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EUROMED HERITAGE II

UNIMED CULTURAL HERITAGE II

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WP1 (Task. 1.1)

A comparative analysis of national regulations for the protection of the Cultural Heritage.





INTRODUCTION

The work which follows has been done for the MEDA project Euromed Heritage II by Elena Ferrari (CRAS). As a matter of fact, the project foresaw a comparative analysis of the legislation on Cultural Heritage of ten countries, namely: Algeria, Egypt, Jordan, Italy, Lebanon, Morocco, Palestinian Authority, Portugal, Spain, Syria, Tunisia, Turkey. The legislations of the majority of these countries had been already examined as part of the project UNIMED AUDIT by Dr Federica Mucci, University of Roma II “Tor Vergata” – Roma which concluded her work in 1998.

Thus, the main effort done for phase II was to introduce new countries in the analysis already carried out and to complete it with the laws launched in the period between 1998 - 2004.

THE PROTECTION OF THE CULTURAL HERITAGE AS A STATE RESPONSIBILITY

The adoption of regulations for the protection of the cultural heritage within a State is, first and foremost, an expression of the public’s interest in safeguarding certain properties. Determining the tasks the State should carry out for such protection, in some cases at a constitutional level, is therefore bound to reflect the form taken by this interest. A comparison between the national legislations under review, carried out according to parameters of confrontation that refer to the principal aspects of protection, reveals the different features which legal protection has assumed in each State. The comprehensive analysis of these regulations, on the other hand, enables us to identify a number of important common elements, and in particular significant trends, which occur within the legislations and express a new and more complex view of public interest in the protection of the cultural heritage.

The State - as the institutional organization of society - has, over time, paid attention to the protection of the cultural heritage; this attention reflects the progress, so far incomplete, of national communities’ awareness of the “public” importance of the material expressions and testimonies of their culture. The legal consequence of this growing awareness is, firstly, the introduction of single penal or administrative



measures and subsequently, of systematic regulations, further adapted through successive amendments and additions as times and requirements change.

In the majority of the regulations analysed, the possession by public bodies of the properties to be protected is not held to be both indispensable and sufficient on its own to safeguard their cultural value, although in some cases it is recommended as a general system. The State's purchase of cultural properties is favoured by the right of first option at the moment of sale or export and the faculty of expropriation, if held to be necessary in the public interest. State purchase, besides, takes place automatically in the case of archaeological finds; however, the possession of cultural properties by private individuals is also allowed, though their freedom to dispose of them is limited by State control. Such control is exercised over all cultural properties, whether in public or private possession, and is aimed mainly at preventing acts which, by their nature, could alter the character of the properties under protection.

Since there is a distinction of concept between the economic value of the property and its "cultural", artistic, or - broadly speaking - documentary value, which is protected by legislation, the possession of the properties may vary, while the State function of protection and enhancement remains unaffected. In this connection it should be noted that several more recent regulations favour greater interaction between "public" and "private", going well beyond the State's restraint of the private owner's faculty of disposing of a certain property. Such interaction would mean that the latter could be involved in the State's function not only by having access to financing by special public funds, but also by playing a decisive role, both in the planning and in the executive phase of protection.

Even before controlling, and therefore submitting to authorisation, any act that potentially modifies the condition of places or objects, basic regulations for the protection of the cultural heritage provide for State registration and classification of properties at different levels, according to their importance or characteristics. Public authorities identify them for registration according to indications supplied by legislative texts, which briefly describe items whose exact definition is the task of specialized, non-legal, knowledge. In many cases, in the interests of protection, properties dating to certain eras of the past are assumed to be valuable, without



excluding that those of a later date may also be considered so on the basis of specific valuation.

The identification of properties by public bodies through registration has a dual effect. On the one hand it serves and defines the sphere of application of protection regulations, when registration, classification and declaration are seen as creating public interest in protection and the necessary legislative constraints. When seen simply as an opportunity to declare such an interest, it plays an important role in informing those who are directly interested and third parties. On the other hand, however, inventorying, and hence acquiring, non-generic knowledge of the heritage, is in itself a form of protection of cultural values.

Inventorying also becomes important in the exercise of public control over export. Such control, which represents the most obvious means of protecting movable property, is generally seen as an indication of a more or less “protectionist” policy, according to the degree of severity applied in preventing the property leaving national territory. It should be noted, however, that the control of export does not have a “protectionist” meaning in a narrow nationalistic sense. Although public interest in a property not leaving the country and thus impoverishing its cultural heritage is principally to be taken into account, the definition, and respect, of legal parameters for the export of cultural properties are - according to international conventions - an obligation, and not a right, of the State.

This obligation, laid down mainly by the Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the UNESCO General Conference held in Paris on 14 November 1970 and signed by all the States whose regulations are being considered here, is not founded only on the fact that international co-operation in opposing the illicit trafficking of cultural properties has been proved indispensable. Beside the obligation of co-operation between the contracting States to ensure that protection measures are effective, there has also been envisaged an obligation *erga omnes* that protects the interest of the whole international community, and not merely of one nation, and therefore is not of a protectionist type. This affirms that each State has the duty to protect its heritage - i.e. the cultural properties existing on its territory - against the dangers of theft, clandestine excavations and illicit export, since they represent a people's civilisation



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and culture, and assume their true worth only if their origin, history and context have been ascertained as precisely as possible.

The defence of the cultural heritage by imposing limits on export can thus, if carried out satisfactorily, become more significant than simply ensuring that the properties do not leave the national territory. Such a result is assured if their material protection is considered indispensable for the full knowledge and appreciation of their context, with a view to enhancing their value. The regulation of the sale of cultural properties between private citizens within a State, being an integral part of some of the basic regulations on the cultural heritage examined in this analysis, can also be seen as protecting the interest in safeguarding all information relating to the identification and conservation of these properties.

Evolutionary trends in national legal protection, taking international conventions into account.

a) With reference to the notion of “cultural heritage”:

The growing interest of the whole international community in the protection of cultural properties, as expressed by international conventions, reveals an openness towards the world outside the State and an evolution of national protection systems. It may also, however - as the example mentioned above shows - affect the form and substance of national regulations. The very notion of a “cultural property”, and hence of a “cultural heritage”, understood as a totalizing definition of diverse qualifications (artistic, historical, archaeological, ethnographic, scientific, etc.,) was initially affirmed in international conventional law when UNESCO concluded the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed by nearly all the States whose regulations are the object of this analysis. The notion of “cultural heritage” was also adopted by other international organizations such as the Council of Europe, specifically competent on the subject, or the European Community, whose interest in it is limited. Only a few of the States under review, however, are members of these organizations.

It should be noted that such a totalizing notion of “cultural heritage” seen as inspiring the basic scheme for protection does not appear in all the legislations analysed; some

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of these are directed almost exclusively towards the safeguarding of historical and archaeological properties, which is naturally the priority objective of State protection. Some of the national regulations considered here, on the other hand, are at variance with the internationally accepted notion of heritage in that they consider peculiar aspects of cultural life that are not, for the moment, protected by conventional instruments. Here we are specifically dealing with cultural properties defined as either “traditional” or “immaterial”, characterized as “living” cultural expressions, which cannot be crystallized in the form of a material object.

In the texts of some of the legislations studied other elements also appear, revealing trends in national regulations which are evolving in conformity with rules elaborated at the international level. In particular some of the more recent regulations evidently refer to the definition of properties given by the Paris Convention of 1972 Concerning the Protection of the World Cultural and Natural Heritage, to which all the States considered here are contracting parties.

The similarity between normative definitions is not, in itself, particularly significant, since both international and internal provisions merely give a sketch, as we have said before, of a reality which can be more precisely defined by systems of knowledge other than the law. But it does appear singular that the universal value of a property is in some cases considered by internal regulations as a reason for protection besides its national value (**Tunisia**). Since the sole body responsible for the interest in the protection of the universal value of properties is the international community, mentioning it as the ground for applying national protection can only mean confirming the respect due to an international obligation sanctioned by the Paris Convention of 1972. We may see here a further sign of the fact that by now, alongside their function as guardians of their national cultural heritage, the States, being delegated to do so, also carry out the function of protecting the heritage of the world.

b) With reference to the form and implementation of the task of protection, conservation and presentation:

A look at the developments of international law on the subject, in some respects subsequent and in others previous to the parallel development of internal regulations



shows us - beside changing definitions of the object to be protected - the progress made by national regulations in determining the State function of protection. Where former regulations were aimed basically at the protection and conservation of cultural properties, meaning by this their defence against intentional modification or unintentional deterioration, more recent legislation often stresses the task of presenting properties: at an international level, the Paris Convention of 1972 refers to the protection, conservation and presentation (enhancement) of the cultural heritage. Naturally, presentation does not mean replacing the need for the material conservation of the heritage in all its authenticity, but rather satisfying it through means more suited to expressing its cultural value in a complete sense. In particular, presentation involves adopting measures aimed principally at ensuring that cultural properties are accessible and hence available for the enjoyment of the public, but also that their management is programmed within the wider sphere of culture, and not only of culture, of their country.

As part of the national regulations here examined, such measures sometimes consist - once again - simply in imposing restrictions on the faculty of disposing freely of items of private property and making them, to some extent, accessible to the public. On the other hand, there are also regulations which operate a reorganization of administrative procedures, aimed at programming the management of the cultural heritage while assessing social, economic and ecological requirements with a view to achieving culturally sustainable development.

THE COMPONENTS OF THE HERITAGE AND THEIR IDENTIFICATION

Today the expression “cultural heritage” stands, practically everywhere, for a single notion indicating different realities which have their “cultural importance” in common. The assessment of this cultural importance is the result of studies in the fields of knowledge each dealing with a specific aspect (archaeology, anthropology, history, history of art, the natural sciences...). Where, however, a particular legal regime is applied to the cultural heritage, it becomes the task of law to supply the necessary elements to identify its field of application.



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This does not mean that protection legislation provides a precise definition of what we should understand by “cultural heritage”. The notion of a cultural property can only be an “open” one, since it must gradually admit the definitions which specific branches of knowledge decide to attribute to it. It should be noted here that the contemporary trend is to reject a certain elitist interpretation of culture, and hence of its material expressions, according to a view that takes the life of society in its global sense into account. Such considerations, in any case, only make more evident the need to determine exactly the field of application of the legal regulations protecting the heritage.

From the comparison between the regulations which are the object of this analysis there emerges, in the first place, an interesting fact: reference to a single legal notion of “cultural heritage” is not common to all the regulations examined, and has, in any event, been acquired gradually. In a number of cases it is evident that basic regulations, dedicated in the first place to the protection only of certain categories of cultural properties, have been altered to include new categories, in line with growing public interest in their protection. This is the case, for example, of Algeria, Portugal, Spain, Turkey, Morocco and Tunisia, which have recently adopted comprehensive protection regulations, reforming those that preceded them, that were mainly focussed on the protection of the archaeological heritage.

The Tunisian Law of February 24, 1994, by referring to an archaeological, historical and folk-art heritage, basically covers every category of cultural properties; indeed, it opens with a very detailed definition of the protected items, specifying aspects which generally remain implied or imprecise. It explains that properties to be protected may have already been discovered or are yet to be discovered, may be either on land or in the sea, and may have a national or a universal value. There is no doubt, therefore, that although there is no reference to a single notion of cultural properties, the field of application of the regulations is as wide as in the other two cases, where there is an explicit reference to such a single notion.

Basic Italian regulations, adopted in 1939, already referred, in substance, to the whole of what is today commonly understood as “cultural heritage”. These regulations, while not citing the term “cultural properties”, only adopted by Italian legislation after the setting up of the Ministry dedicated to them, in reality applied to all objects



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that present an artistic, historical, archaeological or ethnographic interest. Adopted at nearly the same time as regulations for the protection of natural properties (at a much earlier date than the comprehensive protection regulations mentioned above) Italian basic regulations, successively added to and altered more than once, have recently been collected in a single text, the **Legislative Decree October 29, 1999, n. 490**, formally dedicated to provisions concerning cultural and natural properties and containing an even more comprehensive definition of cultural heritage.

Turkey and Morocco have also adopted a comprehensive law which rules the whole Cultural Heritage field.

As a matter of fact, the Turkish **Law on the Protection of Cultural and Natural Assets 23 July 1983, n. 2863** as well refers to the “cultural heritage” as a whole, including in its definition not only “the movable and fixed cultural assets” but also the natural ones. It gives also a specific definition of both cultural and natural assets, protected sites and protection areas, specifying what is meant by these terms. This law has been modified by the Regulation for determination and registration of cultural and natural properties, 19 August 1989, which refers to cultural and natural assets with the expression cultural and natural properties, giving definitions more specific than before. This regulation also introduces new categories of cultural and natural properties, namely “urban sites”, “historical sites”, “archaeological sites” and “natural sites”.

The **Moroccan law on the preservation of monuments and historical sites 25 December 1980**, strengthened by the Prime Minister memorandum of 30th December 1992 and by the Ministerial memorandum of 8th March 1993, refers to movables and real estates whose preservation is relevant to the Moroccan art, history or civilisation. Nevertheless, when it comes to a more detailed definition of movables and real estates, the law recognises them a relevance not only in relation to the Moroccan but to the history and civilisation of the humanity as a whole.

Spain has adopted two different laws to protect its Historical and National Heritage: the **Law 16/1985 on Historical Heritage** which forms the most wide-reaching legal framework for dealing with Spain’s cultural assets and the **Law 23/182 regarding**

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National Heritage. The latter concerns those assets which belong to the State and are for State use or for that of the King and the members of the Royal Family for representation purposes.

Between the two, the Law 16/1985 represents the most important legal text concerning Cultural Heritage as it is the result of the general consensus of the nationwide political parties.

This Law ratifies a number of latent ideas included in the articles of the 1978 Spanish Constitution and its main objectives are the protection, growth and passing down to future generations of Spain's historical heritage.

Certain aspects of this Law were altered by Royal Decree of 10 January 1986, and by Royal Decree of 21 January 1994. Other improvements have been achieved by means of complementary and modifying ordinances and, mainly, by the enactment of laws on historical heritage by the Autonomous Regions.

The Law 16/1985 defines in a very detailed way all the different kinds of Cultural assets. They are split up, due to their physical nature, into movables and real estate; Both of them are divided into four types of "special heritage": Archaeological Heritage, Ethnographic Heritage, Documentary and Bibliographic Heritage, and Archives, Libraries and Museums.

Furthermore, the Law 16/1985 introduces the concept of "Historical Site" to which a special treatment is assured. "Historical Site" are defined as "the groups of real estate property that form settlement units, either continuous or disperse, conditioned by physical structures that are representative of the evolution of a human community, that are testimony of human culture or that form a value that can be used and enjoyed by society. The "Sites" are also individualized nuclei of buildings included within a larger population unit, which have the same characteristics and can be clearly identified". The same special treatment must be given to the "surroundings" of the historical site.

Algerian and Portuguese basic regulations, too, are formally dedicated to the protection of "the cultural heritage", but they are mainly characterized by their field of application being extended to include immaterial cultural properties, following a trend which is now beginning to make its appearance in the international field as well.

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This category of properties covers not only the products of “immaterial arts” in the true sense of the word such as the theatre, choreography and the oral literary tradition, but also, for example, the culinary arts, legends, proverbs and traditional games, which are linked to the modern, non-elitist notion of culture mentioned above. While Portuguese regulations require that such properties be considered as being of significant interest for the survival and identity of Portuguese culture over time in order for their right to protection to be recognized, the Algerian regulations simply refer to the products of traditional events and of individual and collective creativity which have found expression from time immemorial down to our day.

In reality the Algerian regulations represent, in this respect, an exception to the other regulations examined. On the whole, and not only with regard to immaterial properties, they make no reference to any qualification of value or importance necessary for a property to be protected, it being sufficient for material properties to be a legacy of the civilizations which have succeeded each other from prehistoric times to our day. As a general rule, however, for a property to be subject to the application of protection regulations, evidence of its importance, such as its proved national or international value (for the Tunisian regulations), its significant interest (for the Portuguese and Spanish regulations) or other similar qualifications, is required.

The point of such qualifications is that they can provide an indication, however generic, for identifying individual properties to be protected; the same aim is achieved by qualifications of a “temporal” character, which are to be found in many of the regulations analysed. For example the exclusion from protection in the Italian regulations of the works of living artists or those created within the last fifty years seems to be motivated mainly by the need to allow for a sufficiently detached, and therefore more objective assessment of their value.

“Temporal” criteria for identifying properties to be protected characterize the remaining basic regulations which are the objects of this analysis, all dedicated to the protection of antiquities. In this connection it should be noted that Egyptian legislation considers as “antiquities” – with reference to the regulations, and hence to be protected – any property that is at least a hundred years old, so long as it is of archaeological or historic importance as a testimony of one of Egypt’s successive

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civilizations; The Law 16/1985 on Spain's Historical heritage adopted a criterion similar to the Egyptian one by stating that are part of the Spanish Historical Heritage goods at least hundred years old or listed in the General inventory by the Administration Council. The Turkish law adopted the same general criterion by stating that the fixed cultural assets which have to be protected must be built not after the end of the 19th century. It also adds to the temporal criteria the one related to its relevance. Thus, it mentions the assets built after the stated date but considered of significant interest by the Ministry of Culture and Tourism, the ones located within protected areas or the one related in some ways with the National War of Liberty, the foundation of the Republic or the life of Mustafa Kemal. The law gives also a wide range of fixed natural assets which have to be protected.

The Regulation for determination and registration of cultural and natural properties, 19 August 1989 further specifies the evaluation criteria for the determination of a cultural and natural property, thus adding the characteristics needed by "urban sites", "historical sites", "archaeological sites" and "natural sites" to be protected by the Turkish law.

The regulations of Jordan, Lebanon and Palestine assume that protection should apply to properties belonging to periods prior to 1700. The hundred year interval, rather than this more restrictive temporal criterion, can also be found in several international conventions.

The Moroccan law differs from the others as it doesn't give any temporal criteria but, as already stated, it considers as cultural and natural assets all monuments, sites, paintings, written stones etc which have an artistic, historical, pictorial or any other kind of relevance relating to the past or to the present, no matter for the period in which they have been built, the language used or other specific characteristics.

All these regulations, as specified in their title, are directed to the specific protection of archaeological properties; actually this protection, with the exception of Lebanese regulations, explicitly includes human and animal remains, for which the temporal qualification, established at a hundred years in Egyptian legislation but prior to the year 600 for Jordan and Palestine, also holds good.



A general analysis of the domestic legal processes of these States shows us three possible criteria for identifying the historic or archaeological character of the cultural property to be protected on temporal grounds. According to the first criterion, the property must have a sort of “minimal age” (as in Egyptian regulations); according to the second criterion, it must date back to a period preceding a specific date relating to the history of the country in question (as in the regulations of Jordan, Lebanon, Turkey and Palestine); according to the third criterion the property must belong to a particular civilization or a specific historical period (such as the pre-Columbian age or the colonial period for certain Latin American countries and to some extent Turkish regulations). In any case, the regulations examined lay down that the temporal criterion cannot, of itself, provide sufficient elements to identify a cultural property from the legal point of view. As already mentioned, a further qualification of the value and importance of the property is generally required: the temporal criterion cannot be considered absolute, because the criterion of interest must also apply, and hence “sufficiently old” properties may not in practice be judged worthy of protection. On the other hand even properties which are outside the temporal limits may be declared to merit protection, whenever other criteria of valuation indicate that such an interest exists. If, therefore, a general temporal criterion is not alone sufficient to identify a cultural property, the competent authorities will be required to assess its importance by applying other, less “automatic” valuation criteria. Such assessment is called for when a particular level of protection is envisaged for the property in question. In many cases the regulations examined distinguish between different levels of interest in protection, with a legal regime adapted to correspond to each level. It therefore becomes necessary for the competent authorities to classify properties according to diverse levels of importance by applying general parameters.

Since such classifications base the definition of the regime to be applied to properties on the degree of public interest in their protection, it is better to study them with reference to the description of protection regimes. On the other hand, the identification of properties and their cataloguing and classification is in itself a form of protection of cultural interests, providing us with non-generic information on the components of the heritage. According to all the regulations examined, a national cultural heritage consists both of movable and of immovable property (Algerian



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regulations specify that certain properties can be considered immovable “in relation to their function”. The distinction between the two categories is assumed as given, not being restricted to properties of cultural interest and hence already figuring in State regulations. In the two above-mentioned cases of Portuguese and Algerian regulations, the immaterial component of the heritage is also protected. Within these large categories there can generally be found different types of property, each one requiring its own protection regime. With regard to immovable properties (monuments, groups of buildings and sites) the definition of these types often derives from the UNESCO Convention on the world heritage, particularly in the case of States whose basic regulations were drawn up after the ratification of the Convention.

THE LEGAL PROTECTION REGIME

The characteristics of the legal protection provided by States for their cultural heritage correspond to the various ways in which they understand the term (link with Part II) and identify public interest in its protection. In most cases, it is the following interests that are considered worthy of protection: the integrity of properties and the possibility for the public to have access to them; safeguarding the complete historic or archaeological information to be gleaned from the discovery of a property; and, in all cases, keeping the properties within the State. The latter holds true even apart from any need to show the link between the property and its context in order fully to reveal its cultural significance.

In reality, the legal regime gradually realized by States at a national level is aimed at achieving two main objectives: safeguarding the properties that are materially present on their territory and the control of their transfer outside it. Till a short time ago, it was generally thought that only problems relative to the second objective, expressed in the regulations for the control of export, and in some cases, of import, was of international as well as national importance. With reference to the international circulation of properties, co-operation between States for achieving the objectives of protection is evidently very important.

The need to protect properties internationally is becoming more and more clear, at least as a matter of principle, even apart from considerations on their leaving their national territory. By the motivations they give for their national protection regulations and by their voluntary signing of international agreements, States often recognize that the protection of cultural property present on national soil is an international duty, because the cultural heritage belongs to the whole of humanity, independently of where it is produced or where it is situated. The need for international protection of the cultural heritage was first revealed in relation to the particular situation of danger occurring in the case of armed conflict (**the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict**). It was later to assume a broader scope, by referring directly to the normal situation in peacetime (**Convention concerning the Protection of the World Cultural and Natural Heritage**).



Among the regulations which are the object of this analysis, there is an exceptional case in which the recognition of the universal value of a property, as a reason for the existence of an international obligation for its protection, represents a distinct and autonomous title for the recognition of its protection at the national level (**law 94-35 of Tunisia and Introduction**). Such a specification appears superfluous, since the international level of protection, at least for the moment, can only be applied with reference to properties already protected by national regulations, and in particular to the most representative among them. In fact international law leaves to national legislations the task of identifying properties, even if it considers this to be an international duty.

If on the one hand international protection of the cultural heritage works to strengthen the protection provided by domestic law, on the other hand some internal systems of protection analysed here have aspects that are in advance of the current situation of international protection. In particular immaterial cultural properties may only have an indirect importance in the international field, while in Algerian and Portuguese protection regulations they have their own autonomous importance beside moveable and immovable properties (**The components of the heritage and their identification**). Such autonomous consideration is technically justified by the fact that the protection regime provided for immaterial properties necessarily has peculiar characteristics, and cannot be constructed with reference to the provisions for controlling a given material object.

Apart from generic declarations of respect for the collective national identity and memory, the immaterial values safeguarded by these regulations seem to be protected mainly through reference to certain material elements which are their necessary support: (control of the orthographic exactitude of the written form of the language as a measure to ensure its protection, unity and autonomy - **Portuguese Art. 43, law 13-85** - ; identifying the person or group of persons who possess immaterial traditional or popular knowledge - **Algerian Art. 68 law 98-04**). Where there are no such material elements, a priority means of protection consists in “crystallizing” the material supports (transcriptions, recordings, etc.) of the object of protection, though the conservation of the material support should not be achieved at the cost of the integrity of the immaterial values, whose true protection consists in the conservation, study and

transmission to future generations of the property in its immaterial form (**Art. 68 Algerian law 98-04**).

Just as creating and archiving material supports is a way of protecting immaterial properties, so drawing up lists or inventories of the material cultural heritage, both moveable and immovable, has the effect of achieving a certain level of information on the components of the national heritage and hence of the cultural values expressed in it. The classification of cultural properties carried out in *civil law* countries, however, has in the first place the function of adapting protection measures to the recognized importance of the property. Although protection is generally provided for all properties that can, in the abstract, correspond to the definitions of the heritage found in the regulations (in contrast to the enumeration technique typical of *common law* countries) the operation of classification consists in an assessment of the cultural interest of a given property, carried out by a competent authority (**Institutions and competencies - the role of private citizens**), and considered necessary for the application of specific measures of protection.

Such protection measures are essentially directed, as we have seen, to the safeguarding of properties materially present on the territory and the control of their exportation. The first of these goals is pursued through restrictions on the freedom to dispose of a property, addressed to anyone - whether a public body or a private citizen - who owns or is in possession of it. On the one hand, the material protection of a property, understood as the preservation of its physical integrity and its full cultural importance, is guaranteed by subjecting to preventive authorization any operation that might involve damage or alteration to it. On the other hand, the imposition of positive obligations, comparable to servitudes, aims at guaranteeing the protection of public interest in the accessibility of properties. Generally, in the regulations analysed, a property is classified in different ways according to the importance ascribed to it, and the limits imposed on its management, or the servitudes with which it is burdened, are more or less stringent. So the owner may be obliged to restore a property only with the authorization and under the supervision of the competent public authority, or else make it accessible to public viewing.

One example of this classification practice, it's offered by the Spanish **Law 16/1985 on Historical Heritage Assets** which recognises two different levels of protection:



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the higher level, which provides the greatest protection for a movable or for real estate, is the category of ASSET OF CULTURAL INTEREST (BIC) (art. 9.1.). This asset requires an administrative declaration and is included in the Assets of Cultural Interest Register. BICs cannot be exported and all the elements in their make-up are equally protected.

The second category or protection level takes in certain movables with a particular relevance. These assets are included in the General Inventory of Cultural Interest Movables.

Finally, the general, and largest, category corresponds to “undeclared cultural assets”, which generically include all of Spain’s Historical Heritage, well defined by Law and protected under the National Information Programmes (art. 35).

All of Spain’s Historical Heritage assets over 100 years and all those included in the Inventory must have an export permit if they are to be taken abroad. Illegal export is classed as smuggling and any asset thus discovered automatically passes over to State property. The permit is granted by the Classification, Valuation and Export Committee for Spain’s Historical Heritage Assets.

State purchase of cultural properties is favoured mainly because it ensures their accessibility, based on their morally “belonging” to the public, but also because a public body is enabled to guarantee a higher level of material protection. However, property may also be privately owned (**art.26 of the Turkish Law on the Protection of Cultural and Natural Assets** which recognises to Ministries, public organisations and institutions, real and corporate persons, foundations and collection keepers the right to own Cultural Assets), even if, in several cases, this is quite exceptional (cf. Egyptian regulations - **Arts. 6 and 8 of Law 117, 1983**). The preparation of various lists and classifications of the heritage also serve State purchase because rights of pre-emption, coercive purchase or similar forms of protection exercised at the time of sale by private persons of classified or, in general, other cultural properties are provided in the State’s favour. In addition, if general interest so demands, the State may also proceed with the expropriation of a property for purposes of public utility.

With regard to publicly owned properties, in general their classification as cultural properties involves inalienability and the respect of their cultural destination and in



this case too restrictions may be absolute or relative, more or less severe according to the property's importance. Besides, special regimes are provided for the ownership and management of properties of a religious character (cf. **Art. 6 of the Egyptian legislation** and **Art. 19 of the Italian Legislative Decree October 29 1999, n. 490**).

Restrictive measures, both direct and indirect, aimed at preventing the transfer of moveable property beyond the borders of the State, correspond to the various levels of protection mentioned above. While direct measures may take the form, according to individual cases or levels of protection, of an absolute ban on export, of imposing an authorization or a compulsory licence, or of attributing the right of State pre-emption at the moment of exportation, indirect measures consist, in general, in imposing heavy taxes on exportation or, on the contrary, in fiscal incentives in the case of alienation within the State, particularly in order to favour purchase by museums or public bodies.

Besides control of the export of properties, the control of import has also in some cases been provided for, thus implementing the co-operation laid down by the international conventions and aimed at combating the illicit transfer of cultural properties (cf. **the 1970 Unesco Convention** - and the system based on reciprocity according to **Art. 28 of the Palestinian regulations**). In the field of the European Union, and thus with reference to the legislation of Italy, Spain and Portugal, regulations concerning the issue of export licences for cultural properties and their return, (if they have left the territory illicitly), have been harmonized (cf. **Community Regulation 3911/92** and **Community Directive 93/7**).

This legislative act at Community level became necessary to ensure that measures to oppose the illicit traffic of cultural properties were effective and at the same time compatible with the setting up of a single market among the Member States of the European Community. The freedom of the circulation of goods within the Community market is incompatible, besides, with maintaining indirect fiscal systems, directed at preventing cultural properties from leaving national territory (cf. the sentence of the Court of Justice of the European Communities in lawsuit 7/68).

Besides responding to a "protectionist" logic, identified with the interest of simply keeping a property on national territory, export controls - and in particular import controls - answer the need to combat the illicit traffic of cultural properties. This



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traffic - a true scourge - is not only in conflict with a private interest in the protection of the right to ownership of a property, but also with public interest in the protection of its cultural values since, once stolen, it no longer enjoys the public guarantee of protection and accessibility and can only be recuperated, once beyond the border, with the aid of effective mechanisms of international co-operation.

Because of the illicit, and hence uncontrolled, transfer of cultural properties abroad, but also within the borders of a State, there often occurs the loss of important information on the cultural importance of the property itself and the whole context to which it belongs. This happens particularly when archaeological properties are discovered, so all the regulations analysed always subject archaeological research to public control. In the majority of cases they ensure that the finds are purchased by the State, save for providing compensation either in cash or by handing over other cultural finds, if the competent authorities agree. Public interest in the communication of information on the national cultural heritage is, in some cases, protected by the obligation to publish the scientific results of research, the control of which is provided for (cf. **Arts. 6 and 71 Algerian law 98-04**).

INSTITUTIONS AND COMPETENCIES

THE ROLE OF PRIVATE CITIZENS

The national laws which protect the cultural heritage, by defining the public duty of protection, also name the authorities competent to carry out this task. The introductions to the national regulations which are the object of this analysis give us a summary of the breakdown of these competencies with reference to each State (**Algeria, Egypt, Jordan, Italy, Lebanon, Morocco, Palestinian Authority, Portugal, Spain, Syria, Tunisia, Turkey**). Apart from the specific features of each national administration, a number of general considerations should be made concerning the implications and significant developments in the distribution of specific competencies in the field of heritage protection and their superimposition on other kinds of competencies, not to mention the participation of private citizens in the public task of protection.

Identifying the competent public authorities brings about, in the first place, the distribution among them of the responsibilities of the public function of protection. In some cases it is specified, at least with reference to immovable properties, that they remain the heritage of the State considered as a whole, whatever the legal or *de facto* condition regarding the ownership or management of single properties (**Art. 5-A “The Antiquities Law” of Jordan and Art. 4.1 of the Portuguese Law 13-85**). In the framework of this general analysis, we are led to reflect not so much on the implications of private law regarding the ownership of such properties, as on the consequences with reference to public responsibility for protection. In the last instance - apart from any internal distribution of competencies on the basis of sector or territory, it is always the State considered as a whole, at least where other States are concerned, that is responsible for the protection of the cultural heritage with regard to the obligations laid down by international conventions. As a matter of fact in the **Spanish Law 23/1982 regarding National Heritage**, and in its **Rules of 1987** is stated that the Administration Council is responsible for managing and administering the assets and the rights of the National Heritage. State administration of cultural assets is the responsibility of the Ministry for Education and Culture, reorganised as from 1985, by Royal Decree 565/1985, in order to take on the new role



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of the central cultural administration following the transfer of responsibilities to the autonomous regions.

In most cases, the task of identifying (**The components of the Heritage and their Identification**) and classifying properties and controlling their management (**The legal protection regime**) depends on the central organs of the State, which carry it out with the aid of commissions composed of technically qualified experts. The referent is of course represented, where it exists, by a Ministry specifically dedicated to culture and cultural properties, which often exercises functions of control even where the identification of the property is the task of authorities responsible at a local level (**Arts. 11 and 14 of Algerian law 98-04**).

The Turkish Law 2863 on the Protection of Cultural and Natural Assets even identifying in the Turkish Grand National Assembly and in the Ministry of Culture and Tourism the Institutions responsible of the protection of fixed Cultural and Natural assets recognises to owners their full right on their ownership if it is not in contradiction to the provisions of this Law.

The central institutions of the State are, in any case, called on to carry out a job of coordination even when autonomous territorial regimes have been recognized, as have consultation procedures with organs representing exponents of religious faiths (**Art. 19 of the Italian Legislative Decree October 29 1999, n. 490 and Art. 30 of Egyptian law 117-83**) whose practice is related to cultural properties.

In a number of cases the setting up of public bodies responsible for the management of specific properties through the institution of cultural parks (**Art. 40 of the Algerian law 98-04**) has been provided for, although such a practice is generally more common in connection with the protection of the natural heritage of the State. It should be pointed out that identifying a specific competent body for the protection of a property, brings forward in time the drawing up of a plan for its management, as called for by the UNESCO Convention of 1972 on the protection of the world cultural and natural heritage (**application Guidelines of the Convention**). However, this does not represent the only way to guarantee the preparation of effective planning instruments, which can also be the result of agreement between different bodies, each being responsible for part of the competence on the property in question.



In any case, a certain level of agreement with the public authorities appointed to protect interests of varying nature is necessary for ensuring the protection of cultural properties. In point of fact the function of protecting the heritage often has implications involving the implementation of regulations directed mainly at protecting other interests of public importance. For this reason, beside the basic laws on the protection of cultural properties, the texts illustrating the domestic legislation of the States examined in this analysis also speak of regulations with a different content, connected in particular to town-planning or environmental protection. And in a number of cases the procedures for such agreements between different authorities are laid down directly by the basic regulations on the cultural heritage (cf., **Art. 41 of Algerian Law 98-04**, **Art. 51 of Egyptian Law 117** and **Art. 26 of the Italian Legislative Decree October 29, 1999, n. 490**, **Art. 6 of the Spanish Law regulating national Heritage**, **Art. 51 of the Turkish Law 2863 on the Protection of Cultural and Natural Assets**; one may also note how **Art. 43f of the Egyptian law 117-83** penalizes the forging of properties carried out with fraudulent intent, in the context of the regulations specifically dedicated to the protection of the cultural heritage).

To sum up, the cultural (and natural) heritage is protected by the State for its role in the life of individuals and of the community; therefore the need to ensure that its protection is integrated with the protection of other interests of public importance is clear. Besides, it would be an over-simplification to interpret the protection of the cultural heritage as a task for the specialist, to be carried out having as a point of reference only the technical characteristics of the property in question. Such a separation of the management of the property from its social contest would in fact impair its cultural significance, which the protection regulations tend to stress more and more.

These subjects are addressed, at an international level, in the text of the **Unesco Recommendation concerning the protection, at national level, of the cultural and natural heritage**, where it is affirmed that, in a society where conditions of life are changing very fast, it is fundamental for people's balance and development, to preserve for them a life-space of their own dimension, where they can be in touch with nature and the testimonies of civilizations left by past generations. With that aim it is held to be necessary, from the legal point of view, to assign to the properties of

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the cultural and natural heritage an active role in the life of the community and to integrate in a single policy the achievements of our time and the values of the past, as well as the beauties of nature.

Such indications, even though expressed by the non-binding instrument of a recommendation, are also directed to the States whose regulations are the object of this analysis, and help to make clear the meaning of the provisions of Art. 5 (a) of **the Convention on the world heritage**. The latter is obligatory and commits the States party to it (among which all the States considered here) to adopt a general policy with the aim of attributing to the cultural and natural heritage specific functions in the life of the community and of including the protection of this heritage in the general planning programmes.

The “contamination” between the different competencies is therefore, within certain limits, a “physiological” feature of the protection regime, which reveals the intention of including the protection of the heritage in the general plan of the other public functions, thus allowing its full enhancement. As can be seen from the analysis of the texts of the most recent regulations, it appears that it is more and more the task of the State not only to protect and preserve, but also to enhance the components of the heritage.

These three terms, which describe different aspects of the action of protection, are to be found, once more, in **the UNESCO Convention on the world heritage**, always cited in the same order. This could make one mistakenly believe in a succession of priorities, as if it were possible firstly, to protect, - that is to defend the heritage against aggression; secondly to find a way to preserve it - that is to keep it in its original condition, avoiding any alteration or unintentional deterioration; and only lastly - if and as far as possible, to display its value. In reality, there cannot be effective protection or conservation of properties apart from their enhancement, which is necessarily connected to the dynamic and interdisciplinary planning of the development of the areas in question. Thus the authorities specifically appointed for the protection of cultural properties, aided by technical organs expert in conservation, must be co-ordinated, at the time they adopt their decisions, with the authorities appointed for the protection of the other public interests involved, taking into due account the technical valuations made by the latter (**Art. 7, Tunisian Law 94-35**).



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For the heritage to be truly enhanced, it is extremely important that the protection initiatives have the full support of the local population, which may, if possible, promote them itself (cf. **Art. 42, Algerian Law 98-04**,). It is also of course desirable that the institutions responsible for higher education and research be profitably involved in the activity of protection and management of the cultural heritage (cf. **the setting up, in Lebanon, in 1993, of a Ministry dedicated both to culture and to higher education, Art. 14 of Law 6/1997 regarding Organization and Management of State Administration and, more specifically on the functions established by Royal Decree 1331/2000, of 7 July, which establishes the basic structure of the Ministry for Education, Culture and Sport; cf. also Egyptian Law 117, Art. 28** with reference to the role of universities in the organization and administration of museums).

Considering the heritage as an issue for general planning allows us, besides, to show that the cultural heritage is a wealth that contributes to human development and is not opposed to it, and its protection is not a sterile waste of resources, because the heritage itself is a living resource which can play an important part in the progress of humanity. The protection of cultural properties does not, therefore, represent a burden, a cause of the absorption without return of resources which could be destined for more profitable investments, an unsustainable luxury.

With reference to the cultural heritage seen as a resource, even in the economic sense, it should be noted that some more recent regulations favour an interaction between “public” and “private” in the exercise of protection. Private citizens may contribute to the State function of protection through forms of participation contemplating a decisive role on their part, both in the proposing and in the executive phase (cf. **Arts. 112 and 113 of the Italian Legislative Decree October 29, 1999, n. 490** concerning the services of cultural assistance and hospitality connected to the presentation of the heritage in museums, monuments, archaeological sites and parks, archives and libraries, not to mention **Art. 2 of Tunisian Law 97-16** on the creation of a national agency for the enhancement and exploitation of the archaeological and historic heritage and **Regulation for determination and registration of Cultural and Natural properties** which recognises not only to the Ministry of Culture and Tourism and to the General Directorate of Pious Foundation but also to every



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governmental and legal institution the responsibility for the preservation, restoration and maintenance of the cultural properties under their possession). Private investment in public cultural properties and considerations on its advantages are not, therefore, necessarily in contrast with the function of protection, so long as there are sufficient guarantees to ensure that the latter is not unacceptably challenged.

Even in the opposite case, when a cultural property of public interest is owned by a private citizen, the public importance of the role such a citizen plays in the management of a property through access to financing from special public funds, or fiscal concessions, has often been recognized. A particular support for the public action of protection can also be offered by associations working in the field of the cultural heritage; by their statutory commitments they can offer a precious contribution to cultural promotion and the respect of regulations (cf. **Art. 91 of Algerian Law 98-04, Art. 11 of the Turkish Law 2863 on the Protection of Cultural and Natural Assets**).

THE PROTECTION OF THE CULTURAL HERITAGE MAIN CHANGES INTRODUCED BETWEEN 1998-2004

After having examined in detail the legislation on Cultural Heritage of the countries involved in UNIMED AUDIT and having completed the analysis with the countries involved in phase II of the above-mentioned project I am now doing an overview of the main laws introduced and launched in the last seven years. As a matter of fact, since 1998 some countries have experienced big changes in the legislation which rules Cultural Heritage while some others had just day-by-day adjustments. Thus, this section is specifically dedicated to Portugal, Tunisia, Algeria and Italy, which in the last years launched important laws in the field of Cultural Heritage.

PORTUGAL

Portugal legislation on Cultural Heritage underwent relevant changes in the period between 1998-2004. In many cases, laws were only directed to slightly modify the previous ones, even though some of them introduced new elements in the preservation and conservation of Cultural Heritage. The Portuguese law on Cultural Heritage, discussed and approved in Parliament in January 2001. (Law n. 107/2001 of 10th September 2001) hopefully will fill the gap on Cultural Heritage that characterised the Portuguese legislation in the last years. Right at the beginning, the new law recognises the anomaly in which the country has been and proposes to define the bases of *policies* and of the “*regime of protection and valorisation of Cultural Heritage*” as a “*reality of the greatest relevance for the understanding, permanency and building of National identity and for democratisation of culture*”.

This new way of looking at heritage is complemented with article 2nd, where the new idea of Cultural Heritage is defined on which the new law is based; now the idea of heritage is enormously broadened. The law reads: “*For the purposes of the present law included in Cultural Heritage are all assets which, for giving evidence of civilisation value or culture and being of relevant cultural interest, should be object of special protection and valorisation*”. And after this general introduction, it indicates that this relevant cultural interest falls on all goods and structures of “*historical, archaeological, architectonic, documental, artistic, ethnographic,*

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scientific, social or technical nature, on the assets that are included in Cultural Heritage and which reflect values of memory, antiquity, authenticity, originality, rarity, singularity or exemplariness”.

As it was in the previous law, this reaffirms that *“included in Cultural Heritage are also those immaterial assets which constitute structuring parts of the Portuguese collective identity and memory”, as well “as any other assets which may be considered as such by force of International conventions which oblige the Portuguese State, at least for the purposes foreseen therein”.*

The very broad way in which the idea of heritage was defined will render the application of the law difficult although it is more precise in what respects the classification levels, and recovers what is inscribed in the previous law 13/85. Now the interest of the asset does not depend any longer on the entity classifying it but on what it represents. In spite of in article 14th the landscape and natural values being considered as also pertaining to the cultural assets to be preserved, the complexity of the new legislation and the lack of access to some information and documentation which might have originated it, leads to maintaining a prudent expectation.

Following the track of the previous legislation the 96/2000 resolution of the Portuguese Cabinet recognises the Portuguese culinary art as an immaterial Cultural property and gives to protection by law.

Moreover, in 1999, the Portuguese Institute of Conservation and Restoration has been set up

to contribute to the restoration and conservation of Cultural Heritage. It will also be in charge of disseminate Cultural Heritage issues, to train experts, to give scientific and technical advise as well as award with a quality certification the most effective associations which work in the Cultural Heritage field.

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It is also important to highlight that the 4th of August 2000 Portugal has finally ratified the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

ITALY

In Italy the most important law adopted in the last years is the Code of Cultural Heritage and Landscape (Decreto Legislativo 22 gennaio 2004, n. 42) whose aim was to rule the Italian Cultural and Environmental Heritage in a more comprehensive and coherent way.

The need for this new legislation was due to the fact that in 2001 federalism has been recognised by the Italian Constitution and thus, it was necessary to better define competencies in this field. Moreover, the previous legislation had shown the impossibility to administrate such a big topic only with specific laws but it was necessary to have an all-inclusive and wide-ranging code in order to avoid conflicts, overlaps and loop gaps.

Finally, the previous laws arose unsolved questions and problems which could be solved only by reorganising the whole sector. For these reasons, the new Code has been drafted and approved in a way which leaves the possibility to modify it according to what emerges from its actual implementation.

From an organisational point of view, the main changes concern: the structure of the Code itself which classifies different topics in a logical a reasoned way; the systematisation of the relations between the public and private sector and the competencies of the State and the regions in the field of Cultural Heritage; control and audit tools which modify the relations between the State and the citizens, giving to the latter more protection.

As far as the protection and valorisation of Cultural and Environmental Heritage is concerned the most important changes are related to the fully inclusion of the landscape within the Cultural Heritage thus, assuring to it a wider and deeper protection; the idea of thinking about the Cultural, Natural and Landscaping Heritage

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as whole; the clear identification of State assets within the broader concept of Public property which need to be preserved representing an heritage for the whole Italian community; the importance awarded to the Landscape protection which is recognised more important than Urban development thus, the latter has always to be subordinated to the first one.

The Code of Cultural Heritage and Landscape represents an important change whose aim is to reorganise the protection and valorisation of Cultural and Environmental Heritage in Italy as well as specify and detail some topics which have been neglected for too many years.

TUNISIA

During the last period, Tunisian laws have been focussed on designing new Institutions or defining their role in the protection, preservation and promotion of Cultural Heritage.

One of the most important Institutions set up is the National Council on Handicrafts (Law 98-1071) which is in charge of outlining the main actions to be taken for the development of the handicrafts sector at the economic, social and cultural level. The new body has been put under the control of the Ministry of Tourism Leisure and Handicrafts, which is now in charge of steering the investments in the Handicrafts sector as well as promote and develop it. At the same time, it is also responsible of the analysis of the National and International tourism situation, its promotion and the identification of new ways to promote Tunisian tourism and products (laws 2000-1243 and 2000-1244).

Another important institute set up in the last years is the Advanced Training course on Cultural Heritage which depends by the Ministry of Higher Education.

This course is mainly focussed on the protection, conservation, management and implementation of the Tunisian Cultural Heritage and it is directed to experts and

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specialists of this sector. It gives a on field and in-depth training especially on Tunisian and Mediterranean Culture and Civilisation.

Other important initiatives are the prizes launched by the Tunisian President to promote the Handicrafts and Cultural sectors.

ALGERIA

The most important laws introduced in the last years are related to the Ministry of Culture and Communication, the Ministry of Tourism and Handicrafts and the Ministry of the Environment.

As the legislation regarding the first two Ministries are mainly related to the day-by-day management and implementation of these sectors the laws launched by the Ministry of the Environment introduce relevant changes in the management of Natural sites.

As a consequence the analysis will be specifically focussed on the situation of the Environmental management in Algeria.

The Law 2000-136 of 20th May 2000 states that the management of the Environment as well as the promotion and protection of the Natural Heritage will be carried out in a sustainable development perspective. It is also stressed (Law 01-09 of the 7th of January 2001) the importance of listing and cataloguing all the significant Natural sites in order to elaborate a better strategies for their protection and conservation.

Moreover, an inspection team will be set up to guarantee the respect of the legislation in this sector.

It is also highlighted that the Environmental National Framework aims to assure the protection, and development of the National Ecological heritage as well as the restoration and implementation of the National Historical Heritage (law 01-20 of the 12nd of December 2001) . This goal will be reached through the setting up of rules which will define how to manage urban sites and how to preserve ecological and tourist sites (law 02-02 of the 5th of February 2002).



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As far as the Ministry of Culture and Communication is concerned, the main laws launched are the ones fixing the contents of the specialised Courses in Fine Arts (arrêté interministériel du 29/11/2000 ; arrêté interministériel correspondant au 5/12/99 ; arrêté interministériel correspondant au 5/12/99) and the law (Law 01-88 of 5th April 2001) which reaffirms that the main task of the Ministry of Tourism and Handicrafts' Central Administration is to assure the carrying out of professional activities related to the promotion and implementation of Cultural Heritage.