,⁶⁹ public expenditure on maintenance is not legitimate if it is construed as a direct funding of religious exercise (Daly 2013, pp. 9 f.). The *Conseil d’État* has ruled, for example, that the acquisition and repair of a church organ inside a public religious edifice does not offend the prohibitions on ‘subvention’ under the 1905 *Act*, if it supports various educational or cultural (secular) events that constitute a communal goal of public interest (“*un but d’intérêt public communal*”), such as concerts or musical events,⁷⁰ and, therefore, is equipped to serve a wider educational, artistic and cultural public benefit. As it has been pointed out by Daly (2013, p. 14)⁷¹:

While the organ in this case was to be used for religious services, it would also be used for secular musical events. The *Conseil* held that such an acquisition could be upheld on the basis of the organ’s secular value, essentially its artistic and cultural benefits. Although the organ should be acquired for cultural purposes, this did not preclude that it could also be available for religious use. However, this was conditional on the local authority making arrangements to ensure it had appropriate opportunities to use the facility, and to ensure it was not allocated exclusively for religious use. The ‘modality’ of its use would have to be regulated by a convention, and, significantly, this would have to require the denomination benefited by the facility to make a financial contribution proportionate to the benefit it acquired.

In any case, by virtue of the relevant provisions of the *Act* of 1905,⁷² as well as of the aforementioned *Act* of 1907 concerning the public exercise of religion, the allocation (*affectation légale*) of the religious edifices that belong to the public domain (i.e. pre-1905 structures), guarantees their prime destination and perpetual

⁶⁸ *Conseil d’État, Fédération de la libre pensée et de l’action sociale du Rhône et M.P.*, 19 July 2011, No. 308817.

⁶⁹ *Loi du 9 décembre 1905*, op. cit., Art. 2: “La République ne reconnaît, ne salarie ni ne subventionne aucun cult”; cf. Art. 19 of the same *Act*, which states that the sums allocated for the repairing of historical monuments are not considered as subsidies (“ne sont pas considérées comme subventions les sommes allouées pour réparation aux monuments classés”).

⁷⁰ Cf. the Judgment of November 5, 1910 of the Criminal Division of the *Court of Cassation* (Fornerod 2013, p. 167); the latter held that the organization of a musical event inside the church may correlate also with the organization of worship: “bien qu’elle soit investie par l’article L 2212-2 du CGCT [Code général des collectivités territoriales] d’un droit de police sur les églises comme sur les autres lieux publics, l’autorité municipale ne peut cependant interdire l’audition d’une société musicale ou chorale à l’intérieur d’une église. Ce serait s’immiscer dans l’organisation du culte, qui appartient exclusivement au cure”. See also Untermaier E. (2005) *Culte, culture et domanialité publique. L’organisation de concerts dans les églises*, Collection de l’Equipe de droit public, No. 1, Lyon: Publication de l’Université Jean Moulin Lyon 3.

⁷¹ *Conseil d’État, Commune de Trélazé*, 19 July 2011, No. 308544.

⁷² *Loi du 9 décembre 1905*, op. cit., Art. 13: “les édifices servant à l’exercice public du culte, ainsi que les objets mobiliers les garnissant, seront laissés gratuitement à la disposition des établissements publics du culte, puis des associations appelées à les remplacer . . .”.

function as places of worship. This legal ‘*affectation*’, which is “*gratuite, exclusive e perpetuelle*” (Benelbaz 2011, p. 475), offers, through the allocation of the edifices to the public sphere, a solid legal basis for the effective protection against the possibility of insufficient maintenance or improper use (Fornerod 2013, pp. 39 f., 155 f.) and correlates with both the cultural and the religious allocation (*affectation culturelle et cultuelle*) of the same structures (Chatelain 1987, pp. 6 f.; Fornerod 2006).⁷³ On the contrary, the procedure of ‘*désaffectation*’ is applicable only under specific circumstances prescribed by the law (such as the termination of the entrusted religious association; the cessation of religious services for more than 6 consecutive months, except for cases of *force majeure*; the improper conservation of the buildings or the disrespect of their original destination; non-compliance to the regulations pertaining to historical monuments) and it requires the approval of the *Conseil d’État*.⁷⁴

Furthermore, on the basis of the 1905 Act,⁷⁵ access to both classified immovable religious structures or exhibits of classified moveable sacred objects indented for purposes of worship, is open to the public and free of charge.⁷⁶ As the *Conseil d’État* has ruled, with respect to the allocation of a religious structure to the public worship, the administrative decision, regarding a corresponding ‘*droit de visite*’, must obtain, first and foremost, the consent of the religious community in question⁷⁷; if it is not associated directly to issues of worship, it must, at least, be compatible with the prior allocation (‘*affectation cultuelle*’) of the monument.⁷⁸ In the same vein, pursuant to the *General Code of the Property of Public Persons*, the relevant ‘*droit de visite*’ (or any similar activity) inside a public edifice must be

⁷³ Cf. the relevant Report issued by the *Commission de réflexion juridique sur les relations des cultes avec les pouvoirs publics*, under the aegis of the *Ministère de l’intérieur*, in 2006 (p. 31 f.).

⁷⁴ *Loi du 9 décembre 1905*, op. cit., Art. 13.

⁷⁵ *Ibid.*, Art. 17 *en fin*; cf. *Décret du 16 mars 1906 portant règlement d’administration publique pour l’exécution de la loi du 9 décembre 1905 sur la séparation des Eglises et de l’Etat en ce qui concerne l’attribution des biens, les édifices des cultes, les associations cultuelles, la police des cultes*.

⁷⁶ Art. L.622-9 of the *Heritage Code*, provided before its modification in 2006, that the competent public authorities could impose an admission fee, if necessary, in order to cover the expenses for the maintenance and upkeep of such monuments located under their care (see Fornerod 2013, pp. 458 f.).

⁷⁷ *Conseil d’État, Abbé Chalumey*, 4 November 1994, No. 135842.

⁷⁸ *Conseil d’État, Commune des Saintes Maries de la Mer v Abbé de Vregille*, 20 June 2012, No. 340648, where the Court held that it was not necessary for the town council to obtain the prior agreement of the local church’s authorities, in relation to the organization of (fee-paying) visits on the church’s roof terrace, since the latter was an autonomous architectural feature of the edifice, not associated directly to worship; nevertheless, the Court ruled that the authorities are responsible for ensuring proper arrangements for visiting, consistent with the allocation of the edifice, in order not to disrupt the exercise of religious worship inside the building (“que la commune peut, sans avoir à recueillir l’accord préalable du desservant de l’église, organiser des visites de tels aménagements; qu’il lui appartient de veiller à ce que les modalités d’organisation de celles-ci ne conduisent pas à perturber l’exercice du culte à l’intérieur de l’édifice et soient compatibles avec l’affectation de l’édifice sur lequel les aménagements visités sont situés”).

performed in a manner compatible with the designated religious purpose of the edifice. According to Art. L.2124-31 of the *Code*:

Lorsque la visite de parties d'édifices affectés au culte, notamment de celles où sont exposés des objets mobiliers classés ou inscrits, justifie des modalités particulières d'organisation, leur accès est subordonné à l'accord de l'affectataire. Il en va de même en cas d'utilisation de ces édifices pour des activités *compatibles avec l'affectation culturelle*. L'accord précise les conditions et les modalités de cet accès ou de cette utilisation. Cet accès ou cette utilisation donne lieu, le cas échéant, au versement d'une redevance domaniale dont le produit peut être partagé entre la collectivité propriétaire et l'affectataire.⁷⁹

From the perspective of Criminal Law protection, it should be noted that the current *Code pénal* criminalizes the destruction, degradation or deterioration: (a) of an immovable or movable (religious) monument if the latter has been classified or inscribed ("*classé ou inscrit*") under the provisions of the *Heritage Code*, (b) an archaeological site or an edifice assigned to worship ("*un terrain sur lequel se déroulent des opérations archéologiques ou un édifice affecté au culte*") and (c) any cultural good existing in the public domain or displayed, held or stored, even temporarily, *inter alia*, inside a place of worship (Fornerod 2013, p. 147).⁸⁰

9.6 Germany

Although, since the end of the Second World War, several conventions and concordats have been concluded between the German States (*Länder*) and the religious authorities,⁸¹ effecting also the preservation of the country's religious patrimony (von Campenhausen and de Wall 2006, pp. 194–195), by virtue of the current *Constitution (Grundgesetz für die Bundesrepublik Deutschland)*,⁸² the protection, conservation and funding of the Federation's overall cultural heritage is basically the responsibility of the *Länder*.⁸³ On the basis of this cultural

⁷⁹ *Code général de la propriété des personnes publiques*, Art. L.2124-31 in: *Journal Officiel*, 1.3.2011; cf. Untermaier E. (2006) *Les églises et le code général de la propriété des personnes publiques – A propos de l'article L. 2124-31 du Code général de la propriété des personnes publiques*, Actualité Juridique Droit Administratif, pp. 2210–13.

⁸⁰ *Code pénal*, Art. 322-3-1 (issued by Art. 34 loi no 2008-696 du 15 juillet 2008 relative aux archives, in: *Journal Officiel*, 16.7.2008).

⁸¹ For a historical overview see Weber W. (1971) *Die deutschen Konkordate und Kirchenverträge der Gegenwart*, Göttingen: Vandenhoeck & Ruprecht; Listl J. (1987) *Konkordate und Kirchenverträge in der Bundesrepublik Deutschland* (Vo. I-II), Berlin: Duncker & Humblot.

⁸² Art. 70 § 1 of the *Grundgesetz* [GG]. See Jarass H. & Pieroth B. (2011) *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, München: C. H. Beck, p. 783 f.

⁸³ The Federal and State authorities co-operate also via the *Deutsches Nationalkomitee für Denkmalschutz* [German National Committee for Monument Protection]; further information available online at: www.dnk.de. Their work has been supported since 1985 by the *Deutsche Stiftung Denkmalschutz*; further information on the Foundation available online at: www.denkmalschutz.de. Accessed on March 31, 2014.

autonomy, the legal protection of religious heritage is enshrined in the provisions relating to the protection of the various historical monuments, which are dispersed across the territory of the 16 federal states. This status has been summarized by Professor Robbers (2010, p. 307):

Religious communities in Germany own a considerable amount of cultural monuments. The law on cultural monuments – which to its most part is a matter in the competence of the *Länder* – is rather strict throughout Germany. Owners of cultural monuments in general are strongly restricted in the way they use their property. Changes in appearance need the consent of the respective state authorities. In general, a cultural monument is only to be restored or repaired, its appearance or substance changed or impaired, equipped with fittings, writings or signs or advertising, removed from an environment, destroyed or disposed of with the approval of the monument conservation authority.

Despite some variations in the legislative patterns (Heckel 1987, pp. 87 f.),⁸⁴ the majority of the *Länder* explicitly ensure the religious dimension of cultural heritage. In Hamburg, for instance, the relevant *Monument Protection Act* stipulates in Art. 8 § 2 that, although any alteration to movable or immovable religious monuments must take place only in concurrence with the competent public authorities, the latter must respect the relevant requests and needs of the religious communities in question (“*Die zuständige Behörde hat zu beachten, dass die liturgischen Anliegen und Veranstaltungen von Religionsgesellschaften nicht beeinträchtigt werden*”).⁸⁵ Particularly in the case of religious (functional) monuments, the legislation prevents the competent public authorities from acting as with other (secular) monuments. Indeed, in many cases the religious function of historical buildings benefits from a high level of protection, and this often gives priority over the conservation process. For example, the *Law on the Protection of Cultural Monuments* in the Land of Hesse prioritizes the religious concerns determined by the competent religious authorities in the case of cultural monuments directly used for religious purposes:

Die Denkmalschutzbehörden haben diejenigen Maßnahmen zu treffen, die ihnen nach pflichtgemäßem Ermessen erforderlich erscheinen, um Kulturdenkmäler zu schützen, zu erhalten und zu bergen sowie Gefahren von ihnen abzuwenden. Sie haben bei allen Entscheidungen den berechtigten Interessen der Eigentümer oder Besitzer von

⁸⁴ Mainly before the reunification of Germany, three main ‘categories’ (*Rechstlagen*) of religious heritage regulations could be defined: in the first category, where functional religious edifices are preserved by the State as monuments, religious interests prevail over conservation interests; in the second, religious edifices are subject to the common legislative provisions irrespective of their functionality; in the third category, the religious edifices are treated separately from the other structures and they are subject to the internal regulations of the respective religious communities; see Hammer F. (1995) *Die geschichtliche Entwicklung des Denkmalrechts in Deutschland*, Tübingen: Mohr Siebeck, p. 337 f. Today, the main differences between the laws of the *Länder* could be divided between two main legal systems: the *Ipsa iure* system (i.e. if a structure or object fulfils all the conditions specified within the law, it is classified as being protected) and the registration system (i.e. structure or objects are protected after registration in an official list of protected monuments); other states use a mixed system; further information available online at: www.kulturgutschutz-deutschland.de. Accessed on March 31, 2014.

⁸⁵ *Denkmalschutzgesetz*, of December 3, 1973 in: *Gesetz- und Verordnungsblatt [GVBl.]* p. 466, Glied.-No.: 224-1), last amended in November 27, 2007 (in: GVBl. p. 410).

Kulturdenkmälern Rechnung zu tragen. Bei Kulturdenkmälern, die der unmittelbaren Religionsausübung dienen, sind die von den Leitungen der Religionsgesellschaften festgestellten religiösen Belange *vorrangig zu berücksichtigen*.⁸⁶

A similar prioritization of ‘ritual and pastoral needs’ is also prescribed in the “*Special provisions on churches and religious communities*” included in the *Law ‘on the Protection and Preservation of Cultural Monuments’* of the State of Rhineland-Palatinate⁸⁷:

In cultural monuments, which are intended to serve worship or other ritual acts, the Monument Protection Authorities and the Office for the conservation of monuments take into consideration, as a matter of priority, the ritual and pastoral needs of the churches and religious communities [Bei Kulturdenkmälern, die dem Gottesdienst oder sonstigen Kulthandlungen zu dienen bestimmt sind, haben die Denkmalschutzbehörden und die Denkmalfachbehörde auf die kultischen und seelsorgerischen Belange der Kirchen und Religionsgemeinschaften vorrangig Rücksicht zu nehmen].⁸⁸

Besides, in almost all cases, it is foreseen that the religious authorities are consulted before any intervention for conservation or maintenance purposes. A typical example thereof is the Bavarian *Law ‘on the Protection and Preservation of Monuments’*⁸⁹: according to Art. 26 § 2,⁹⁰ if decisions are to be made involving movable or immovable monuments serving directly devotional purposes (“*gottesdienstlichen Zwecken*”), of either the Catholic Church or the Evangelical-Lutheran Church, the Monument Protection Authorities must take into account the declared church-related issues (“*die kirchlichen Belange*”) of the relevant church authorities; the latter must be allowed to participate in all relevant procedures. If the Local and Upper Monument Protection Authorities do not recognize the asserted interests of the church, the decision is to be made by the appropriate church superior authority in consultation with the Highest Monument Protection Authority. Concerning other religious communities, which have been recognized as legal

⁸⁶ *Gesetz zum Schutze der Kulturdenkmäler* (Denkmalschutzgesetz) of September 5, 1986 (in: GVBl. I 1986 p. 262, Glied.-No: 76-4), last amended in November 21, 2012 (in: GVBl. p. 444), Art. 7 § 1.

⁸⁷ *Landesgesetz zum Schutz und zur Pflege der Kulturdenkmäler* (Denkmalschutzgesetz - DSchG) of March 23, 1978 (in: GVBl. 1978 p. 159, Glied.-No. 224-2), last amended in September 28, 2010 (in: GVBl. p. 301).

⁸⁸ *Ibid.*, Art. 23 § 1.

⁸⁹ *Gesetz zum Schutz und zur Pflege der Denkmäler* (Denkmalschutzgesetz - DSchG) of July 27, 2009 (in: *Bayerische Rechtssammlung* IV, 354 [2242-1-WFK] & GVBl. p. 385, 390 f.).

⁹⁰ “(1) Sollen Entscheidungen über Bau- oder Bodendenkmäler oder über eingetragene bewegliche Denkmäler getroffen werden, die unmittelbar gottesdienstlichen Zwecken der Katholischen Kirche oder der Evangelisch-Lutherischen Kirche dienen, so haben die Denkmalschutzbehörden die von den zuständigen kirchlichen Oberbehörden festgestellten kirchlichen Belange zu berücksichtigen. (2) Die Kirchen sind am Verfahren zu beteiligen. (3) Die zuständige kirchliche Oberbehörde entscheidet im Benehmen mit der Obersten Denkmalschutzbehörde, falls die Untere und Höhere Denkmalschutzbehörde die geltend gemachten kirchlichen Belange nicht anerkennen. (4) Gegenüber anderen Religionsgemeinschaften, die Körperschaften des öffentlichen Rechts sind, gelten die Sätze 1 bis 3 sinngemäß.”

public corporations, the same provisions are implemented accordingly. Pursuant to § 1 of Art. 26 of the same *Act*, the Concordat with the Holy See (March 29, 1924),⁹¹ as well as Art. 18 and 19 of the contract between the Free State of Bavaria and the Evangelical-Lutheran Church in Bavaria ‘right of the Rhine’ (November 15, 1924),⁹² remain unaltered. In addition, two representatives, each from the Catholic Church and the Protestant-Lutheran Church in Bavaria, participate in the State Monument Advisory Board (*Landesdenkmalrat*).⁹³

Following the above wording, the relevant *Law* ‘on the Protection of Monuments in Berlin’⁹⁴ stipulates in Art. 21 § 1 that decisions and actions of the competent monument authorities in relation to monuments belonging to recognized religious communities and serving direct liturgical purposes, take place in consultation with the competent religious authorities and in view of current issues of worship (“*gottesdienstliche Belange*”).⁹⁵ Similar provisions, establishing a status of mutual respect and co-operation between state and religious authorities, have been incorporated also in the *Monument Protection Acts* of the State of Brandenburg⁹⁶; Hamburg⁹⁷; Mecklenburg-Vorpommern⁹⁸; Lower Saxony⁹⁹; North Rhine-Westphalia¹⁰⁰; Rhineland-Palatinate¹⁰¹; Saarland¹⁰²; Saxony-Anhalt¹⁰³; and

⁹¹ *Die deutschen Konkordate und Kirchenverträge der Gegenwart*, op. cit., p. 40 f.

⁹² *Ibid.*, p. 152 f.

⁹³ *Gesetz zum Schutz und zur Pflege der Denkmäler*, op. cit., Art. 14 § 2 (d).

⁹⁴ *Gesetz zum Schutz von Denkmälern in Berlin* (Denkmalschutzgesetz Berlin - DSchG Bln) of April 24, 1995 (in: GVBl. p. 274), last amended in July 8, 2010 (in: GVBl. p. 396).

⁹⁵ *Ibid.*, Art. 21 § 1.

⁹⁶ *Gesetz über den Schutz und die Pflege der Denkmale im Land Brandenburg* (Brandenburgisches Denkmalschutzgesetz – BbgDSchG) of May 24, 2004 (in: GVBl. I p. 215, Glied.-No.: 557-1), Art. 21.

⁹⁷ *Denkmalschutzgesetz*, op. cit., Art. 8 § 3.

⁹⁸ *Denkmalschutzgesetz* (DSchG M-V) of January 6, 1998 (GVOBl. M-V p. 12, Glied.-No.: 224-2), last amended in July 12, 2010 (GVOBl. M-V p. 366, 379, 383, 392), Art. 10 § 3.

⁹⁹ *Niedersächsisches Denkmalschutzgesetz* (NDSchG) of May 30, 1978 (Nds. GVBl. 517), last amended in May 26, 2011 (Nds. GVBl. p. 135), Art. 36: “Die Verträge des Landes Niedersachsen mit den Evangelischen Landeskirchen in Niedersachsen vom 19. März 1955 (Nieders. GVBl. Sb. I S. 369) und vom 4. März 1965 (Nieders. GVBl. 1966 S. 4), das Konkordat zwischen dem Heiligen Stuhle und dem Lande Niedersachsen vom 26. Februar 1965 (Nieders. GVBl. S. 192), zuletzt geändert durch Vertrag vom 29. Oktober 1993 (Nieders. GVBl. 1994 S. 304), sowie die zur Ausführung dieser Verträge geschlossenen Vereinbarungen bleiben unberührt”; See the relevant agreements in: *Die deutschen Konkordate und Kirchenverträge der Gegenwart*, op. cit., p. 212 f.

¹⁰⁰ *Gesetz zum Schutz und zur Pflege der Denkmäler im Lande Nordrhein-Westfalen* (Denkmalschutzgesetz - DSchG) of March 11, 1980 (GV. NRW. 1980 p. 226, 716; Glied.-No.: 224), last amended in April 5, 2005 (GV. NRW. p. 274), Art. 38.

¹⁰¹ *Landesgesetz zum Schutz und zur Pflege der Kulturdenkmäler*, op. cit.

¹⁰² *Saarländisches Denkmalschutzgesetz* (SDschG) of May 19, 2004 (Amtsbl. 2004 p. 1498), last amended in June 17, 2009 (Amtsbl. p. 1374 - Glied. -No.: 224-5), Art. 23 § 1.

¹⁰³ *Denkmalschutzgesetz des Landes Sachsen-Anhalt*, of October 21, 1991 (GVBl. LSA p. 368; Glied.-No.: 2242.1), last amended in December 20, 2005 (GVBl. LSA p. 769, 801), Art. 8 § 5.

Thüringen.¹⁰⁴ As it has been concluded (von Campenhausen and de Wall 2006, p. 193):

Die meisten Länder haben in den Denkmalschutzgesetzen Berücksichtigungsklauseln, wonach die kirchlichen Belange gewährleistet sind und klargestellt ist, daß für den kirchlichen Aspekt die kirchliche Stellungnahme maßgeblich ist. Sie sind erkennbar von dem Bestreben geleitet, einen *Ausgleich* zwischen staatlicher Verantwortung und berechtigten kirchlichen Erwartungen zu finden.

The aforementioned balance, or ‘*Ausgleich*’, seems rather difficult to achieve in those cases where a religious community adopts changes in worship and the latter reflect on their monumental structures (the actual places of worship) which, at the same time, ought to be preserved and protected by the competent State authorities. In those cases, where religious and conservation interests must be balanced, it is a question of taking into account, on the basis of the relevant constitutional¹⁰⁵ and federal legislative provisions, “all concrete circumstances of the single case to answer the question which interest is being preferred” (Robbers 2005, p. 884). In the light of the constitutional triptych of ‘*Religions-, Kunst- und Eigentumsfreiheit*’ (Hollerbach 1980, p. 742; Heckel 1987, pp. 85–87, 97 f.; Isensee 2004; Odendahl 2005, pp. 254–255, 285–286; Hammer 2007, pp. 133 f.), a typical such example of legislative ‘symmetry’ can be found in the *Law* ‘on the Protection of Cultural Monuments’ in the State of Baden-Württemberg¹⁰⁶: although establishing a general exemption of all church-owned monuments from the general provisions of authorized conservation, the *Law* provides for the protection and preservation (by the competent State conservation authorities) of the ecclesiastical cultural monuments which are used for worship, with respect to their liturgical function and status of ownership (Hollerbach 1980, pp. 742–743; Isensee 1999; Hammer 2003; von Campenhausen and de Wall 2006, pp. 193–194).¹⁰⁷ In the same vein, as far as

¹⁰⁴ *Thüringer Gesetz zur Pflege und zum Schutz der Kulturdenkmale* (Thüringer Denkmalschutzgesetz - ThürDSchG) of April 14, 2004 (GVBl. 2004, p. 465, Glied.-No.: 224-1) last amended in December 16, 2008 (GVBl. p. 574, 584), Art. 32.

¹⁰⁵ See Art. 4 §§ 1 and 2 GG [freedom of faith and conscience], Art. 5 § 3 GG [freedom of art], and Art. 140 GG in conjunction with Articles 136 § 2, 137 § 3 and 138 § 2 of the *Weimarer Verfassung* (Weimar Constitution of August 11, 1919), in relation to autonomy and property rights of the religious societies; see *Grundgesetz für die Bundesrepublik Deutschland*, op. cit., p. 154 f., 178 f. & 1193 f. It should be noted that the guarantee of Art. 140 GG in relation to property rights of religious societies in their assets intended for purposes of worship, applies also in the case of monument preservation (Robbers 2010, p. 308).

¹⁰⁶ *Gesetz zum Schutz der Kulturdenkmale* (Denkmalschutzgesetz - DSchG) of December 6, 1983 (in: GBl. 1983 p. 797, Glied.-No.: 2139-1), last amended in January 25, 2012 (in: GBl pp. 65–6).

¹⁰⁷ *Ibid.*, Art. 11: “(1) Die Denkmalschutzbehörden haben bei Kulturdenkmälern, die dem Gottesdienst dienen, die gottesdienstlichen Belange, die von der oberen Kirchenbehörde oder der entsprechenden Stelle der betroffenen Religionsgemeinschaft festzustellen sind, vorrangig zu beachten. Vor der Durchführung von Maßnahmen setzen sich die Denkmalschutzbehörden mit der oberen Kirchenbehörde oder der entsprechenden Stelle der betroffenen Religionsgemeinschaft ins Benehmen. (2) § 7 Abs. 1, § 8 sowie § 15 Abs. 1 und 2 finden keine Anwendung auf Kulturdenkmale, die im kirchlichen Eigentum stehen, soweit sie dem Gottesdienst dienen und

monuments serving the purposes of worship are concerned, the *Law 'on the Protection and Preservation of Cultural Monuments in the Free State of Saxony'*¹⁰⁸ provides in Art. 18, that the monument protection authorities must, as a matter of priority, adhere to the concerns of religious service; the latter are being determined by the superior church authority or the appropriate agency of the religious community in question. In addition, the general conservation measures prescribed by the same *Law*¹⁰⁹ do not apply to cultural monuments owned by churches and used for religious services; for the protection of the latter, the churches issue their own provisions ("*eigene Vorschriften*"), with the consent, however, of the Highest Authority on the Protection of Monuments (Robbers 2010, pp. 307–308).

In relation to movable assets, the federal *Cultural Assets Protection Act* excludes from its general application those cultural assets and archived assets, which constitute the property of churches or other religious societies recognized as public-law corporations; in those cases, the sale of valuable cultural assets and archived assets is approved, autonomously, by a supervisory church body (or other competent authority), on the basis of internal public-law provisions ("*eigene öffentlich-rechtliche Vorschriften*") and statutory rules.¹¹⁰ However, according to the same provisions, an expert agency must be heard, in any case, prior to the decision on the approval of sale. The churches and religious communities recognized as corporations under public law may register their works of art or other cultural assets, for inclusion in the '*List of cultural assets valuable to the nation*'; the highest *Land* authority decides accordingly on the basis of the *Act's* specific provisions (see Odendahl 2005, pp. 328, 345, 383, 587; Robbers 2010, p. 308).

Furthermore, according to Section 304 of the *German Penal Code* whosoever unlawfully damages or destroys (or even unlawfully alters the appearance of) objects of veneration belonging to a religious association existing within Germany or property dedicated to religious worship, public monuments, natural monuments, or objects of art which are kept in public collections or which are publicly exhibited,

die Kirchen im Einvernehmen mit der obersten Denkmalschutzbehörde eigene Vorschriften zum Schutz dieser Kulturdenkmale erlassen. Vor der Durchführung von Vorhaben im Sinne der erwähnten Bestimmungen ist die höhere Denkmalschutzbehörde zu hören. Kommt eine Einigung mit der höheren Denkmalschutzbehörde nicht zustande, so entscheidet die obere Kirchenbehörde im Benehmen mit der obersten Denkmalschutzbehörde. (3) Der 8. Abschnitt dieses Gesetzes ist auf kircheneigene Kulturdenkmale nicht anwendbar".

¹⁰⁸ *Gesetz zum Schutz und zur Pflege der Kulturdenkmale im Freistaat Sachsen* (Sächsisches Denkmalschutzgesetz - SächsDSchG) of March 3, 1993 (SächsGVBl. p. 229, Glied.-No.: 46-1), last amended in January 27, 2012 (SächsGVBl. p. 130, 140).

¹⁰⁹ See *ibid.*, Art. 11 & 12; these provisions concern measures to be taken by the monument conservation authorities, stipulating, *inter alia*, that a cultural monument is only to be restored or repaired, equipped (with fittings, writings or signs or advertising), removed from an environment, destroyed or disposed of, only with the approval of the monument conservation authority.

¹¹⁰ *Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung* (Kulturgüterschutzgesetz - KultGSchG) of August 6, 1956 (in: *Bundesgesetzblatt* [BGBl.] I p. 501), last amended in October 29, 2001 (BGBl. I p. 2785), Art. 19.

is subject to imprisonment not exceeding 3 years or a fine; the attempt is also considered punishable.¹¹¹

It remains to be noted that, pursuant to the relevant provisions of the German *Copyright Law*,¹¹² the public communication of a published work of religious music (*Kirchenmusik*) shall be permissible at a religious service or a celebration of the churches or religious communities; however, the organizer shall pay the author an equitable remuneration (*see Kröber 2004*).¹¹³ In addition, reproduction and distribution shall be permissible where limited parts of musical works are incorporated, after their publication, in a collection which assembles the works of a considerable number of authors and is intended, by its nature, exclusively for religious use.¹¹⁴

9.7 Greece

The cornerstone of cultural heritage protection in Greece, is enshrined in the Constitution. Pursuant to Art. 24 §§ 1 and 6:

1. The protection of the natural and cultural environment constitutes a duty of the State. The State is bound to adopt special preventive or repressive measures for the preservation of the environment in the context of the principle of sustainable development. . .
6. Monuments and historic areas and elements shall be under the protection of the State.¹¹⁵

The aforementioned constitutional protection has been interpreted by the Supreme Administrative Court, i.e. the Hellenic Council of State (CoS), in the light of Art. 13 of the Constitution regarding the freedom of religion (*see*

¹¹¹ *Strafgesetzbuch* of November 13, 1998, (in: BGBl. I p. 3322), last amended in October 2, 2009 (BGBl. I p. 3214), § 304: “(1) Wer rechtswidrig Gegenstände der Verehrung einer im Staat bestehenden Religionsgesellschaft oder Sachen, die dem Gottesdienst gewidmet sind, oder Grabmäler, öffentliche Denkmäler, Naturdenkmäler, Gegenstände der Kunst, der Wissenschaft oder des Gewerbes, welche in öffentlichen Sammlungen aufbewahrt werden oder öffentlich aufgestellt sind, oder Gegenstände, welche zum öffentlichen Nutzen oder zur Verschönerung öffentlicher Wege, Plätze oder Anlagen dienen, beschädigt oder zerstört, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft. (2) Ebenso wird bestraft, wer unbefugt das Erscheinungsbild einer in Absatz 1 bezeichneten Sache oder eines dort bezeichneten Gegenstandes nicht nur unerheblich und nicht nur vorübergehend verändert. (3) Der Versuch ist strafbar”.

¹¹² *Gesetz über Urheberrecht und verwandte Schutzrechte* (Urheberrechtsgesetz - UrhG) of September 9, 1965 (BGBl. I p. 1273) last amended in 2012.

¹¹³ UrhG, Art. § 52 (2).

¹¹⁴ UrhG, Art. § 46 (1).

¹¹⁵ Mavrias K. & Spiliotopoulos E. (eds) (2008) *The Constitution of Greece as revised by the Parliamentary Resolution of May 27th 2008 of the VIIIth Revisionary Parliament*, Hellenic Parliament, p. 42; from the relevant literature *see* among many: Spyropoulos Ph. & Fortsakis Th. (2009) *Constitutional law in Greece*, Kluwer Law International, p. 255.

Kyriazopoulos 1993; Konidaris 2011, pp. 23 f.).¹¹⁶ According to the CoS, the preservation of the ‘religious cultural environment’ (Tsvolas 2013, pp. 264 f.) entails also the preservation of the feature of *sacredness*, the latter being incorporated in the various cultural elements of this sheltered environment:

In view of the significant role religion has always played in shaping culture, sacred places, i.e. places of spiritual character where ritual is exercised, including the places of worship, namely churches, belonging to the Greek Orthodox Church, are unarguably integral parts of the overall cultural environment, which is protected in the same way as the natural environment. Both State and local authorities are required to provide protection to places of worship and spiritual isolation [churches and monasteries], in a protective manner to their *sacredness* and their authentic religious character, as well as to the individual religious freedom of both the clergy and the believers. This means that when the aforementioned authorities issue administrative acts, which, while not affecting directly the aforementioned religious places, may cause, in view of their purpose and nature, adverse effects either on the feature of *sacredness* or on the right to religious freedom, must be explicitly motivated with reference to specific facts and data, on the basis of which it must become apparent that all other possibilities for a less adverse *in concreto* solution have been exhausted, so that the resulting measure appears as an inevitable and, proportionally, necessary ‘sacrifice’ in view of the general interest, the latter taking legal precedence over religious beliefs pursuant to Article 13 § 4 of the Constitution.¹¹⁷

Similarly, as it has been emphasized by the relevant jurisprudence, “*the sacredness of a place is not an abstract situation or idea, but a living reality, which is directly associated to the kinds of peoples, ideas and activities that are being developed within its limits*”.¹¹⁸ In this rationale, the protection of *sacredness*, which is inseparably linked to the protection of the religious environment, may also correlate to the protection of personality rights. Following this approach the courts have concluded that the normative content of the private right of personality (under the relevant provisions of Art. 57 of the Greek Civil Code) should also include the interest of individuals in the full respect of their natural and cultural environment.¹¹⁹ For example, in the case of the Meteora monastic communities, where the monasteries are situated since the Byzantine era and are being protected as ‘sacred sites’, the Court identified a relevant claim invoked under Art. 24 § 1 of the Constitution by the monastic communities, and ordered a singer, who tried to stage a video clip at the area, to cease this activity and abstain from any future use of the relevant material); according to the Court¹²⁰:

¹¹⁶ Art. 13 §§ 1 and 2: “1. Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual’s religious beliefs. 2. All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited”; see Mavrias & Spiliotopoulos, op. cit., p. 28.

¹¹⁷ CoS No. 2956/2005, in: Nomokanonika 2/2006, pp. 149–52; cf. CoS No. 245/1997 in: Tsvolas 2013, pp. 273 f.

¹¹⁸ Trikala Court of First Instance, Decision No. 349/2002, in: Nomokanonika 2/2002, p. 165.

¹¹⁹ Cf. Akrivopoulou Ch. (2007) *Taking Private Law seriously in the Application of Constitutional Rights*, in: Fedtke J. & Oliver D. (eds.) *Human Rights and the Private Sphere*, Routledge, p. 171.

¹²⁰ Law 2351/1995 ‘*recognition of the Meteora area as a sacred site*’ in: *Government Gazette* issue A 225/1.11.1995.

[I]f the enjoyment of the cultural environment is an essential element of everyman's life and an indispensable part of everyman's personality, all the more the religious environment of an active monastic community, as the Meteora Monasteries, constitutes a fundamental element of the personality of its residents (monks), since it provides the necessary space within which the latter live and create.¹²¹

Under the constitutional principle of sustainability (Art. 24 § 1), the protection of 'religious cultural environment' includes, *inter alia*, the perpetual preservation of the relevant heritage elements.¹²² Indeed, the State has a duty to perpetuate the existence of all religious heritage elements, and, thus, the law may impose restrictions both to the freedom of worship and to property rights in order to protect those elements from any damage or alteration. In addition, according to the established case-law,¹²³ any intervention near a religious monument shall, in principle, aim at protecting it and demonstrating its importance; it shall be attempted in view of the specific characteristics and nature of the monument and on the basis of scientific data, prohibiting interventions and actions incompatible with the intended use of the monument.¹²⁴ According to the relevant case-law of the CoS, this protection includes the space needed for the emergence of a religious edifice as a *historical, aesthetic and functional module*; following this *ratio* the Court has protected the 'sacred character' and 'aesthetic value' of the Metropolitan Cathedral of Athens against the perilous expansion of subway construction works,¹²⁵ the historical significance of the Patmian Monastery of Saint John the Theologian against illegal private constructions on the 'sacred island' of Patmos,¹²⁶ as well as 'the aesthetic and functional value' of a byzantine church situated on the island of Hydra against the building of a private swimming pool nearby.¹²⁷

The aforementioned provisions of Art. 24 of the Constitution have been specified via the current *Law 'on the Protection of Antiquities and Cultural Heritage in General'*,¹²⁸ that replaced a complex sequence of amendments to earlier pieces of legislation dating from 1932 to 1950 (Doris 1985).¹²⁹ The *Law* regulates the fundamental aspects of religious cultural heritage "*from ancient times up to present day*" (Art. 1 § 1) and defines which elements constitute the spectrum of 'religious cultural heritage'. On the basis of the relevant provisions, the concept of religious

¹²¹ *Ibid*, p. 166.

¹²² See indicatively: CoS No. 3700/2000; 4460/2005; 293/2010.

¹²³ See indicatively: CoS No. 2596/1998; 2284/2000; 3610/2002.

¹²⁴ See indicatively: CoS No 3454/2004; 3279/2003; 3824/2007; 2057/2007.

¹²⁵ CoS 2073/1997 in. *Archeio Nomologias* Vol. 50 (1999) p. 451 f.

¹²⁶ CoS 457/2010 in. *Nomokanonika* 2/2010, p. 129 f. The Patmos Island has been recognized as a 'sacred site' by virtue of Law 1155/1981 '*recognition of Patmos as a Sacred Island and other ecclesiastical issues*' in: *Government Gazette* issue A 122/8.1.1981.

¹²⁷ CoS 828/2009 in. *Nomokanonika* 1/2010 p. 99 f.

¹²⁸ Law 3028/2002, in: *Government Gazette* issue A 153/28.6.2002; supplemented by Law 3658/2008 '*measures on the protection of cultural goods*' in: *Government Gazette* issue A 70/22.4.2008.

¹²⁹ L. 5351/1932 (in: *Government Gazette* issue A 275/24.8.1932) and Law 1469/1950 (in: *Government Gazette* issue A 169/7.8.1950).

cultural heritage encompasses immovable religious monuments and sites (as well as their surroundings), moveable cult objects and elements of intangible religious heritage (i.e. religious traditions, music and practices), regardless of denominational origin or tradition (Art. 2). Particularly in relation to monuments, within the ambit of protection fall *ex lege* all religious objects, moveable and immovable, dating before AD 1453, and all immovable religious monuments dating before AD 1830. More recent cultural assets can also be placed under protection if specifically characterized as containing special value. In addition, religious icons and other cult objects used for worship, dating after AD 1453 and up to AD 1830 are automatically protected without the need for the issuance of any administrative act.¹³⁰

Among the basic protective measures established by the aforementioned *Law* in relation to religious monuments, are: (a) the prohibition of any activity that may result directly or indirectly in the destruction, damage or disfigurement of an ancient edifice¹³¹; (b) the prior authorization by the Minister of Culture for the establishment or operation of any industrial, handicraft or commercial enterprise, the installation of telecommunications or other structures, the execution of any kind of technical or other work as well as of any building activity in the vicinity of a religious monument,¹³² (c) the duty of the owner, possessor or holder of an immovable or movable religious monument to co-operate with the competent State authorities and follow their instructions for the preservation, enhancement and protection of the monument¹³³; (d) the liability of the owner or holder of a movable religious monument for its overall safety and preservation.¹³⁴ However, apart from the measures of physical preservation and conservation, the notion of ‘protection’ encompasses also the identification, research, documentation, access, and social, aesthetic and educational valorisation of the religious cultural heritage.¹³⁵

Pursuant to Art. 7 § 1 and 21 § 1 of the *Law*, ancient (movable and immovable) monuments dating up to AD 1453 “belong to the State in terms of ownership and possession, are *res extra commercium* and imprescriptible”. However, according to Art. 73 § 1 of the same *Law*:

The existing rights of ownership, at the time of entry into force of the present law, of the ecclesiastical legal persons of the Church of Greece, the Church of Crete, the Dioceses of Dodecanese, the Ecumenical Patriarchate of Constantinople, the Patriarchates of Alexandria, Antiocheia and Jerusalem, the Holy Monastery of Sinai, the Holy Monasteries of Mount Ahtos, the Patriarchal Monasteries of Aghia Anastasia Pharmakolytria in Chalkidiki, of Vlatadhes in Thessaloniki and Ioannis the Evangelist Theologos in Patmos, other legal persons or associations representing religions or confessions, of ancient monuments of religious character, even those dating up to 1453, shall be preserved.

¹³⁰ See Law 3028/2002 op. cit., Art. 7 f. (immovable monuments) and 20 f. (movable monuments).

¹³¹ *Ibid.*, Art. 10 § 1.

¹³² *Ibid.*, Art. 10 § 3.

¹³³ *Ibid.*, Art. 11.

¹³⁴ *Ibid.*, Art. 27.

¹³⁵ *Ibid.*, Art. 3.

According to the second paragraph of Art. 73, the provisions of *Law 3028/2002* shall not affect the special provisions of law governing the monastic peninsula of Mount Athos, which is, in accordance with its ancient privileged status, “a self-governed part of the Greek State” pursuant to Art. 105 § 1 of the Constitution.¹³⁶ In essence, the priceless Athonian cultural treasures (architectural structures, relics, icons etc.) are being protected by the special provisions of Mount Athos’ *Constitutional Charter*, that has been ratified by the Greek State pursuant to the *Legislative Decree* of 10/16 September 1926 (Konidaris 2012, pp. 162 f.; Tsvolas 2013, pp. 176 f. and 351 f.). Nevertheless, in relation to the preservation of the architectural heritage of Mount Athos, the relevant restoration programs and the execution of the restoration works (in full consultation and agreement with the holy community of Mount Athos) is the responsibility of the Centre for the Preservation of Mount Athos Heritage (acronym in Greek: Ke.D.A.K.), which is under the direct supervision of the Greek Ministry for Macedonia and Thrace.¹³⁷

Similar (special) provisions regarding the protection of ecclesiastical heritage and the relevant co-operation between State and Church, have been also incorporated in the *Statutory Charter* of the Autocephalous Orthodox Church of Greece,¹³⁸ which stipulates that “The Greek Church co-operates with the State in relation to matters of common interest [among them] the protection of sacred relics and Christian monuments”¹³⁹; the *Statutory Law* of the semi-Autonomous Orthodox Church of Crete¹⁴⁰; and the legislative corpus governing the ecclesiastical provinces of the Dodecanese Islands (*see* Tsvolas 2013, pp. 335 f.).

9.8 Italy

According to Art. 9 of the current Constitution “The Republic promotes the development of culture and . . . safeguards natural landscape and the historical and artistic heritage of the Nation” [La Repubblica promuove lo sviluppo della cultura e . . . [t]utela il paesaggio e il patrimonio storico e artistico della Nazione”].¹⁴¹ This fundamental constitutional provision, entails, in conjunction with the preceding Articles 7 (State and Catholic Church) and 8 (State and other

¹³⁶ Mavrias & Spiliotopoulos, op. cit., p. 119.

¹³⁷ Law 1198/1981, Art. 9 in. *Government Gazette* issue A 238/1.9.1981.

¹³⁸ Law 590/1977, Art. 45; *see* Konidaris 2011, p. 207.

¹³⁹ *Ibid.*, Art. 2.

¹⁴⁰ Law 4149/1961, Art. 134 §§ 1 and 2.

¹⁴¹ *Constitution of the Italian Republic*, Senato della Repubblica: Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication, p. 6 (document available online at: www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf. Accessed on March 31, 2014); cf. *ibid.*, pp. 30–1, Art. 117 (c) (s): “The State has exclusive legislative powers in the following matters: . . . relations between the Republic and religious denominations; . . . protection of the environment, the ecosystem and cultural heritage”.

denominations),¹⁴² the responsibility of the Italian State to protect, in co-operation with the religious communities involved, all religious heritage assets of national importance (Renna 2003; Sandulli 2012, pp. 90–91). At the level of legislative protection, the care of ‘cultural goods of religious interest’ (*beni culturali d’interesse religioso*) is basically prescribed in Art. 9 § 1 of the *Code of Cultural Goods and Landscape* (‘Codice Urbani’)¹⁴³:

The Ministry of Cultural Heritage and, where applicable, the Regions shall attend to the exigencies of cultural property of religious interest belonging to bodies and institutions of the Catholic Church and of other religious denominations, according to the needs of worship, and in agreement with the respective authorities [Per i beni culturali di interesse religioso appartenenti ad enti ed istituzioni della Chiesa cattolica o di altre confessioni religiose, il Ministero e, per quanto di competenza, le regioni provvedono, relativamente alle esigenze di culto, d’accordo con le rispettive autorità].¹⁴⁴

Particularly in the case of the Catholic Church, according to the *Lateran Treaty* of 1929 (*Trattato fra la Santa Sede e l’Italia*),¹⁴⁵ which basically established Vatican City as an independent state:

I tesori d’arte e di scienza esistenti nella Città del Vaticano e nel Palazzo Lateranense rimarranno visibili agli studiosi ed ai visitatori, pur essendo riservata alla Santa Sede la piena libertà di regolare l’accesso del pubblico [The artistic and scientific treasures existing within the Vatican City and the Lateran Palace shall remain open to scholars and visitors; full liberty shall be reserved to the Holy See to regulate the admission of the public thereto].¹⁴⁶

Furthermore, pursuant to §§ 1 and 2 of Art. 12 of the *Agreement* of 1984 between the Italian Republic and the Holy See (*Accordo di Villa Madama*),¹⁴⁷ which

¹⁴² *Ibid.*, Art. 8 § 3: “Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives”.

¹⁴³ *Decreto Legislativo n. 42 del 22 gennaio 2004, Codice dei beni culturali e del paesaggio, ai sensi dell’articolo 10 della legge 6 luglio 2002, n. 137* in: *Gazzetta Ufficiale* of February 24, 2004 No. 45 = Berlingò and Casuscelli 2009, p. 428 (last amended in 2008).

¹⁴⁴ Translation of Art. 9 of the Italian *Code of Cultural Goods* by UNESCO, available online at: <http://www.unesco.org>. Accessed on March 31, 2014.

¹⁴⁵ For a historical introduction see Géraud A. (1929) *The Lateran Treaties: A Step in Vatican Policy, Foreign Affairs*, Vol. 7, No. 4, pp. 571–84. The Treaties were ratified by *Legge n. 810 del 27 maggio 1929, Esecuzione del Trattato, dei quattro allegati annessi, e del Concordato, sottoscritti in Roma, tra la Santa Sede e l’Italia, dell’11 febbraio 1929*, in: *Gazzetta Ufficiale del Regno d’Italia* of June 5, 1929, No. 130 = Berlingò and Casuscelli 2009, pp. 521 f.).

¹⁴⁶ Translated by Grewe W. (ed.) (1992) *Fontes Historiae Iuris Gentium: Vol. 3. Part II: 1815–1945*, Berlin: Walter de Gruyter, p. 902; cf. Art. 16 § 2 of the *Lateran Treaty*, which stipulates that it shall be permissible for the Holy See to deal with all buildings mentioned or referred to in the Treaty as it may deem fit, without obtaining the authorization or consent of the Italian governmental, provincial, or communal authorities; the later rely entirely ‘on the high artistic traditions of the Catholic Church’ (“*sulle nobili tradizioni artistiche che vanta la Chiesa Cattolica*”).

¹⁴⁷ The Agreement (which was signed by both parties on February 18, 1984) was ratified by the Italian Parliament on March 25, 1985 (*Legge n. 121 del 25 marzo 1985, Ratifica ed esecuzione dell’accordo, con protocollo addizionale, firmato a Roma il 18 febbraio 1984, che apporta modificazioni al Concordato lateranense dell’11 febbraio 1929, tra la Repubblica italiana e la Santa Sede* in: *Gazzetta Ufficiale* of April 10, 1985, No. 85 = Berlingò and Casuscelli 2009,

amended the Lateran Treaty of 1929 (Cagnazzo 2011, pp. 3 f., 82 f.; Sandulli 2012, pp. 88, 91 f.), it has been acknowledged that:

(1) The Holy See and the Italian Republic, each in its proper order, shall collaborate for the protection of the historical and artistic heritage. In order to harmonize the application of Italian law with the religious needs, the competent authorities of the two Parties shall agree upon appropriate provisions for the protection, appraisal, and enjoyment of cultural property of religious interest that belongs to ecclesiastical bodies or institutions. The preservation and consultation of archives of historical interest and of the libraries of the same bodies and institutions shall be favoured and facilitated on the basis of understandings between the competent authorities of the two Parties.

(2) The Holy See shall retain the power to dispose of the Christian catacombs that exist underground at Rome and other parts of the Italian territory, bearing the consequent responsibility for their custody, maintenance and preservation, but it shall waive the power to dispose of the other catacombs. Subject to the laws of the State and to any rights of third parties, the Holy See shall be at liberty to proceed with any necessary excavation and removal of sacred relics.¹⁴⁸

In the light of the above, one of the most important covenants between the State and the Catholic Church regarding the protection of cultural property belonging to ecclesiastical institutions,¹⁴⁹ is the *Agreement* between the Ministry of National Heritage and Culture and the Italian Episcopal Conference, signed on January 26, 2005 (Madonna 2007; Cagnazzo 2011, p. 111; Vitali and Chizzoniti 2012, p. 154). The *Agreement*, that abrogated and replaced the previous one of 1996, was put in force through the *Presidential Decree* No 78 of February 4, 2005.¹⁵⁰ It should be noted that all the covenants concluded under Art. 12 of the aforementioned *Accordo* with the Holy See of 1984, or by the laws issued on the basis of agreements concluded under Art. 8 § 3 of the Italian Constitution, with religious denominations other than the Catholic Church, are explicitly protected by the aforementioned *Code of Cultural Goods* of 2004 (see Chizzoniti 2008, pp. 90 f.; Cagnazzo 2011, pp. 22 f.; Sandulli 2012, pp. 103 f.; Vitali and Chizzoniti 2012, pp. 156 f.); the latter stipulates in Art. 9 § 2 that:

Si osservano, altresì, le disposizioni stabilite dalle intese concluse ai sensi dell'articolo 12 dell'Accordo di modificazione del Concordato lateranense firmato il 18 febbraio 1984, ratificato e reso esecutivo con legge 25 marzo 1985, n. 121, ovvero dalle leggi emanate

p. 537); cf. Direzione generale delle informazioni, dell'editoria, della proprietà letteraria, artistica, & scientifica (1986) *Un Accordo di libertà: la revisione del Concordato con la Santa Sede, la riforma della legislazioni sugli enti ecclesiastici e i nuovi rapporti con le altre confessioni religiose* [=Società e istituzioni 1], Istituto Poligrafico e Zecca dello Stato.

¹⁴⁸ *International Legal Materials* (1985) Vol. 24 No 6, The American Society of International Law, p. 1589.

¹⁴⁹ See Bolgiani I. (ed.) (2009) *La Chiesa cattolica in Italia: normativa pattizia*, Milano: Giuffrè Editore, p. 343 f.

¹⁵⁰ *Decreto del Presidente della Repubblica 4 febbraio 2005, n. 78. Esecuzione dell'intesa tra il Ministro per i beni e le attività culturali ed il Presidente della Conferenza episcopale italiana, firmata il 26 gennaio 2005, relativa alla tutela dei beni culturali di interesse religioso appartenenti a enti e istituzioni ecclesiastiche* in: *Gazzetta Ufficiale* of February 11, 2005, No. 68 = Berlingò and Casuscelli 2009, p. 667).

sulla base delle intese sottoscritte con le confessioni religiose diverse dalla cattolica, ai sensi dell'articolo 8, comma 3, della Costituzione.

As a matter of fact, since 1984, various provisions establishing a status of 'collaboration' (Chizzoniti 2008, pp. 100 f.) in the field of religious cultural heritage, have been incorporated in an array of treaties with several denominations, including the Waldesian Evangelical Church¹⁵¹; the Seventh-day Adventist Church¹⁵²; the *Assemblee di Dio in Italia*¹⁵³; the Baptist Evangelical Christian Union of Italy¹⁵⁴; the Lutheran Evangelical Church¹⁵⁵; the Greek Orthodox Archdiocese of Italy¹⁵⁶; and the Jewish Community (*Comunità ebraiche italiane*).¹⁵⁷ As

¹⁵¹ *Legge n. 449, del 11 agosto 1984, Norme per la regolazione dei rapporti tra lo Stato e le chiese rappresentate dalla Tavola valdese* in: *Gazzetta Ufficiale* of August 13, 1984, No. 222 = Berlingò and Casuscelli 2009, p. 681, Art. 17: "La Repubblica italiana e la Tavola valdese collaborano per la tutela e la valorizzazione dei beni culturali afferenti al patrimonio storico, morale e materiale delle chiese rappresentate dalla Tavola valdese, istituendo a tale fine apposite commissioni miste. Tali commissioni hanno tra l'altro il compito della compilazione e dell'aggiornamento dell'inventario dei beni culturali suddetti".

¹⁵² *Legge n. 516, del 22 novembre 1988, Norme per la regolazione dei rapporti tra lo Stato e l'Unione italiana delle Chiese cristiane avventiste del 7° giorno* in: *Gazzetta Ufficiale* of December 2, 1988, No. 283 = Berlingò and Casuscelli 2009, p. 689, Art. 34: "La Repubblica italiana e l'Unione delle Chiese cristiane avventiste si impegnano a collaborare per la tutela e la valorizzazione dei beni afferenti al patrimonio storico e culturale delle chiese facenti parte dell'Unione".

¹⁵³ *Legge n. 517, del 22 novembre 1988, Norme per la regolazione dei rapporti tra lo Stato e le Assemblee di Dio in Italia* in: *Gazzetta Ufficiale* of December 2, 1988, No. 283 = Berlingò and Casuscelli 2009, p. 701, Art. 26: "La Repubblica italiana e le ADI si impegnano a collaborare per la tutela e la valorizzazione dei beni afferenti al patrimonio storico e culturale delle ADI".

¹⁵⁴ *Legge n. 116 del 12 aprile 1995, Norme per la regolazione dei rapporti tra lo Stato e l'Unione Cristiana Evangelica Battista d'Italia (UCEBI)*, in: *Gazzetta Ufficiale* of April 22, 1995, No. 94 = Berlingò and Casuscelli 2009, p. 731, Art. 18: "La Repubblica italiana e l'UCEBI si impegnano a collaborare per la tutela e la valorizzazione dei beni afferenti al patrimonio storico e culturale delle Chiese rappresentate dall'UCEBI".

¹⁵⁵ *Legge n. 520 del 29 novembre 1995, Norme per la regolazione dei rapporti tra lo Stato e la Chiesa Evangelica Luterana in Italia (CELI)*, in: *Gazzetta Ufficiale* of December 7, 1995, No. 740 = Berlingò and Casuscelli 2009, p. 740, Art. 16: "(1) La Repubblica italiana e la CELI collaborano per la tutela e la valorizzazione dei beni culturali afferenti al patrimonio storico, morale e materiale delle Comunità rappresentate dalla CELI, istituendo a tale fine apposite commissioni miste. (2) Le commissioni di cui al comma 1 hanno tra l'altro il compito della compilazione e dell'aggiornamento dell'inventario dei beni suddetti".

¹⁵⁶ *Legge n. 126, del 30 luglio 2012, Norme per la regolazione dei rapporti tra lo Stato e la Sacra arcidiocesi ortodossa d'Italia ed Esarcato per l'Europa Meridionale, in attuazione dell'articolo 8, terzo comma, della Costituzione*, in: *Gazzetta Ufficiale* of August 7, 2012, No. 7183 = Berlingò and Casuscelli 2009, p. 751, Art. 12: "La Repubblica e l'Arcidiocesi si impegnano a collaborare per la tutela e la valorizzazione dei beni afferenti al patrimonio storico e culturale ortodosso".

¹⁵⁷ *Legge n. 101 del 8 marzo 1989, Norme per la regolazione dei rapporti tra lo Stato e l'Unione delle Comunità ebraiche italiane* in: *Gazzetta Ufficiale* of March 3, 1989, No. 69 = Berlingò and Casuscelli 2009, p. 711, Art. 17: "(1) Lo Stato, l'Unione e le Comunità collaborano per la tutela e la valorizzazione dei beni afferenti al patrimonio storico e artistico, culturale, ambientale e architettonico, archeologico, archivistico e librario dell'ebraismo italiano. (2) Entro dodici mesi

to the latter, the Italian State has funded various restoration and conservation works on Jewish cultural, architectural, artistic and archival heritage (“*patrimonio, culturale, architettonico, artistico e archivistico ebraico in Italia*”)¹⁵⁸ during the period between 2005 and 2007; also in 2005, on the basis of a relevant *Memorandum of Understanding*, which was signed between the region of Sicily and the ‘Union of Italian Jewish Communities’, the parties undertook the responsibility “to arrange courses of Jewish culture in collaboration with universities, to establish tourist routes, to collaborate with regional museums on the exhibition of Jewish heritage and to establish an *ad hoc* Jewish museum in Palermo” (Chizzoniti 2008, pp. 91–92; Cagnazzo 2011, p. 106; Vitali and Chizzoniti 2012, p. 156).

9.9 The Netherlands

The basic legal instruments in relation to the protection of religious heritage in the Kingdom of Netherlands, are the *Cultural Heritage Preservation Act* (Wet tot behoud van cultuurbezit)¹⁵⁹ and the *Monuments Act* (Monumentenwet).¹⁶⁰ To date, the relevant legal framework, as it has been repeatedly revised and amended over the years, grants specific protection to cultural religious assets. The law stipulates specific criteria of protection, which seek to distinguish, among the great mass of structures and objects, those cultural elements of particular relevance to the Dutch heritage. According to Lubina (2009, p. 13) “[w]hile intangible values such as religion or folklore are not explicitly recognised as factors in the determination process for immovable cultural heritage, they play a role in determining an object’s (art) historical relevance”.

In the field of ancient monument care, the above determination process¹⁶¹ correlates with the financial assistance, which is provided by the State. Among the monuments, which may be deemed eligible for State protection and financial

dalla data di entrata in vigore della presente legge sarà costituita una Commissione mista per le finalità di cui al comma 1 e con lo scopo di agevolare la raccolta, il riordinamento e il godimento dei beni culturali ebraici. (3) La Commissione determina le modalità di partecipazione dell’Unione alla conservazione e alla gestione delle catacombe ebraiche e le condizioni per il rispetto in esse delle prescrizioni rituali ebraiche. (4) Alla medesima Commissione è data notizia del reperimento di beni di cui al comma 1”.

¹⁵⁸ *Legge n. 175 del 17 agosto 2005, Disposizioni per la salvaguardia del patrimonio culturale ebraico in Italia*, in: *Gazzetta Ufficiale* of September 2, 2005 n. 204; further information available online at the official web portal of the *Fondazione per i Beni Culturali Ebraici in Italia*: <http://moked.it/fbcei>. Accessed on March 31, 2014.

¹⁵⁹ *Staatsblad* 1984, No 49 (all relevant legislation available also online at: www.wetten.nl. Accessed on March 31, 2014).

¹⁶⁰ *Staatsblad* 1988, No 638.

¹⁶¹ *Monumentenwet*, Art. 3 f.; cf. *Wet tot behoud van cultuurbezit*, Chapter II – The designation of protected objects.

support, the law explicitly identifies the ‘*kerkelijke monumenten*’. The latter are defined as:

[I]mmovable structures owned by a church society [*kerkgenootschap*], by an autonomous part of a church society, by an association of church societies or by another society of spiritual nature [*een ander genootschap op geestelijke grondslag*], which are used solely, or predominantly, for the collective worship or for the collective profession of belief.¹⁶²

While the above definition literally refers to ecclesiastical (*kerkelijke*) monuments only, rather than to religious monuments in general, the aforementioned legal provision, interpreted in the light of Art. 6 of the Dutch Constitution that guarantees religious freedom (*see van der Pot et al. 2006*, pp. 365 f.), refers, in essence, to monuments serving any religion (Lubina 2009, p. 23). Hence, ancient edifices belonging to any religious society, after their designation as monuments, are being protected under the aegis of the Minister of Culture who may award grants for their maintenance.¹⁶³ In addition, apart from the central government, local and provincial agencies are actively involved in granting subsidies for ancient religious assets, which have been designated as protected monuments (van Bijsterveld 2001).

During the aforementioned designation process, pursuant to the provisions of the *Monuments Act*, all interested parties are granted the right to be heard by the competent authorities; However, particularly in the case of religious monuments, the *Act* grants “*a more active role*” (Lubina 2009, p. 23) to the involved owners than to the owners of secular structures. More precisely, owners of religious buildings must not only be granted the possibility to be heard, but they must also be consulted; the *Act* explicitly stipulates that without such mandatory consultation, no decision on the designation of religious monuments can be taken (“*Met betrekking tot een kerkelijk monument wordt geen beslissing genomen ingevolge deze wet dan na overleg met de eigenaar*”).¹⁶⁴ Until recently, an additional protection was granted to religious monuments: Art. 18 of the *Monuments Act*, that was repealed in 2010,¹⁶⁵ granted the owner of a religious monument a veto right for decisions taken in accordance with Articles 16 and 17 of the *Act*, in as far as the decisions affected substantial interests of worship or religious belief (“*wezenlijke belangen van het belijden van de godsdienst of de levensovertuiging*”). In any case, the management, preservation and possession of protected religious monuments must be in accordance with the provisions of the *Monuments Act*. The compliance with the latter is monitored by the competent bodies of the Ministry of Education,

¹⁶² *Monumentenwet*, Art. 1 e: “[K]erkelijke monumenten: onroerende monumenten welke eigendom zijn van een kerkgenootschap, een zelfstandig onderdeel daarvan, een lichaam waarin kerkgenootschappen zijn verenigd, of van een ander genootschap op geestelijke grondslag en welke uitsluitend of voor een overwegend deel worden gebruikt voor het gezamenlijk belijden van de godsdienst of levensovertuiging”.

¹⁶³ *Ibid.*, Chapter III - Grants and special-purpose grants (Art. 34 and 34a).

¹⁶⁴ *Ibid.*, Art. 2 (2).

¹⁶⁵ *Wet van 25 maart 2010 tot vaststelling van overgangsrecht en wijziging van diverse wetten ten behoeve van de invoering van de Wet algemene bepalingen omgevingsrecht (Invoeringswet Wet algemene bepalingen omgevingsrecht)*, Art. 7.1, in: *Staatsblad* 2010, No 142.

Culture and Science. Further to monitoring the registration of monuments, the relevant Monuments division of the Ministry supervises also the interested parties involved, “*specifically in the area of management and use of the monuments*” (Lubina 2009, p. 24), and oversees the issuing of permits by municipalities concerning alterations, maintenance or restoration works on (national) monuments.

The Netherlands ratified in 1958 the (First) Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), however it was not until 1997 that it became evident that the Protocol had been never incorporated into Dutch Law; the insight was gained during a court case on the return of religious cultural objects removed from occupied Cyprus (Lubina 2009, pp. 24 f.). According to the *Explanatory Memorandum of the 2007 Act on Cultural Property Originating from Occupied Territory* (Wet tot teruggave cultuuroederen afkomstig uit bezet gebied)¹⁶⁶:

The reason why it took so long for the need for implementation to be recognised was that the first request by a foreign authority to the Dutch government for the return of cultural objects was not submitted under the Protocol until 1997. This was a request by the Cypriot authorities for the return of icons that had been removed from a Greek Orthodox Church in northern Cyprus after the Turkish occupation began in 1974 and had ended up in the Netherlands. All countries concerned (Cyprus, Turkey and the Netherlands) are parties to the Protocol. The request for the return of the icons was made following civil proceedings instituted in 1995 by the Greek Cypriot Church before Rotterdam District Court for their return. In its judgment of 4 February 1999 (NJ kort 1999, 37), the District Court held that article 1.4 of the Protocol was not a provision binding on all persons within the meaning of article 94 of the Constitution. This judgment was upheld on appeal by The Hague Court of Appeal (judgment of 7 March 2002, case number 99/693; this judgment has not been published). The claim for the return of cultural objects on Dutch territory as referred to here was refused for this reason.¹⁶⁷

Hence, in the absence of evidence to the contrary, the Dutch citizen was considered having purchased the Orthodox icons in good faith and, therefore, his title was confirmed. A decade after the request in court for the return of the aforementioned religious icons and the relevant denial of the Church’s claim to ownership of the icons, the First Protocol was implemented into Dutch Law by the aforementioned *Act*.

It should be noted that the religious cultural goods are also protected under the aforementioned *Cultural Heritage Preservation Act*. According to the *Act’s* Chapter IIIA, which is specifically dedicated to the protection of ‘public and church collections’ (“*Bescherming van openbare en kerkelijke collectives*”), no one may take out of the Netherlands, without the written permission of the owner, moveable property which forms an integral part of a ‘church inventory’; the latter is being

¹⁶⁶ *Wet tot teruggave cultuuroederen afkomstig uit bezet gebied [Wet van 8 maart 2007, houdende regels over inbewaringneming en instelling van een vordering tot teruggave van cultuuroederen afkomstig uit een tijdens een gewapend conflict bezet gebied]*, in: *Staatsblad* 2007, No 123.

¹⁶⁷ *Explanatory Memorandum* related to the *Return Act* of 8 March 2007 (available online at: http://www.unesco.org/culture/natlaws/media/pdf/netherlands/netherlands_memo_returnoccupiedterritory_engtof.pdf. Accessed on March 31, 2014).

defined as an inventory of valuable (from a cultural, historical or scholarly perspective) moveable property owned by a church society, an independent part of a church society, or another religious society (“*genootschap op religieuze grondslag*”).¹⁶⁸

9.10 Spain

As stipulated in the Spanish Constitution,¹⁶⁹ the State guarantees the preservation and promotes the enrichment of the historical, cultural and artistic heritage of Spain, as well as of the property of which it consists, regardless of its legal status or ownership; in addition, criminal law shall punish any offences against this heritage (Sánchez 2008, pp. 188 f.). According to the original wording of Art. 46 of the Constitution:

Los poderes públicos garantizarán la conservación y promoverán el enriquecimiento del patrimonio histórico, cultural y artístico de los pueblos de España y de los bienes que lo integran, cualquiera que sea su régimen jurídico y su titularidad. La ley penal sancionará los atentados contra este patrimonio.

The aforementioned provision, which establishes, in essence, an “*Estado de cultura*” (Gonzalez Moreno 2003), must be read, in the case of religious cultural heritage, in conjunction with Art. 16 § 3 of the Constitution that prescribes the responsibility of the public authorities to maintain appropriate relations of co-operation with the Catholic Church and the other denominations (see Sánchez 2008, pp. 204 f.). As it has been noted by Professor Aldanondo (2006a, pp. 178–179):

The specific status of cultural assets of a religious nature and the commitment made by the State by virtue of Article 16.3 of the Constitution, to establish a collaborative relationship with religions, churches and communities, is leading to cooperation by the authorities with the Catholic Church and other religions in activities related to these assets to the extent these assets reflect the exercise of freedom of religion.

In the light of the above, a set of bilateral norms forged over the years a status of partnership between the civil and the religious authorities within the field of religious cultural heritage protection. In relation to the cultural patrimony of the Catholic Church, the various *Acuerdos* (Agreements) between the Spanish State and the Holy See are typical (Aldanondo 2006a, pp. 154 f.; Sánchez 2008,

¹⁶⁸ *Wet tot behoud van cultuurbezit*, op. cit., Art. 14a §§ 1–2a: “Het is verboden een roerende zaak die integreerend deel uitmaakt van een openbare collectie die vermeld staat in de inventarislijst van . . . een inventarislijst van roerende zaken van cultuurhistorische of wetenschappelijke betekenis waarvan een kerkgenootschap, een zelfstandig onderdeel daarvan, of een ander genootschap op religieuze grondslag eigenaar is”.

¹⁶⁹ English translation of the current Constitution (1978) available online at: <http://www.lamoncloa.gob.es/IDIOMAS/9/Espana/LeyFundamental/index.htm>. Accessed on March 31, 2014.

pp. 217 f.). For example, Article I § 5 of the *Acuerdo* of January 3, 1979 between the Spanish State and the Holy See concerning ‘legal affairs’,¹⁷⁰ stipulates that:

The places of worship are guaranteed inviolability according to the Law. They may not be demolished unless they have been previously deprived of their sacred character [Los lugares de culto tienen garantizada su inviolabilidad con arreglo a las Leyes. No podrán ser demolidos *sin ser previamente privados de su carácter sagrado*].

In addition, on the basis of the same Article’s following paragraph (§ 6), the State undertakes the obligation to respect and protect the inviolability of archives, registers and other documents belonging to the Spanish Episcopal Conference, to the Episcopal Curiae, the Curiae of the Superiors of religious Orders and Congregations, the Parishes and the other church Institutions and Organizations. Furthermore, according to the Preamble of the *Acuerdo* of January 3, 1979 between the Spanish State and the Holy See concerning ‘education and cultural affairs’:

The Church’s historical, artistic and documental patrimony continue to be an extremely important part of the cultural estate of the Nation. Therefore, placing this Patrimony in the service and for the enjoyment of society, its conservation and its increase, justify collaboration of the Church and State [El patrimonio histórico, artístico y documental de la Iglesia sigue siendo parte importantísima del acervo cultural de la Nación, por lo que la puesta de tal patrimonio al servicio y goce de la sociedad entera, su conservación y su incremento justifican la colaboración de Iglesia y Estado].¹⁷¹

On the basis of Section XV of the aforementioned Church-State *Acuerdo* on cultural affairs,¹⁷² a Joint Committee was created in 1980 (see Aldanondo 2006a, p. 156; Sánchez 2008, pp. 228 f.). The Committee adopted a fundamental *Document* ‘related to the legal framework regarding the Church-State common action on historical - artistic heritage’ (*Documento relativo al marco jurídico de actuación mixta Iglesia-Estado sobre patrimonio histórico—artístico*),¹⁷³ that was followed by a set of *Rules* regarding the inventorying of all movable and immovable

¹⁷⁰ *Instrumento de Ratificación del Acuerdo entre el Estado español y la Santa Sede sobre asuntos jurídicos, firmado el 3 de enero de 1979 en la Ciudad del Vaticano*, in: *Boletín Oficial del Estado* [B.O.E.] No. 300, 15.12.1979.

¹⁷¹ *Instrumento de Ratificación del Acuerdo entre el Estado español y la Santa Sede sobre Enseñanza y Asuntos Culturales, firmado en la Ciudad del Vaticano el 3 de enero de 1979* in: *B. O.E., ibid.*

¹⁷² *Ibid.*, *Artículo XV*: “La Iglesia reitera su voluntad de continuar poniendo al servicio de la sociedad su patrimonio histórico, artístico y documental y concertará con el Estado las bases para hacer efectivos el interés común y la colaboración de ambas partes, con el fin de preservar, dar a conocer y catalogar este patrimonio cultural en posesión de la Iglesia, de facilitar su contemplación y estudio, de lograr su mejor conservación e impedir cualquier clase de pérdidas en el marco del artículo 46 de la Constitución” [The Church reiterates its disposition to continue to place its historic, artistic and documental patrimony at the service of society in general and shall come to an agreement with the State concerning the basis for effecting the common interests and collaboration of both parties, for the purpose of preserving, making known and cataloging the Church’s cultural patrimony, facilitating its viewing and study, assuring its best possible conservation and preventing all losses, within the framework of Article 46 of the Constitution].

¹⁷³ *Boletín de la Conferencia Episcopal Española*, No. 14, April–June 1987, p. 86.

historical—artistic assets of the Church; the *Rules* were co-signed by the President of the *Comisión Episcopal para el Patrimonio Cultural* and the Secretary of Culture (*Normas con arreglo a las cuales deberá regirse la realización del inventario de todos los bienes muebles e inmuebles de carácter histórico-artístico y documental de la Iglesia española*).¹⁷⁴ In addition, a consensus between the Spanish Episcopal Conference and the Ministry of Culture in relation to the rationalization of conservation methods and public spending on Church's cultural assets, has been further pursued through major *National Plans* regarding 'cathedrals' (in 1990) and 'abbeys, monasteries and convents' (in 2004)¹⁷⁵; the relevant *Plans*, as well as the consequent individual *Acuerdos*, have been instrumental in protecting and preserving the Spanish ecclesiastical cultural heritage via the administrative mechanisms of the competent authorities, i.e. the central government and the autonomous communities (see Aldanondo 2006a, pp. 157–158; Sánchez 2008, pp. 240 f.).

Similar covenants between the State and 'the most traditional religions with ancient roots in Spanish society' (Martínez-Torrón 2001, p. 352) have been also encapsulated in a pair of *Acuerdos* between the Spanish State and the Federation of Israelite Communities, as well as the Islamic Commission of Spain (see Aldanondo 2006a, pp. 162 f.; Sánchez 2008, pp. 250 f.). In the case of the Israelite communities, according to Art. 13 of the *Acuerdo* of 1992, which was ratified by *Law 25/1992*:

The State and the Federation of Israelite Communities of Spain shall co-operate with a view to preserving and promoting the Jewish historic, artistic and cultural heritage in Spain, which will remain at the service of Spanish society for contemplation and study. This co-operation shall include the preparation of the catalogue and inventory of this heritage, and the creation of trusteeships, foundations and other types of cultural institutions [El Estado y la Federación de Comunidades Israelitas de España colaborarán en la conservación y fomento del patrimonio histórico, artístico y cultural judío, que continuará al servicio de la sociedad, para su contemplación y estudio. Dicha colaboración se extenderá a la realización del catálogo e inventario del referido patrimonio, así como a la creación de Patronatos, Fundaciones u otro tipo de instituciones de carácter cultural].¹⁷⁶

The above provision is almost identical to Art. 13 of the *Acuerdo*, of the same year, with the Islamic community, that was ratified by *Law 26/1992*:

The State and the Islamic Commission of Spain shall co-operate to conserve and further Islamic historic, artistic and cultural heritage in Spain, which shall remain at the service of society, for contemplation and study. Such co-operation shall include drawing up a catalogue and inventory of such heritage and embrace the creation of Trusts, Foundations or other institutions of a cultural nature, whose membership shall include representatives of the Islamic Commission of Spain [El Estado y la Comisión Islámica de España colaborarán en la conservación y fomento del patrimonio histórico, artístico y cultural islámico en España, que continuará al servicio de la sociedad para su contemplación y estudio. Dicha colaboración se extenderá a la realización del catálogo e inventario del referido patrimonio,

¹⁷⁴ *Ibid.*, p. 87.

¹⁷⁵ See also § 5 (c) above.

¹⁷⁶ *Ley 25/1992 por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Comunidades Israelitas de España* in: B.O.E., No. 272, 12.11.1992.

así como a la creación de Patronatos, Fundaciones u otro tipo de instituciones de carácter cultural, de los que formarán parte representantes de la Comisión Islámica de España].¹⁷⁷

Apart from Art. 46 of the Constitution, the above provisions correlate also with the *Historical Heritage Act* of 1985,¹⁷⁸ which regulates and protects *in globo* the entire historic heritage of the Spanish nation, regardless of religious or secular origin (Aldanondo 2006a, pp. 164 f.; Sánchez 2008, pp. 260 f.). On the other hand, the autonomous communities of Spain (*autonomías*), that benefit, under the current Constitution, from a unique territorial status of self-government (the so-called *Estado de las autonomías*), have assumed, on an autonomous basis, important responsibilities in the field of (religious) cultural heritage, and, in the majority of cases, have entered into separate agreements with the respective religious communities (as, for example, in the case of ‘*Colaboración del Principado de Asturias con la Iglesia Católica*’).¹⁷⁹ Above all, however, the *autonomías* have issued specific laws (Heritage Acts) acknowledging in most cases *the religious character, liturgical use or even dedication to worship of the (sacred) cultural property* located within their region (Aldanondo 2006b). Typical examples, thereof, are the *Act 7/1990 on the Basque Cultural Heritage*,¹⁸⁰ which acknowledges that: “In the case of cultural goods intended for religious worship, the peculiarity of the religious purposes, which are inherent to them, shall be taken into account” [Cuando se trate de bienes culturales destinados al culto religioso habrá de tenerse en cuenta la peculiaridad de los fines religiosos inherentes a los mismos],¹⁸¹ or the *Act 4/1999 on the Historical Heritage of the Canary Islands*,¹⁸² which stipulates that the de-contextualization of sacred objects (for the purposes of their exhibition inside

¹⁷⁷ *Ley 26/1992 por la que se aprueba el Acuerdo de Cooperación del Estado con la Comisión Islámica de España* in: *B.O.E.*, *ibid*.

¹⁷⁸ *Ley 16/1985, de 25 de junio, del Patrimonio Histórico Español*, in: *B.O.E.*, No. 155, 29.6.1985 (last amended in 2012).

¹⁷⁹ *Ley 1/2001, de 6 marzo, Normas reguladoras del Patrimonio Cultural* in: *Boletín Oficial del Principado de Asturias* No. 75, 30.3.2001 (*Disposiciones Adicionales*): “Con objeto de mantener el sistema de colaboración existente entre ambas instituciones, establecido en el Acuerdo de 18 de febrero de 1987, entre el Principado de Asturias y la Archidiócesis de Oviedo, sobre Asuntos Culturales, el Principado de Asturias favorecerá el mantenimiento de la Comisión Mixta establecida en el mismo, con las funciones, composición y funcionamiento prescritas en dicho Acuerdo. A través de ella se analizarán los problemas relativos a la protección, conservación, restauración y difusión del patrimonio cultural afectado, con sujeción a lo dispuesto en la presente Ley, muy especialmente en lo relativo a seguridad y preservación física, compatibilidad entre los usos religiosos y otras funciones de carácter cultural, acceso a los investigadores y disfrute público”.

¹⁸⁰ *Ley 7/1990, de 3 de julio, del Patrimonio Cultural del País Vasco* in: *Boletín Oficial del País Vasco*, No. 157, 6.8.1990 (last amended in 2012).

¹⁸¹ Art. 12 § 1 (d); cf. Art. 29 § 1: “Cuando se trate de bienes culturales destinados al culto religioso, habrán de tenerse en cuenta las exigencias que dicho uso requiere”.

¹⁸² *Ley 4/1999, de 15 marzo 1999, del Patrimonio Histórico de Canarias* in: *Boletín Oficial de Canarias*, No. 36, 24.3.1999.

a museum) shall not offend their original purpose of worship nor devalue their original (sacred) location:

In collaboration with the ecclesiastical authorities, museums of sacred art, may exhibit art objects which have been withdrawn from their liturgical use or are unsuitable to be kept inside the temples. Efforts will be made, in any case, not to de-contextualize objects that are intended to be the subject of religious worship or to devalue their original location [En colaboración con las autoridades eclesiásticas, podrán crearse museos de arte sacro, donde se exhiban objetos artísticos retirados de usos litúrgicos o que no convenga mantener en el interior de los templos. Se procurará, en todo caso, no descontextualizar las piezas destinadas a ser objeto de culto religioso o a desvalorizar sus emplazamientos originales].¹⁸³

Similar provisions have been incorporated in Act 6/1998 on the *Valencian Cultural Heritage*¹⁸⁴; Act 10/1998 on the *Historical Heritage of the Community of Madrid*,¹⁸⁵ Act 11/1998 on the *Cantabria Cultural Heritage*¹⁸⁶; and Act 2/1999 on the *Extremadura Historical and Cultural Heritage*.¹⁸⁷

9.11 Sweden

The Royal Decree of 1666, entitled ‘*Placat och Påbudh om Gamble Monumenter och Antiquiteter*’,¹⁸⁸ which is worldwide the first legislative Act concerning monuments and antiquities, laid the foundations for the protection of religious cultural heritage in Sweden (Sørmoen 2006, pp. 330 f.; cf. Hegardt and Källén 2011, pp. 111, 123 f.). On the basis of the relevant Decree, which was sent to vicars and clerics all over the territory of Sweden demanding a systematic inventory and collection of heritage assets, “protection was extended to ecclesiastical structures with all their fittings, ornaments and adjuncts...”.¹⁸⁹ At the present time, the protection of ecclesiastical heritage, despite the fact that the Church of Sweden has been formally separated from the State since 2000 and is now governed solely

¹⁸³ *Ibid.*, Art. 81 § 3.

¹⁸⁴ *Ley 4/1998, de 11 junio, del patrimonio cultural valenciano* in: *Diario Oficial de la Generalitat Valenciana*, No. 3267, 18.6.1998 (Art. 6).

¹⁸⁵ *Ley 10/1998, de 9 julio, del Patrimonio Histórico de la Comunidad de Madrid* in: *Boletín Oficial de la Comunidad de Madrid*, No. 167, 16.7.1998 (Art. 6).

¹⁸⁶ *Ley 11/1998, de 13 octubre, del Patrimonio Cultural* in: *Boletín Oficial de Cantabria*, No. 240, 2.12.1998 (Art. 8).

¹⁸⁷ *Ley 2/1999, de 29 marzo, del Patrimonio Histórico y Cultural* in: *Diario Oficial de Extremadura*, No. 59, 22.5.1999 (Art. 3).

¹⁸⁸ A copy of the original print available online at: <http://www.kb.se/f1700/Monumenter/Default.htm>. Accessed on March 31, 2014.

¹⁸⁹ Baldwin Brown G. (1905) *The care of ancient monuments: an account of the legislative and other measures adopted in European countries for protecting ancient monuments and objects and scenes of natural beauty, and for preserving the aspect of historical cities*, Cambridge University Press, p. 192.

by internal regulations,¹⁹⁰ remains a matter of co-operation between the public authorities (namely the County Heritage Boards) and the relevant ecclesiastical structures (namely the competent dioceses). As it has been officially stated by the Swedish Government:

The ecclesiastical cultural heritage has been built during nearly a thousand years and been formed in continuous interchange with other parts of society. Through the historical standing of the Church it has come to both mirror and make up an important part of Swedish history. This is living a cultural heritage that through the centuries has been used continuously and that is still used for the same purpose. It is also a cultural heritage that is accessible to everyone regardless of, for example, church affiliation, age, sex and citizenship. Each and everyone can experience the church buildings and their inventories as historical and antiquarian memories and take part of art and architecture, listen to church music or seek a moment of stillness and peace [Det kyrkliga kulturarvet har byggts upp under närmare ett årtusende och har formats i kontinuerlig växelverkan med andra delar av samhället. Genom kyrkans historiska ställning har det kommit att både avspegla och utgöra en väsentlig del av Sveriges historia. Det är fråga om ett levande kulturarv som genom århundradena fortlöpande har använts och alltjämt används för samma ändamål. Det är också ett kulturarv som är tillgängligt för alla, oberoende av exempelvis kyrkotillhörighet, ålder, kön och medborgarskap. Var och en har möjlighet att uppleva kyrkobyggnaderna och deras inventarier som historiska och antikvariska minnesmärken, att ta del av konst och arkitektur, att lyssna på kyrkomusik eller att söka en stund av stillhet och ro].¹⁹¹

This ‘special position’ of the ecclesiastical organization within the field of heritage protection is particularly based on the fact “that the Church owns a large part of Sweden’s national cultural heritage in the form of medieval churches and other old buildings” (Pettersson 2011, p. 123). Indeed, the vast majority of the historical edifices owned by the Church of Sweden (approximately 3,000 churches and chapels)¹⁹² fall within the ambit of the current Swedish *Heritage*

¹⁹⁰ See for example the *Kyrkomötets beslut om ändringar i kyrkoordningen* (in: *Svenska kyrkans bestämmelser* [SvKB] 1999:1), SvKB 2012:14, that stipulates in Art. 40 § 2: “Kyrkobyggnader och deras inventarier ska underhållas så att de kan tjäna sitt ändamål. I lagen (1988:950) om kulturminnen m.m. finns ytterligare bestämmelser om värden av kyrkobyggnader och inventarier. Kyrkobyggnaderna ska hållas tillgängliga för allmänheten. Kyrkoherden och en kyrkvård ansvarar för kyrkobyggnadernas inventarier i enlighet med bestämmelserna i lagen om kulturminnen m.m. [Church buildings and their furnishings should be maintained so that they can serve their purpose. The Act (1988: 950) concerning cultural heritage etc., provides additional rules for the care of church buildings and furnishings. Church buildings should be made publicly available. The pastor and the church warden are responsible for the maintenance of the church buildings’ furnishings in accordance with the provisions of the Heritage Conservation Act]”.

¹⁹¹ *Regeringens proposition* 1998/99:38 (10.12.1998), p. 134; translation provided by Harding 2007, p. 351. The relevant *Governmental Bill* led to the issuing of a Parliamentary Report (*Konstitutionsutskottets betänkande* 1998/99: KU 18), which also stressed the importance of the Church of Sweden to the Swedish history and heritage.

¹⁹² Alpin C. (ed.) (2012) *Review and Financial Summary for the Church of Sweden: National Level*, Uppsala: Church of Sweden, p. 9: “The number of churches and chapels owned by the Church of Sweden is 3,381, of which 2,953 are protected by the Swedish Heritage Conservation Act. Of these, 115 were built after 1940, and of those, 35 were built after 2000”.

Conservation Act.¹⁹³ The latter, stipulates in Chapter 4 Section 1, that the historical cultural values inherent in church buildings, church sites, church furnishings and burial grounds are protected under its provisions (“*Kulturhistoriska värden i kyrkobyggnader, kyrkotomter, kyrkliga inventarier och begravningsplatser är skyddade enligt bestämmelserna i detta kapitel*”). More precisely, for the purposes of the *Heritage Conservation Act*, ‘church buildings’ are defined as edifices consecrated according to the rites of the Church of Sweden before January 1, 2000 and owned or managed by the Church or any of its organizational bodies; ‘church sites’ are defined as (non-burial) areas surrounding church facilities, connected with the function and environment of the latter, whereas ‘burial grounds’ are referred to as the areas defined in Section 13 of the *Burials Act* of 1990.¹⁹⁴

According to Chapter 4 Section 2 of the *Heritage Conservation Act*, church buildings and sites are cared for and maintained in such a way that their cultural historic value is not diminished and their appearance and character are not debased (“*Kyrkobyggnader och kyrkotomter skall vårdas och underhållas så att deras kulturhistoriska värde inte minskas och deras utseende och karaktär inte förvanskas*”). In addition, according to Section 3, church buildings erected, and church sites established before the end of 1939, may not be altered in any significant way without obtaining a permission from the competent County Administrative Board (*Länsstyrelsen*). In this rationale, “the Church is responsible for the care and maintenance of these church buildings and sites in accordance with their cultural-historical value and with respect to their appearance and purpose” (Jäterä-Jareborg 2010, p. 681; cf. Schwanborg 2005, pp. 13 f.). The aforementioned administrative permission must always be obtained prior to any demolition, relocation or structural change to a protected religious edifice (i.e. a pre-1939 building), as well as any interference with or alteration of its exterior or interior (including permanent fittings and artistic decorations), or any alteration to its color scheme; in the case of church sites, the aforementioned permission is always required for the expansion of a site or for the erection or significant alteration of structures, walls, portals or other permanent features. By virtue of Section 3, Chapter 4 of the *Heritage Conservation Act*, the competent *Länsstyrelsen* may define reasonable conditions in view of the circumstances prompting any alteration to a protected ecclesiastical edifice: the conditions may refer to the manner in which the alteration shall be implemented and the documentation needed. In any case, according to Section 5 of the same Chapter, customary maintenance works or urgent repairs may be carried out without such permission. Nevertheless, measures of this kind shall be carried out using materials and methods appropriate to the cultural historic value of the protected structures or their installations (“*Sådana åtgärder skall utföras med*

¹⁹³ *Kulturmiljölag* (1988:950), in: *Svensk författningssamling* [SFS] 2002:620 (full text of the Act available online at: <http://www.riksdagen.se/sv>); for further information regarding the latest amendments (2013) to the Act see: <http://www.raa.se/fran-kulturminneslag-till-kulturmiljolak>. Accessed on March 31, 2014.

¹⁹⁴ *Begravningslag* (1990:1144) last amended in 2013 (in: SFS 2013:552).

material och metoder som är lämpliga med hänsyn till byggnadens eller anläggningens kulturhistoriska värde”).

The relevant provisions have been interpreted and implemented by the Supreme Administrative Court of Sweden in three important cases: in 2004,¹⁹⁵ the Court, contrary to the disapproval of the County Heritage Board that was ratified by the County Administrative Court, permitted the partial demolition of an organ loft (i.e. an interior balcony area occupied by the church organ) inside the medieval Viksta church at Björklinge, Uppsala. According to the Court, the removal of the loft’s stands would create more free space inside the building, and thus, without being a disproportionate intervention to the church’s fabric, it would better facilitate the service of worship. Besides, this functional improvement was, in essence, intertwined with the cultural value of the edifice; as the Court pointed out:

The capacity of churches to be functional in relation to worship and other religious services is essential for the preservation of their cultural and historical value. Numerous parishes nowadays require space in their churches for various activities. The most common solution for these purposes is to . . . arrange for the necessary free space [Att kyrkorna kan fortsätta att användas för gudstjänster och andra kyrkliga förrättningar är väsentligt för bevarandet av det kulturhistoriska värdet. Många församlingar har numera behov av utrymmen i sina kyrkor för olika aktiviteter. Den vanligaste lösningen är . . . iordningställa det fria utrymmet för dessa ändamål].¹⁹⁶

In 2005,¹⁹⁷ the Court again granted permission for the demolition of the abandoned (since 1976) New Maglarp Church (*Maglarp nya kyrka*) due to lack of funds and accelerating maintenance costs (Bexhed 2008, pp. 884–885).¹⁹⁸ By way of contrast, in 2007,¹⁹⁹ the Court found that the installation of a set of solar panels on the roof of the Fläckebo church at Västerås, in central Sweden, violated the provisions of the *Heritage Conservation Act* as it devalued the structure’s cultural and historic significance (Bexhed 2008, pp. 885–886).

Protection under the provisions of the *Heritage Conservation Act* may be extended also to ecclesiastical edifices built after 1939: according to Section 4 Chapter 4, the competent County Heritage Board may decide so, in view of the outstanding cultural historic value of the relevant structures.²⁰⁰ Protection is also provided by the *Act* to pre-1939 burial grounds (Sections 11–15); the latter must be cared for and maintained

¹⁹⁵ RÅ 2004 ref. 125, Case No. 6482-02.

¹⁹⁶ See the wording of the relevant Decision online at: <https://lagen.nu/dom/ra/2004:125>.

¹⁹⁷ RÅ 2005 ref. 55, Case No. 2993-00.

¹⁹⁸ It was the first time that a consecrated building was torn down in Sweden. The demolition process was documented in 2007 by Engeberg C. J.; the relevant material is available online at: <http://abandoned.twohornedbull.ca/?p=79>. See also Pålsson Skarin I. (2011) *A Finance Model for the Built Cultural Heritage. Proposals for improvements of future Heritage Economics*, Architectural Conservation and Restoration, Department of Architecture and Built Environment, Faculty of Engineering: Lund University, p. 16 f. and 328 f.

¹⁹⁹ RÅ 2007 ref. 75, Case No. 4678-05.

²⁰⁰ See the relevant *Lag om ändring i lagen (1988:950) om kulturminnen m.m.* (in: SFS 2013:548), effective since January 1, 2014.

with respect to their cultural historic value (*kulturhistoriska värde*), as integral parts of the Swedish cultural environment (*en del av vår kulturmiljö beaktas*). If the County Heritage Board decides so, the *Act* may encompass cemeteries built after the end of 1939, provided that they are of outstanding historic interest or they adjoin church structures erected before 1939 (Section 14).

Furthermore, the *Act* provides that inventories of movable articles of cultural historic value belonging to a church or to another ecclesiastical building, site or cemetery, are also properly kept and cared for (Section 6).²⁰¹ More precisely, pursuant to Sections 7 and 8 of Chapter 4 of the *Act*, the parishes keep a list of items, which include their status of ownership and location; two persons are appointed in every parish to be responsible for keeping a relevant list and to ensure that the listed objects are properly kept and cared for.²⁰² The lists are verified, every 6 years, by the competent diocese. After the completion of the verification process, a copy is sent to the County Administrative Board; the latter is also responsible for the inspection of ecclesiastical furnishings (Section 11). Particular protective provisions regarding the ecclesiastical movable (and intangible as well) heritage are also included in the 1998 *Act on the Church of Sweden*²⁰³; pursuant to Section 12 of the latter, in the development and care of the archives of the Church, consideration shall be taken to the fact that these archives form part of the national cultural heritage (“*del av det nationella kulturarvet*”).

According to Chapter 4 Section 16 of the aforementioned *Heritage Conservation Act*, the Church of Sweden is entitled to certain compensation from the State for costs justified for cultural historic reasons in conjunction with the care and maintenance of ecclesiastical cultural heritage property.²⁰⁴ The Church decides on the

²⁰¹ Pursuant to Section 19 of the relevant Cultural Monuments Ordinance [*Kulturmiljöförordning* (1988:1188), in: SFS 2013: 554] the relevant church inventories include, for example, “earlier vestments, censers, vessels, books, altarpieces, crosses and crucifixes, baptismal fonts, other paintings and works of art, ciboria, storage chests, poor - boxes, chandeliers and candlesticks, epitaphs, catchments, banners, achievements, coats of arms, armors, votive ships, church bells, musical instruments and certain earlier funeral monuments”.

²⁰² According to Section 9 (as amended by the *Act* 1999:304) in the case of a listed object permission is required from the County Administrative Board in order to dispose of it; to delete it from the list; to repair or alter it; or to move it from the place where it has traditionally belonged. However, permission is not required for minor repairs, which, nevertheless, must not be carried out in such a way as to reduce the cultural historic value of the object concerned: “I fråga om ett föremål i förteckningen, som inte ägs av någon enskild person eller släkt, krävs tillstånd från länsstyrelsen 1. för att avyttra det, 2. för att avföra det från förteckningen, 3. för att reparera eller ändra det, eller 4. för att flytta det från den plats där det sedan gammalt hör hemma . . . Tillstånd krävs inte för mera obetydliga reparationer. Sådana reparationer får inte utföras så, att föremålets kulturhistoriska värde minskas”.

²⁰³ *Lag om Svenska kyrkan* (in: SFS 1998:1591).

²⁰⁴ According to Alpin, op. cit., p. 18: “State ecclesiastical heritage grants totalling SEK 450 million were used in 2012, which is SEK 19 million more than in 2011. These grants cover around a quarter of the total cost of maintaining and investing in church buildings. During the year, the Central Board of the Church of Sweden decided on the distribution of SEK 617 million for 2013. During the autumn, work started in preparation for *Kontrollstation* (Checkpoint) 2014, the status review of the ecclesiastical heritage grant that is performed with the government every five years”.

distribution of the compensation between the dioceses, while the latter decide on the distribution within their area; on the State's part, the National Heritage Board expresses its views on the distribution in the country, while each County Administrative Board expresses its views on the distribution within the relevant county. As it has been emphasized:

When the State and the Church of Sweden were separated as of 1 January 2000, the Church became the owner of the church buildings and sites that had been inaugurated before that date. To compensate the Church for the costs of caring and maintaining this property, a special system was created of State support to the Church. The justification for this compensation, called church-antiquarian compensation constitutes an invaluable part of Sweden's cultural and historical heritage, not the faith of the Church as such . . . No other religious communities in Sweden are included in this system. (Jänterä-Jareborg 2010, p. 682)

It should be noted that all public subsidies to religious communities are funded by general tax revenues and other income of the State (Harding 2007, p. 353). In this respect, all registered religious communities qualify for public financial support; however, in respect to religious heritage compensation, only the Church of Sweden enjoys a privileged position (Jänterä-Jareborg 2010, p. 682). As it has been argued by the Swedish government before the ECtHR in the case of *Bruno v. Sweden*:

The obligation of non-members to pay church tax [burial tax] to the Church of Sweden was based on the notion that the Church . . . also performs other civil activities in the interest of society as a whole, *inter alia* the care and maintenance of old church buildings and other ecclesiastical property and the care of old population records. Considering that religious buildings and property form part of the Swedish cultural heritage which should be preserved for future generations and that the old population records are of importance to researchers and to the general public, the Government submit that it has been natural to demand financial contributions from both members and non-members of the Church of Sweden for the performance of those tasks.²⁰⁵

9.12 United Kingdom

In Great Britain the legislative framework²⁰⁶ for protecting the religious historic environment includes the *Ancient Monuments and Archaeological Areas Act* of 1979 (Chapter 46) which was partially modified recently by the *Historic Environment (Amendment) (Scotland) Act* of 2011; the *Planning (Listed Buildings and Conservation Areas) Act* of 1990 for England and Wales (Chapter 9); the *Planning (Listed Buildings and Conservation Areas) (Scotland) Act* of 1997 (Chapter 9); the *Planning (Northern Ireland) Order* of 1991; and the *Historic Monuments and*

²⁰⁵ *Bruno v. Sweden*, Application No. 32196/96 (Decision issued on August 28, 2001).

²⁰⁶ See all relevant legislation online at: <http://www.legislation.gov.uk>. Accessed on March 31, 2014.

Archaeological Objects (Northern Ireland) Order of 1995.²⁰⁷ Within this complex framework, two basic categories of protected religious structures co-exist: on the one hand ‘scheduled’ monuments designated by the State as archaeological sites of national importance, and on the other hand ‘listed’ edifices of special historic or architectural value, which are inscribed in lists compiled by the State.²⁰⁸

In relation to listed buildings, official exemption from State control and relevant restrictions (such as listed building consent; conservation area consent; building preservation notices etc., though not planning permission) is being provided for edifices in current use for worship, but only in cases where the relevant religious organization operates an independent permissions system equivalent to local authority controls (*see* Mynors 2006, pp. 553 f.; Hill 2007, pp. 222 f.; Doe 2011, p. 168). More precisely, ecclesiastical buildings in Scotland are exempt from listed building controls under section 54 of the aforementioned *Planning (Listed Buildings and Conservation Areas) (Scotland) Act* of 1997, in Wales the *Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order* of 1994 is still in force, whereas in England the 2010 *Exemption Order*.²⁰⁹ stipulates that the ‘ecclesiastical exemption’ is retained for places of worship which are “*for the time being used for ecclesiastical purposes*”²¹⁰ and is limited to specified denominations²¹¹ that have demonstrated that they have established acceptable internal procedures for dealing with proposed works to listed ecclesiastical buildings and unlisted buildings in conservation areas.²¹² In any case, the systems of control organised

²⁰⁷ *The Planning (Northern Ireland) Order 1991* No. 1220 (N.I.11) was last amended in 2010 (*Statutory Rules* 2010 No. 64), while the *Historic Monuments and Archaeological Objects (Northern Ireland) Order 1995* No. 1625 (N.I. 9) was amended in 2007 (*Statutory Rules* 2007/194 art. 2).

²⁰⁸ *See* above Chapter 6.

²⁰⁹ *Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010* in: *Statutory Instruments* No. 1176/2010 (Amendment in: *Statutory Instruments* No. 1806/2010); the exemption originates from the *Ancient Monuments Consolidation and Amendment Act* of 1913 (Hill 2007, p. 222 fn. 14).

²¹⁰ In the same vein, the aforementioned *Ancient Monuments and Archaeological Areas Act* of 1979 specifies in Section 61 (8) that it shall not apply “*to any ecclesiastical building for the time being used for ecclesiastical purposes*”; thereby, such buildings (as well as any object or structure fixed to these edifices) are exempt *ipso jure* from scheduling.

²¹¹ For the time-being, these denominations are: the Church of England; the Roman Catholic Church; the Methodist Church; the Baptist Union of Great Britain; the Baptist Union of Wales; and the United Reformed Church; *see Operation of the Ecclesiastical Exemption and related planning matters for Places of Worship in England, Guidance* (2010) Department for Media, Culture and Sport, p. 7. Other denominations do not fall within the exemption and full listed building or conservation area controls apply; similarly, other faiths such as Judaism and Islam (and thus the relevant synagogues and mosques) also fall within secular control.

²¹² The relevant denominations largely operate a two tier system, with representatives of the statutory bodies attending the lower board, the approval being issued by the higher one; this approval is called a ‘*faculty*’ (ecclesiastical license) by the Church of England, the Roman Catholic Church, and the Methodists. Within the Baptist Union of Wales and the Baptist Union of Great Britain applications are made to the *Listed Buildings Advisory Committee*, which, in addition to the

by the exempt denominations should comply with the current *Government Code of Practice* (2010) in terms of due process, rigour, consultation, openness, transparency and accountability.²¹³ According to the *Code's* provisions:

- A denomination's internal system of control over works to its listed buildings should embody the following principles:
1. All proposals for internal and external works to a listed church, churchyard and/or churchyard structure, which would affect their character as a building of special historic, archaeological, architectural or artistic interest should be submitted for approval to a body or person independent of the local congregation or community proposing the works in question.
 2. The decision-making body, when considering proposals for works, should be under a specific duty to take into account, along with other factors, the desirability of preserving ecclesiastical listed buildings, the importance of protecting features of special historic, archaeological, architectural or artistic interest and any impact on the setting of the church.
 3. The decision-making body should either include, or have arrangements for obtaining advice from, persons accredited to relevant professional standards in conservation, archaeological and planning matters.²¹⁴

Furthermore, even for the exempt denominations, listed building consent or conservation area consent is required for the demolition of a religious edifice, except for the Church of England, the churches of which are being demolished according to the provisions of a pastoral or redundancy scheme under the *Mission and Pastoral Measure* of 2011.²¹⁵ Besides, all works to buildings belonging to the Church of England (whether listed or not) are governed by the Church's very own *faculty jurisdiction* system (Mynors 2006, pp. 567 f.; Hill 2007, pp. 220 f.), while the carrying out of alterations to cathedrals is governed by the provisions of the current *Care of Cathedrals Measure* of 2011.²¹⁶ Particularly in relation to the English 'mediaeval cathedrals', which are located "in some of the most important archaeological sites in the country, not only because of their religious and funerary archaeology but because they often stand in locations which have seen human activity since prehistory",²¹⁷ as it was pointed out, more than a century ago, in comparison to the French paradigm:

Let us take for example the case of the most important class of ancient monuments in France and in England, the mediaeval cathedrals. In the former country the cathedrals are state property and the upkeep of them and of the episcopal palaces accounted in the French

church representatives, includes representatives of either English Heritage or Cadw, Local Authorities and the National Amenity Societies (information available at: www.methodist.org.uk). In relation to the Church of England see Hill 2007, pp. 220 f. (updated information available at: www.churchcare.co.uk).

²¹³ *Annex A to the Operation of the Ecclesiastical Exemption, op. cit.*, pp. 27–9.

²¹⁴ *Ibid.*, p. 27.

²¹⁵ Available online at: <http://www.legislation.gov.uk/ukcm/2011/3>. Accessed on March 31, 2014.

²¹⁶ The *Care of Cathedrals Measure 2011* (No. 1) passed by the General Synod of the Church of England to consolidate, with corrections and minor improvements, the *Care of Cathedrals Measure 1990*, the *Care of Cathedrals (Supplementary Provisions) Measure 1994* and the *Care of Cathedrals (Amendment) Measure 2005*, and related enactments; cf. Hill 2007, pp. 298 f.

²¹⁷ English Heritage (2013) *Scheduling Selection Guide. Religion and Ritual post-AD 410*, p. 15.

budget of 1896 for nearly sixty thousand pounds. In England the cathedrals and their adjuncts are independent of the state, and are administered out of the proceeds of endowments, from some of which the institutions have been benefiting for something like a thousand years. When there is some sudden or special demand, as for repairs or restoration, recourse is had to the freewill offerings of the faithful, and if government add a subsidy this comes rather as a private subscription than as a matter of official routine.²¹⁸

Today, even if the Church of England is still not receiving any direct public funding and, therefore, the responsibility for the maintenance of the Church's built heritage remains with each local church community (Haynes 2008, p. 12), there is a plethora of available funding schemes, that are being significantly subsidized by governmental and non-departmental public bodies, such as the '*Churches Conservation Trust*' co-funded by the Department for Media, Culture & Sport and the General Synod of the Church of England,²¹⁹ the 'Repair Grants' of the *National Churches Trust*,²²⁰ the 'Grants for Cathedrals' scheme of the *English Heritage*,²²¹ and the 'Listed Places of Worship Grant Scheme'.²²² In addition local 'Heritage Partnership Agreements' are signed where appropriate, involving owners, local planning authorities and amenity societies.²²³ In Scotland, subsidies are allocated via the 'Repair Grants for Places of Worship' scheme, operated by *Historic Scotland*, the latter being also supportive to the 'Church Buildings Maintenance in Scotland' Project in conjunction with the Church of Scotland, the Scottish Episcopal Church and the Roman Catholic Bishops' Conference of Scotland.²²⁴

²¹⁸ Baldwin Brown G. (1905) *The care of ancient monuments: an account of the legislative and other measures adopted in European countries for protecting ancient monuments and objects and scenes of natural beauty, and for preserving the aspect of historical cities*, Cambridge University Press, p. 149.

²¹⁹ The Churches Conservation Trust (formerly the Redundant Churches Fund) is the leading body conserving England's historic redundant churches (cf. *Redundant Churches and Other Religious Buildings Act 1969*, Chapter 22). The Trust was established by the *Pastoral Measure* of 1969, which was issued by the Church of England and approved by the Parliament; see <http://www.visitchurches.org.uk/>. Accessed on March 31, 2014.

²²⁰ The National Churches Trust (formerly the Historic Churches Preservation Trust and the Incorporated Church Building Society) was established to raise funds and provide practical assistance to help finance structural repairs to churches, chapels, meeting houses and other places of worship in England and Wales that are over 100 years old; see <http://www.nationalchurchestrust.org/our-grants/repair-grants>. Accessed on March 31, 2014.

²²¹ According to the English Heritage (2013) *National Heritage Protection Plan 2011–2015. Overview Report*, p. 25: "English Heritage is currently grant aiding 22 Places of Worship Support Officers throughout the country. We have so far invested £ 2.17m in Support Officers. We know those Officers have helped congregations secure at least £ 13m in grants, mostly for repairs but also for some widening of use and improved access for non-worshippers. 1574 congregations have received on site visits and ongoing advice . . . More than 6,500 individuals have benefited from conferences, workshops and other training". Further information available online at: <http://www.english-heritage.org.uk/caring/places-of-worship>. Accessed on March 31, 2014.

²²² The 'Listed Places of Worship Grant Scheme' allows VAT on eligible repair or maintenance of protected buildings to be reclaimed in grant, subject to certain conditions; see www.lpwscHEME.org.uk. Accessed on March 31, 2014.

²²³ Cf. Hill 2007, p. 230.

²²⁴ See <http://www.scotlandschurchestrust.org.uk/>. Accessed on March 31, 2014.

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Chapter 10

Conclusion

*I love the church—its hexapteryga,
the silver of the vessels, its candelabra,
the lights, the icons, the pulpit
In church, 1912
C. P. Cavafy*

This study endeavored to give a thorough account of the (historical and current) legal concept of religious cultural heritage within the European continent, *defining* it as the variety of sacred cultural elements emanating from the different religious traditions of the peoples of Europe, which are deemed worthy of protection and preservation due to their outstanding European value, in terms of social, cultural and religious significance. However, the most important finding to emerge from this study is that there is a shared legal ethos in Europe that imposes a duty of appropriate care of this heritage as an invaluable European *cultural capital*. The relevant venture must contemplate the *sui generis* nature of this *capital*: like any other type of asset, it may deteriorate or fade over time, necessitating investment in its preservation or refurbishment; nevertheless, like no other, this particular *capital* maintains a distinct cultural value, as it contains an additional characteristic of ‘sacredness’ expressed in the form of its ‘religious character’, the latter being analyzed, in every individual case, as a triptych of religious memory, religious aesthetics and religious beliefs. The stronger the unity between these three elements, the more promising the survival and enhancement of the overall *capital*. It is true that the value of ‘sacredness’, which is often associated with the concept of “seeing holy places, times and rituals as windows on to another realm” (Scruton 2003, p. 8), outweighs any other economic input:

Consider a historic church building. It may have a potential sale price as real estate, and a non-market value measured, for example, by the willingness of people to pay to see it preserved. But these measures of its economic value may be incapable of representing the full range and complexity of the cultural worth of the building: it may have religious significance unable to be expressed in monetary terms. (Throsby 2011, p. 142)

In this rationale, religious cultural heritage can be defined as an asset that embodies (or gives rise to) cultural values independently of whatever economic value it may possess (*see* Throsby 2011, p. 143). Indeed, as it has been clarified by von Mises (1996, p. 215):

There are things, which cannot at all be evaluated in money, and there are other things which can be appraised in money only with regard to a fraction of the value assigned to them. The appraisal of an old building must disregard its artistic and historical eminence as far as these qualities are not a source of proceeds in money or goods vendible . . . Let us assume that a town council has to decide between two water supply projects. One of them implies the demolition of a historical landmark, while the other at the cost of an increase in money expenditure spares this landmark. The fact that the feelings which recommend the conservation of the monument cannot be estimated in a sum of money does not in any way impede the councilmen's decision. The values that are not reflected in any monetary exchange ratio are, on the contrary, by this very fact lifted into a particular position which makes the decision rather easier. No complaint is less justified than the lamentation that the computation methods of the market do not comprehend things not vendible. Moral and aesthetic values do not suffer any damage on account of this fact.

Notwithstanding the above, religious cultural heritage is, in any case, a source of local development that has positive effects on the economic vitality of various sectors (restoration, urban regeneration, tourism, etc).¹ The findings of this study suggest that the legal protection of religious cultural heritage is not an impediment to development, but rather a support to the wealth of a country and its various communities in the face of globalization, both in terms of competitiveness and attractiveness. Thus, religious cultural heritage could be understood both as an expression of the several religious identities that must be respected in order to establish a dialogue between religious communities for building tolerance, as well as a factor for development, allowing different religious communities to express their social vision and to project it into the future. Respect and appreciation of cultural diversity implies a commitment to human rights and fundamental freedoms as well as to intercultural dialogue, which encompasses inter-religious dialogue, inseparable from a democratic framework, conducive to social stability, peaceful enjoyment of property and economic growth. Besides, an additional implication of these findings is that the scope of all relevant European cultural policy priorities, both by governments at national level and by intergovernmental organizations at a broader international level, should transcend the aesthetic or functional values of this heritage, and acknowledge also its unique, i.e. religious, character, which constitutes an essential feature of its overall cultural structure. Therefore, there is a definite need for all the involved stakeholders to recognize that the tangible and intangible elements of this particular heritage are not just cultural goods with a

¹ Cf. the wording of the Declaration: *Religious, Cultural and Historical Heritage as a Foundation for More Intensive Cooperation amongst States*, 10th UNESCO Summit of Heads of State of Southeast European Countries, Mostar, 3 June, 2012, available online at: www.unesco.org. Accessed on March 31, 2014.

patina of religiosity, but rather actualizations of the notion of ‘sacredness’.² Our grasp of the latter enhances our understanding of the impalpable features of religious cultural heritage throughout Europe and explains its importance as a visual and intellectual feast, in spite of one’s personal (dis)beliefs or impressions of divinity. As it is argued, one can be left cold by the religious doctrines, yet at the same, be astonished at the ways religions have made use of art and architecture, beyond any theological apparatus:

In the secular parts of the world, it is common, even among unbelievers, in fact especially among them, to lament the passing of the great days of religious architecture. It is common to hear those who have no interest in the doctrines of religion admit to a nostalgia for ecclesiastical buildings: for the texture of stone walls on hill-side chapels, for the profiles of spires glimpsed across darkening fields and perhaps for the sheer ambition involved in putting up a temple to house a book (Judaism)... (de Botton 2012, pp. 255–257)

For this reason, the current study, which adds to a growing body of literature on the aspects of the aforementioned cultural and aesthetic, and at the same time profoundly spiritual and solemn, virtues of Europe’s cultural capital, has gone some way towards enhancing our legal understanding of the shared European sense of responsibility for the preservation of these virtues. Obviously, the active involvement of the European governments in the field of heritage preservation is of paramount importance, albeit State interference, though necessary, is not always a panacea. More than 100 years ago, Baldwin Brown emphasized that:

[A]cross the Channel government is officially charged with control, or authorized to exercise such control if it desire, over practically all the ecclesiastical monuments of the country, whereas in England the direct concern of the state in this extensive and important class of monuments has no effective existence. It must be repeated however, that, as in the cases of learning and religion, so here there is no reason to conclude from government inaction in Britain that French cathedrals and other churches are better cared for than our own. The point is that with ourselves the sphere of government interference in the matter of monuments is far less extended than among our neighbors across the narrow sea, but the monuments themselves do not necessarily suffer.³

The need for preserving religious cultural heritage implicates also the involvement of all associated non-State actors: religious communities, academic institutions, property owners, private funding bodies, charities and other interested partners. The public obligation of the religious communities in particular, correlates also with their autonomous right to act on an equal basis within the public sphere, in order to perpetuate their own cultural treasures according to their internal laws, in view of the principle of State’s neutrality. Still, as this study has argued, only a

² In this rationale we should acknowledge, for example, architecture, which is an integral part of religious practice and worship, “as what we might term” according to Brown (2000, p. 199) “a genuine medium of the sacred rather than a mere housing for it”.

³ Baldwin Brown G. (1905) *The care of ancient monuments: an account of the legislative and other measures adopted in European countries for protecting ancient monuments and objects and scenes of natural beauty, and for preserving the aspect of historical cities*, Cambridge University Press, p. 150.

positively neutral, and not an indifferent, State can protect effectively the religious cultural treasures that it encompasses and, hence, be in the position to safeguard the diversity, both in religious and cultural terms, of the heritage located within its territory. Indeed, within the cultural sphere, which is located at the periphery of the State's sovereignty and includes *inter alia* the protection of heritage assets, each State must welcome the various cultural goods that have been created by the different religious traditions, and shelter them under its aegis as protected elements of a common European heritage. The crucial point is to establish efficient cultural policies that strike a careful balance between the collective freedom of religion and the protection of the fundamental rights of the individual.

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