

Cultural Resource Listing in Germany

Just how necessary legal protection is for our cultural heritage became very clear in divided Germany in the post war years. In the young Federal Republic of Germany, where it was initially thought that protection of monuments could be left to the discretion of existing forces in society, great numbers of valuable historic buildings fell victim to demolition during the decades of reconstruction. In the German Democratic Republic, on the other hand, significant cultural monuments were not infrequently given over to ruin because of chronic shortages of materials in the socialist planned economy.

But even today without state protection many historic objects would be irretrievably lost as sources and evidence of our human history. Protection of the cultural heritage is therefore laid down as a public responsibility in the constitutions of most of the states *Länder* (states) the Federal Republic of Germany.

1. The Term Monument

But what is to be considered “cultural heritage”? How should the term monument be defined or, to put it another way, how can that which is worth preserving be distinguished from that which is not worth preserving?

In Germany monument protection and maintenance fall under the legal jurisdiction of the individual *Länder*. Although the monument protection laws of the different *Länder* have a uniform regulative purpose, there is no uniform definition of the object to be regulated.

A crucial term, common to all the laws, is the cultural monument. In several of the laws it is defined simply as a “thing, whole thing, or part of a thing”, in some it is restricted to “things created by man from a past epoch.” Several laws differentiate further by distinguishing between built monuments and movable or immovable field monuments. The field monuments can again be classified as archaeological or paleontological monuments that are or were hidden in the ground. Cultural monuments also include monument ensembles (historic districts) as well as movable things that are not built monuments or field monuments.

But what turns a thing into an object worthy of protection? Which characteristics, what quality must an object possess so that we consider it necessary to place it under legal protection?

The answer to these questions is based on the realization that present-day conditions often have derived from the historic context. Thus the crucial function of the cultural monument is to document the cultural development of man, to reveal the intellectual, technical and artistic work of our ancestors and to make it possible to experience history through contemplation of the

particular object. There is no doubt that monument protection and maintenance serve to protect objects of scientific research. But it is of prime importance to preserve the illustrative and identifying materials of the past for the general public and, not least, for the generations to come.

Thus another term that is central to the monument protection laws of all the *Länder* is the public interest in preservation. Within the context of what I have said before, it is the documentary value of an object that determines the extent of public interest in its preservation. This value has an inherent corrective function which keeps the term monument from getting out of hand.

Not every man-made object should already be placed under protection as a monument just because it exhibits a certain age. On the contrary, the critical factor is the information it provides about life, work and living conditions from past epochs. Public interest in preservation can thus be assumed if an object is illustrative of historic events or artistic, scientific, technical, folklore or urban design developments. Based on these criteria the monument value of an object is also wholly verifiable in court, in the interest of comprehensive legal protection as guaranteed by the constitution. In the dry words of the law (here for instance the Thuringian monument protection law), the term cultural monument is defined as follows:

“Cultural monuments in the sense of this law are things, whole things or parts of things whose preservation for historic, artistic, scientific, technical, folklore or urban design reasons or for reasons of historic townscape maintenance is within the public interest. Monument ensembles (historic districts) (paragraph 2) and archaeological monuments (paragraph 7) are also cultural monuments.”

2. Placing a Monument under Protection

How can effective monument protection be organized procedurally?

All the monument protection laws of the German *Länder* provide for registers (sometimes called monument books) or lists in which cultural monuments worthy of protection are enumerated, but the legal significance of the registration of an object varies from *Land* to *Land*.

Basically we distinguish between two different procedural systems, the constitutive system for placing a monument under protection and the so-called informative or declarative system. How are these to be understood?

2.2. The Constitutive System

The monument protection laws of several *Länder* follow the constitutive registration system: a monument is subject to the legal protection provisions only with registration in a monument list or through the decree of the public preservation agency prior to registration. Through its registration a thing is legally and obligatorily defined as having the character of a cultural monument. Registration simultaneously actuates the obligation to maintain the monument and the prohibition of changes. In these cases registration (or in some *Länder* a decree prior to registration) is therefore characterized as an encumbering administrative action.

An administrative action is understood as a decision or other sovereign measure which a public agency makes for regulating an individual case in

the field of public law and which has an immediate external legal effect which might infringe the rights of a third party.

The fact that registration is characterized as an administrative action is significant because of the possibilities that an affected owner has for legal relief: an encumbering administrative action can be appealed before the administrative court.

In some cases the registration procedure with constitutive results can be too protracted to prevent threatened alteration or even demolition of an object that is worthy of preservation but has not yet been placed under protection. Therefore almost all of the monument protection laws that follow the constitutive registration system also include provisions for provisional protection. After such protection has been ordered – likewise through an administrative action – the object is considered registered for a certain length of time.

2.3.j The Declarative System

In other German *Länder*, in contrast, monument protection functions *ipso jure*. This means that application of the monument protection law to an object follows directly from the existence of the characteristics that meet the legal definition of monument. The execution of an administrative action is not needed in order for the monument protection provisions to be applicable. Rather, every object that fulfills the blanket clause of the definition is protected by the law, regardless of whether this object has already been listed in a monument register or not.

According to the declarative system registration thus does not legally bindingly determine whether an object is a cultural monument. Registration is directed to clarification and not to establishment of legal consequences. It does not have the significance of regulating an individual case and thus does not represent an administrative action in the sense of administrative procedure. Registration merely discloses that in the judgement of the responsible public preservation agency a particular object is a cultural monument worthy of protection. Thus registration has a purely informational character, intended to inform anyone with authority over an object as well as the public agency responsible for building permits.

The informational character of registration has an effect on possibilities for legal relief for an affected party: because the administration does not intervene in his rights, but rather merely informs him of the legally defined monument character, he does not have – at least not at this point in time – a right to appeal the registration.

However, there is no disadvantage in this for the encumbered owner. In the constitutive system for placing an object under protection the administrative action can no longer be appealed after a certain period of time as expired. Thus the affected party must react immediately in order not to lose his possibilities for legal relief.

In contrast a party affected by the declarative system can appeal the public agency's assumption of monument character for an object as soon as he is concretely burdened by any administrative measure that results from reference to the monument character. In general this case arises when an owner wants to make exterior or interior changes to a monument. As long as

such measures do not take place the registration as such does not develop any encumbering effect.

The aforementioned applies to built monuments and archaeological monuments. Several *Länder*, however, do make the protection of movable monuments dependent on their registration. Additional restrictions on registration serve to limit the otherwise incalculable number of movable objects that could be protected.

3. The Legal Consequences of Placement under Protection

What are the effects of registration of an object in a monument list? What consequences are associated with legal placement under protection?

I have already explained the educational (in the broadest sense of the word) effect with regard to our cultural past, in answer to the question of how to define the term cultural monument.

3.1. Prohibition of Adverse Affects

From a legal point of view, placement of an object under protection primarily actuates both prohibitions of adverse affects and preservation requirements. In order to make monument protection effective, the laws of most of the *Länder* include comprehensive prohibitions against changing the state of a cultural monument. The disadvantage of the changes is not at issue here. Even the best intentions of the concerned party are no guarantee that his actions are correct and justified for a monument. Therefore the legislators have made all planned changes subject to a prophylactic prohibition with a permit system.

Not only destruction of the monument or of its historic fabric is prohibited but also any change to its existing state. The intent of monument protection is to document artistic, architectural, social and historic epochs and developments. This is only possible if the design and fabric of a monument is preserved with as little change as possible.

The decision about whether a planned measure that would change a monument is to be permitted or not, given the interests of preservation, devolves on the responsible public preservation agency. The prerequisites for permits are differently regulated in the monument protection laws of the various *Länder*. Several laws link the granting or withholding of permission purely to the existence of reasons for monument protection. Other laws combine preservation concerns with other public interests. According to the latter, measures that have an adverse affect on the public interest in preserving a monument without changes can nonetheless be permitted if other public interests (for instance planning concerns) carry more weight in the individual case. Especially in procedures involving building permits various interests must always be weighed. These procedures include the monument permit process and are required for all large construction changes.

3.2. Preservation Requirements

The public interest in preservation of monuments is not only threatened by intended changes but also by the omission of necessary maintenance work. The monument protection laws therefore standardize positive requirements for preservation as well as prohibitions against adverse affects.

There are two parts to these regulations: first, a standard general preservation obligation which makes owners and sometimes also possessors responsible for preserving an object in a state that is appropriate for a monument and for maintaining it properly.

Second, if the obligated party does not fulfill the general preservation obligation, all the monument protection laws grant a public agency the possibility to order certain maintenance work at the cost of the obligated party.

However, almost all the monument protection laws limit the preservation obligation, or at least the obligation to bear its costs in case a public agency orders the work, to what can be reasonably expected of the obligated party. To compensate for the obligations and burden that are connected with a monument the state provides support in the form of public grants, financial assistance and tax advantages.

The monument protection laws also have an effect on the allowable use of built and archaeological monuments. Experience in the field of preservation has shown that unused historic buildings are more easily given up to ruin than buildings that are in use. Appropriate use of historic buildings is an aim of monument protection and maintenance. The original use of a building is part of its historic significance, and moreover it usually represents the most "gentle" type of use. Where preservation with the original use is not possible at least the use that best guarantees preservation of a building's historic fabric should be the goal.

3.3. Further Legal Consequences

Further legal consequences of placing a monument under protection are contained in the obligation to inform the responsible public agency of existing defects on a monument and of any intention to sell the property. Most of the monument protection laws also provide the staff of the public preservation agency with the right to enter a property. In contrast none of the laws of the *Länder* call for a compulsory order making public access possible.

Finally, the *ultima ratio* of monument protection is the possibility of expropriation with compulsory compensation, if the preservation of the monument cannot be guaranteed in any other way or a danger to its continued existence cannot otherwise be prevented. Expropriation almost never occurs in practice, however, since money for compensation is usually not available.

4. Economic Effects of Placement under Protection

The laws for monument protection also give rise to various consequences from an economic point of view. Economic burdens can arise through the restriction of the legal status and the imposition of public obligations. To some extent the placement of a building under protection has a negative influence on the market value of a property. In addition there are increased costs to cover preservation. Often a potential increase in income is prevented by the limitations on use, so that an owner is not allowed to change to a type of use (for instance commercial use) that would produce more income. On the other hand for certain types of buildings, such as villas or apartment buildings (particularly in cities), monument status can increase the value thanks to tax advantages available for historic buildings.

Monument character is a prerequisite for reductions in income tax, property

tax or inheritance tax, as well as for eligibility for different state, communal or private support programs.

Achieving a just balance between the various and sometimes opposing interests – namely the general public interest in the preservation of monuments as evidence of past epochs on the one hand and the interest of the owner in the largely undisturbed pursuit of his rights on the other hand – is the often difficult job of the public preservation agency and unfortunately also frequently of the relevant courts.

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Curriculum Vitae

Born in 1947 Werner von Trützscher visited school in Bonn /Germany and Karachi/Pakistan. After military service he studied law at Munich University where he passed his first legal state examination in 1972. From 1972 to 1975 he worked as a junior lawyer in the Bavarian State civil service. Werner von Trützscher acquired a doctor's degree (Ph.D.) in international law at Munich University in 1974 and passed his second legal state examination in 1975. During the next two years he worked in an internationally working law firm and with an insurance company before joining the Bavarian Ministry for Education and Culture as a civil servant. He served for 15 years in the ministry in different departments only interrupted by a four year period of service with the Bavarian State Office for the Preservation of Monuments. After the unification of Germany Werner von Trützscher became head of the department for universities in the Thuringian Ministry for Science, Research and Culture. In 2000 he took charge as the director of the Thuringian State Office for the Preservation of Monuments.