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Legal protection of cultural heritage: *Does the legal framework strike a right balance between public and private interests?*

I. Trimester Paper

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Legal protection of cultural heritage: ***Does the legal framework strike a right balance between public and private interests?***

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1. Introduction

A significant portion of cultural heritage is owned by private owners. The exercise of their property rights is limited by the Constitution and by the laws on the protection of cultural heritage and this may cause negative attitudes among the owners of the cultural heritage. The result is the conflict between the private interests of the owners and the public interest in the conservation of the cultural heritage.

I would like to focus on the study of the relationship between the owners and the competent authorities in the field of cultural heritage conservation, which is determined by the legal framework. I will examine the rights and duties of the owners, their *locus standi* in the procedure for inscription of the cultural heritage on the National Heritage List, and the sanctions for breach of law. I will try to assess the legal framework from the point of balance between the rights and duties of the owners and the public interest in the conservation of cultural heritage. I will focus only on the architectural heritage, which falls within the scope of Granada Convention[1], not on the archaeological heritage regulated by Valetta Convention[2], although both types of heritage are subject to legal regulation by the Act n. 49/2002 Coll. of 19 December 2001 on the protection of monuments and historic sites (the „Monuments act"). I will also offer practical examples, which can be seen in Svätý Jur, the seat of the Academia Istropolitana Nova.

[1] Convention for the protection of the architectural heritage of Europe, Granada, 3.10. 1985, Council of Europe, European Treaty Series – No. 121.

[2] Convention on the Protection of the archaeological heritage (Revised), Valetta, 16.1. 1992, Council of Europe, European Treaty Series – No. 143.

2. The constitutional basis for the definition of public interest and private interest

The public interest refers to general "welfare", "common good" or "well-being". The public interest is central to policy debates, politics, and democracy and is open to speculation because there is no consensus what constitutes public interest.[3] Neither public nor private interest is defined in the Constitution of Slovak republic; therefore it is open to an interpretation by courts and competent authorities. Public interest is referred to in relation to the human rights, because it is invoked as a ground for their limitation. The human rights which are linked to cultural heritage, include the right to property[4], the inviolability of home[5], and the right to protection of environment and of cultural heritage[6]. So there is a linkage between human rights and public interest, but what is the essence of private interest? It may be assumed that it is the very content of the humans rights related to cultural heritage.

The Article 20 of the Constitution on the property rights states:

> (1) Everyone shall have the right to own property. Property rights of all owners shall be uniformly construed and equally protected by law. […] (3) The ownership is binding. It shall not be abused to the detriment of others or in contradiction with the public interests protected by the law. The exercise of right to property *must not be detrimental* to the human health, nature, *cultural monuments* and the environment beyond the extent laid down by a law. (4) *Expropriation* or *restrictions of right to property* may be imposed only to the *necessary* extent and *in public interest, on the basis of the law* and an appropriate *compensation* must be awarded."

According to legal theory the content of the property right is the right to *hold* a property, to *use* a property and to *dispose* of a property. The owner of a property is thus free to damage his property if he wishes to. However, the article 20 of the Constitution recognizes a need to protect public interest and restricts freedom of an owner of a property which is a cultural monument. Expropriation is considered to be the most serious interference with right to property and the Constitution imposes rigid conditions on its application: i) necessity, ii)

[3] .The concept has an ambiguous meaning, as there are competing views as to how many members of society must benefit from the action in the public interest: in extreme cases it has to be either *every* member of society, or just *some* of its members. http://en.wikipedia.org/wiki/Public_interest.

[4] Article 20 of the Constitution.

[5] Article 21 of the Constitution.

[6] Article 44 of the Constitution:

public interest, iii) legal basis, iv) compensation. In case of cultural heritage the mandatory legal basis for expropriation is instituted by Building Act, which allows expropriation on the basis of a *decision* of Building bureau[7] acting on the initiative of Monuments Board.[8]

The article 21 of the Constitutions states:

> (1) The home shall be inviolable. Entry without consent of the person residing therein is not permitted. (2) A search shall be allowed only in connection with criminal proceedings and only upon a search warrant issued by a judge. […](3) Other infringements of the inviolability of the home shall be legally justified only if it is necessary in a democratic society to protect life, health, or property, to protect rights and freedoms of others, or to avert a serious threat to public order. […] .

Right to inviolability of a home/residence is an inherent part of the right to privacy[9]. It provides an owner with absolute freedom to refuse an access to his home, even in the case he resides in a cultural monument. The extent to which this right may be limited in the interest of protection of cultural heritage is very narrow and it will be discussed in the later passages of this work.

The right to protection of cultural heritage is not an independent right but is specified jointly with right to the protection of environment in the Article 44 of the Constitution:

> "(1) Everyone shall have the right to favourable environment. (2) Everyone shall have a duty to protect and improve the environment and to *foster cultural heritage*. (3) No one shall imperil or damage the environment, natural resources and *cultural heritage* beyond the limits laid down by a law. ….](5) Details on the rights and duties according to paragraphs 1 to 4 shall be laid down by a *law*."

These rights are rights of third generation, which only began to develop after World War II. Unlike first generation rights, i.e. basic human rights (right to a property and inviolability of a home) requiring the non-intervention by a state (negative obligation not to act), the third generation rights require a state to intervene (positive obligation to act) to adopt

[7] § 108 section 2 m) of the Building Act.

[8] § 43 a section 1 of the Monuments Act.

[9] Article 8 of the European Convention on Human Rights. http://www.hri.org/docs/ECHR50.html

implementing legislation.[10] Thus this right is weaker then basic human rights and is very difficult to enforce if a legislator has no political will to act and to adopt necessary legal framework.

3. The legal framework for protection of a cultural heritage

The legal framework related to protection of cultural heritage is comprised of the Act n. 49/2002 Coll. on the protection of monuments and historic sites (the „Monuments act“) as amended by the Act n. 479/2005 a 208/2009, the Act. N. 50/1976 Coll. Building Act, the Act n. 71/1967 Coll. Administrative Procedure Act, the Act. n. 162/1995 Coll. Cadastral Act and the Act n. 300/2005 Coll. Criminal Act.

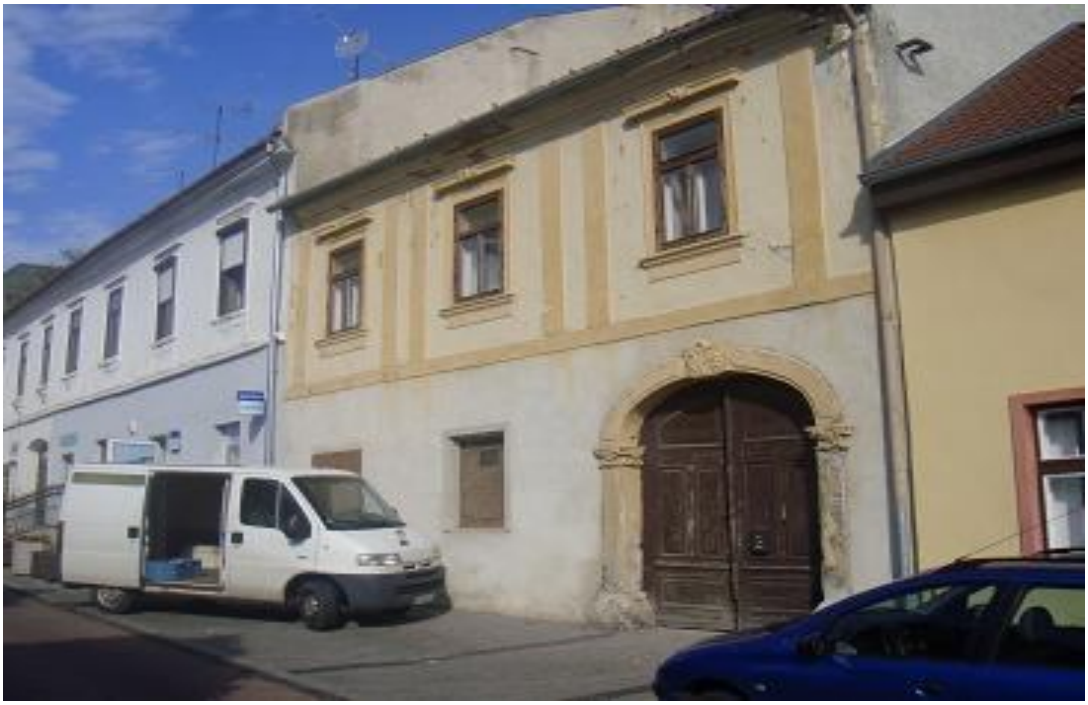
The Monuments Act expressly declares that monuments and historic sites form an important part of cultural heritage, the conservation of which is in the public interest[11]. Monuments Act creates a legal framework for the protection of cultural heritage by setting out its scope of application, the competences of state administration, procedure for inscription on the National Heritage List, rights and duties of the owners of cultural property and sanctions for a breach of law.

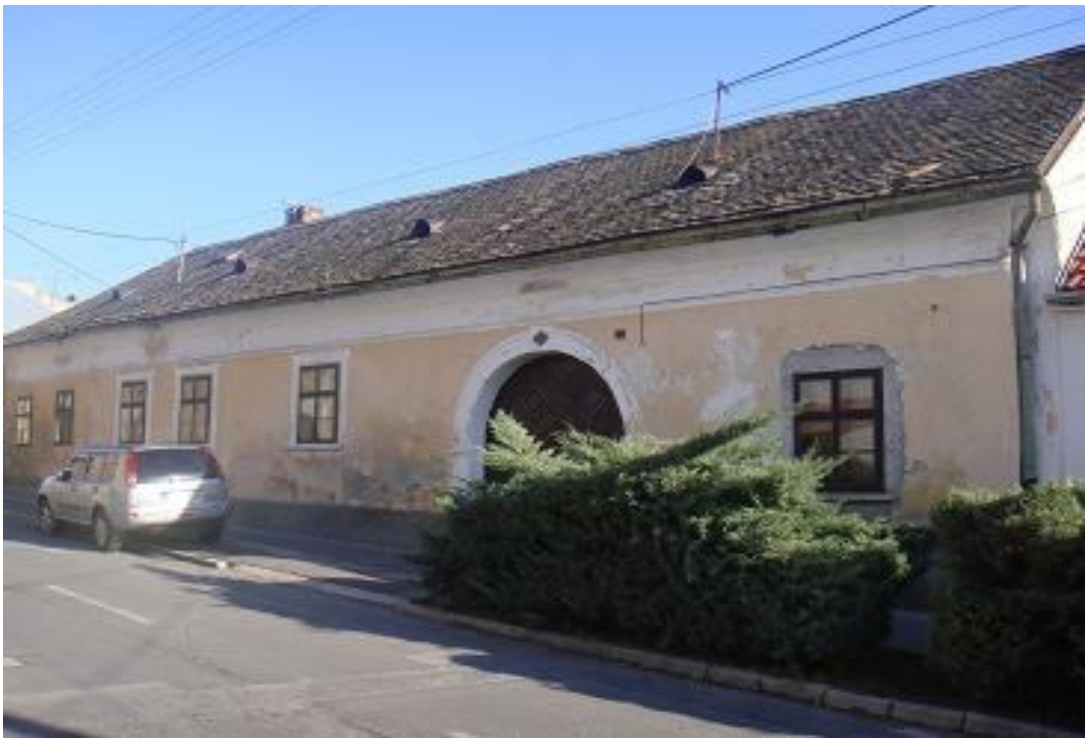
3.1 Scope of the Monuments Act

The Monuments Act recognizes as a **cultural heritage** (pamiatkový fond) *cultural monuments* (kultúrne pamiatky) and *historic sites* (pamiatkové územia), which comprise of *historic reserves* (pamiatkové rezervácie) and *historic zones* (pamiatkové zóny). *Cultural monuments* are objects of individual protection, while *historic sites* (historic reserves and historic zones) and *buffer zones* are objects of territorial protection. This means that the legal regimes applying to an immovable property differ according to its classification as a cultural monument or as a real estate in historic reserve, historic zone or buffer zone, even though *prima facie* there is very little difference in their appearance.

[10] Drgonec, J.: Základné práva a slobody podľa Ústavy Slovenskej republiky, zv. 1, MANZ Bratislava, 1999.

[11] § 1 section 2 of the Monuments Act.





The picture n. 1 shows a vineyard house, which is a cultural monument, while picture n.2 vineyard house, which is not a cultural monument.

Cultural monument is a movable or an immovable object of *cultural heritage value*[12] which has been recognized as a cultural monument for the purpose of its protection. Archaeological finds shall also be considered a cultural monument[13]. Every cultural monument is declared a *national cultural monument* and receives same level of protection without regard to its national importance.

The Monuments Act operates a presumption that cultural heritage also includes objects in relation to which a specialized administrative procedure for inscription on the National Heritage List has been instituted[14].

The Monuments Act institutes *subjective system,* where the protection is linked to the inscription of the cultural heritage on the National Heritage List, unlike in the case of *objective system,* where all of the objects of certain age are protected by the law irregardless of their inscription[15]. In the subjective system the determining criteria for assessment of the objects which merit the inscription is a *cultural heritage value* or *a cultural interest.* It is defined as an aggregate of an important historic, social, rural, urban, architectonic, scientific, technical, visual art, artistic and craft values[16]. Only those movable and immovable objects that have a cultural heritage value, can be considered for the inscription on the National Heritage List.

3.2 The specialised administrative procedure for the inscription of cultural monument on the National Heritage List

The administrative procedure is deemed to be instituted as soon as the application (návrh na vyhlásenie) is submitted by the Monuments Board of Slovak Republic, which has

[12] Granada Convention defines as monuments "*all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings.*" This definition is worded differently (objects are of interest rather than of value) and as opposed to the Slovak Monuments Act it covers also the fixtures and fittings of the buildings.

[13] § 2 section 3 of the Monuments Act.

[14] The purpose of this provision is to prevent demolition of objects *before* the completion of the lengthy administrative procedure, when the intention to inscribe the object has become known to developers.

[15] The subjective system has replaced the objective system which prevailed in Slovakia during much of the socialist state era from 1958 until 1987.

[16] § 2 section 2 of the Monuments Act.

its seat in Bratislava (further ”central Monuments Board”), or by any of the regional Monuments Boards. Monuments Boards may do so on the basis their own motion or on the initiative of any natural or legal person (it can be considered general public in this case). The moment the application has been submitted to the central Monuments Board creates legal consequences for an owner of a cultural monument: his right of free disposal is limited by an obligation to protect it and to abstain from any conduct which could cause a damage, before the administrative procedure is brought to an end.

The owner of the cultural monument is a **party to the specialised administrative procedure**[17]. This means that he has procedural right to submit his observations in the course of the procedure. This moment is a good starting platform in the future relationship between the owner and the authorities. If the owner's observations are not taken into due account by the administration, there is a high probability, that the relationship between the owner and the administration would be confrontational rather then cooperative[18].

The administrative procedure is completed with adoption of decision taken by the central Monuments Board. *Decision* is an individual administrative act, which concerns individually the owner. It does not create legal effect for third parties. The owner has a procedural right to bring appeal within 15 days of notification of the decision to him to the Ministry of Culture. The decision on the appeal may reverse or uphold the first instance decision. In extreme case an owner may contest a legality of the decision of Ministry of Culture in a court. Not all of disagreeing owners will take this complicated and expensive legal route, some of them will attempt to circumvent the Monuments Act and will let the cultural monument dilapidate.

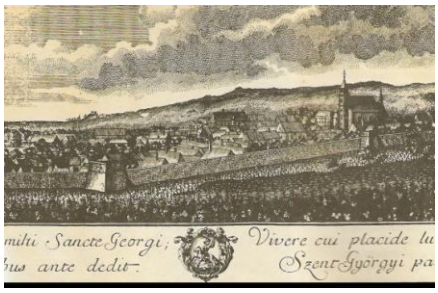
The other party to the administrative procedure is a **municipality – local government**. Its position is important one: municipality can provide financing for the restoration of the cultural monuments.

[17] Subsidiary application of the General Administrative Procedure Act, only in cases where the Monuments Act does not regulate the matter.

[18] In some countries public consultation is held, where the public may express its opposition or approval to the inscription. In Slovakia public consultation is held only in case of historic sites, not in case of cultural monuments.

3.3 Procedure for declaration of historic reserves,historic zones and buffer zones

Historic reserves[19] are declared by the **Government** on the basis of a proposal of Ministry of Culture. The proposal is prepared by central Monuments Board in co-operation with municipality. The declaration is concretised in the form of *a regulation*, which is a legal act of general application creating legal effect for third parties. It is a result of a legislative procedure, not an administrative procedure, and therefore the owners of immovable property situated in historic zones have no procedural rights i. e. they cannot submit their observations and they do not have a right to appeal against a declaration of historic reserve. A good example of a historic reserve can be illustrated by city of Svätý Jur, which has been declared an urban historic reserve (mestská pamiatková rezervácia).



Historic zones[20] are declared by **Ministry of Culture** on the basis of a proposal of central Monuments Board in the form of a *decision*, which is adopted as a result of a regular administrative procedure. The parties to the procedure are informed only about a final decision by means of a public notice. Because they are not informed of start of the procedure, it seems that they are not expected to submit observations.

Buffer zones[21] have a special status - they encircle not only cultural monuments, but also historic reserves and historic zones. Buffer zones are declared by a decision of the central

[19] *"Historic reserve is a territory with a homogenous historic residential arrangement and a massive concentration of immovable cultural monuments, or territory with groups of significant archaeological finds and archaeological sites which can be topographically definable."* § 16 section 1.

[20] *"Historic zone is a territory with a historical residential arrangement, a territory of cultural landscape of cultural heritage values, or a territory with archaeological finds and archaeological sites which can be topographically definable."* § 17 section 1 of the Monuments Act.

[21] *"The buffer zone is the territory determined for the protection and controlled development of the area or surroundings of an immovable cultural monument, historic reserve or historic zone."* § 18 section *1.*

Monuments Boards on the basis of the opinion of the municipality. The parties to the procedure are informed about the start of procedure by means of a public notice and therefore they may submit their observations.

3.4 Rights and duties of owners of cultural monuments

From the preceding paragraph it is apparent that there are different legal regimes for cultural monument, and for historic reserves and historic zones.

The owner of cultural monument is **entitled to**:

- request the professional and methodological assistance of regional Monuments Boards in matters concerning the protection of the cultural monument;
- apply for a subsidy or a state aid to the municipality and the Ministry of Culture;
- request compensation of prejudice suffered due to application of the Monuments Act or a decision taken on the basis thereof.[22]

The owner of a cultural monument is **obliged** to:

- carry out the **basic protection of the** cultural monument at his/her own expense,
- use the cultural monument in compliance with its cultural heritage value;
- in cases of transfer of ownership, **notify** the contractual party of the fact that the cultural monument is protected in accordance with this Act;
- enable officials of Monuments Board or regional Monuments Board upon presentation of their service cards, to **enter** the premises of a cultural monument *provided it is not a residence*;
- enable distinctive **marking** of the cultural monument;
- make the cultural monument **available to the public** in cases *where it is not a residence* for certain time periods and for payment of compensation on the basis of the decision of regional Monuments Board;
- ensure special protection of cultural monument and deposit a movable cultural monument in custody in the case of an emergency event;
- ensure special protection of cultural monument during the armed readiness of the country, and safeguard immovable cultural monuments in compliance with international legal instruments.[23]

[22] § 28 section 1 of the Monuments Act.

The owner of cultural monument has a broad **notification duty**, he is obliged to notify Monuments Board of:

- any danger, damage, theft or destruction of the cultural monument without delay, any intended change in use of the cultural heritage monument,
- any change in ownership of the cultural monument.[24]

The Monuments Act attempts to balance public and private interest by stating limits on exercise of the property rights of the owners, but even these limitations are limited by exceptions.

3.4.1 Duty of basic protection

The owner is obliged by the Monuments Act to carry out basic protection of cultural monument, which is defined as a

> ”the set of activities and measures taken in order to prevent danger, damage, destruction or theft of a cultural monument, and in order to permanently keep the cultural monument including its surroundings in a good state and for such means of use and presentation which correspond to its cultural heritage value and to its technical status.“[25]

The **basic protection** includes measures which shall be taken by the owner in order to prevent deterioration of the cultural monument, and at his/her own expense. The best preventive measure should normally be maintenance, it is very well known, that the property which is maintained does not require heavy repairs.

For rather strange reasons the maintenance is not part of basic protection, but is subsumed by the Monuments Act under **renovation,** which is

> „the set of specialised professional activities for the maintenance, conservation, repair, adaptation and reconstruction of a cultural monument or its part.“ [26]

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[23] § 28 section 2 of the Monuments Act.

[24] § 28 section 3 of the Monuments Act.

[25] § 27 of the Monuments Act.

[26] § 32 section 1 of the Monuments Act.

The renovation including maintenance is not conceived as an *obligation*, but rather *an entitlement*, which is subject to a condition - obtaining administrative authorisation. The owner must apply to the regional Monuments Board for a decision before proceeding with the maintenance. It is as if the administration was doing a favour to the owner, allowing him, what he should do anyway.

The maintenance, conservation, repair, adaptation and reconstruction are considered renovation and treated equally – there is no clear line between the maintenance, which should be done on a regular basis, and the reconstruction, which requires intervention into the monument's structure. If a only common maintenance is required, then the duty to consult the authorities is too burdensome for the owner, who may be discouraged from carrying out any maintenance at all. I consider this to be a great weakness of the law. In my opinion the maintenance should be a part of basic protection of a cultural monument.

3.4.2 Duty of notification

In case of sale of a real estate, the owner is obliged to notify the buyer of the fact that the object is a cultural monument. During a real estate transaction the buyer usually checks the entry in cadastre before concluding the contract. The fact that the object is cultural monument is mandatory information to be included in the cadastral entry on the basis of the Cadastral Act[27]. The Monuments Board is obliged to notify the decision on the inscription of the cultural monument to the administration of the cadastre. The problem starts when the administration of the cadastre does not fulfil its duty to inscribe this information into the cadastre. In that case the buyer may not know what he is going to buy. I am of the opinion that if the administration of the cadastre does not fulfil its duty of inscription, it has no moral right to sanction the owner for breach of the duty of notification.

3.4.3 Access to cultural monument – privacy of the owners or persons who reside therein

The owner is in principle obliged to enable the state officials and other authorised persons to enter the cultural monument, except in the case the cultural monuments serves as a *residence*. The Monuments Act specifies the right of the officials of the Monuments Board to

[27] § 6 section 1 e) of the Cadastral Act.

enter the monument for the purpose of state supervision, but only with the *consent of the person who resides therein*, regardless of the fact if he is the owner or not[28]. This is an example of a very strong protection afforded to the privacy of the owner or a tenant whose constitutional right to inviolability of the residence prevails over the need to protect the cultural monument. The only exception from the right to inviolability of the home concerns the procedure for inscription on the National Heritage List – in the course of the procedure the owner is obliged by Monuments Act to enable authorised persons to survey the object in order to draw up documentation.

It follows from the preceding points that the officials are allowed to enter the monument at a single occasion when they conduct research for the purpose of inscription on the National Heritage List. Afterwards the owner may refuse to grant access and by doing so render the monitoring of the object difficult. The entry may be enforced only in extreme scenario if the owner is a subject to criminal prosecution on the basis of a search warrant issued by a judge. The Criminal Act does provides legal basis for the prosecution of the owner who abuses his property right in order to damage or destroy an important cultural interest and anyone who conducts unauthorised archaeological excavations.[29]

Before the amendment the Monuments Act contained bizarre clause stating that the information about the owners contained in the Central Register of the cultural heritage is subject to a protection as a top secret on the basis of the Act on the protection of secretive information[30]. Such a high level of protection had no rationale behind it, because it was still possible to identify the owners on the basis of the simple match between the search results in the National Heritage List and the Cadastre. This clause was deleted by the latest amendment.

3.4.4 Renovation of cultural monument

According to a theory the renovation is derived from the verb *renew*, and is justified only where it has a conserving effect itself or where conservation measures prove to be

[28] § 12 section 1 a) of the Monuments Act.

[29] § 248 a § 249 of the Criminal Act.

[30] Act n. 215/2004 Coll. on the Protection of Secretive Information.

unfeasible.[31] Therefore this concept used by Monuments Act is not appropriate for what the Monuments Act aims to achieve. What the state officials pursue is rather the historic preservation or conservation, not the renovation.

From the point of view of the owners it is renovation, that they desire. In general public there is a prevailing view that the old buildings are no longer useful and should be either completely replaced by new buildings or renovated using modern materials. Indeed the general public does not know that demolishing old building and constructing a replica is not a legitimate way of preserving the heritage. Therefore Monuments Board has an important role to play from the moment the owner decides to intervene into his cultural monument.

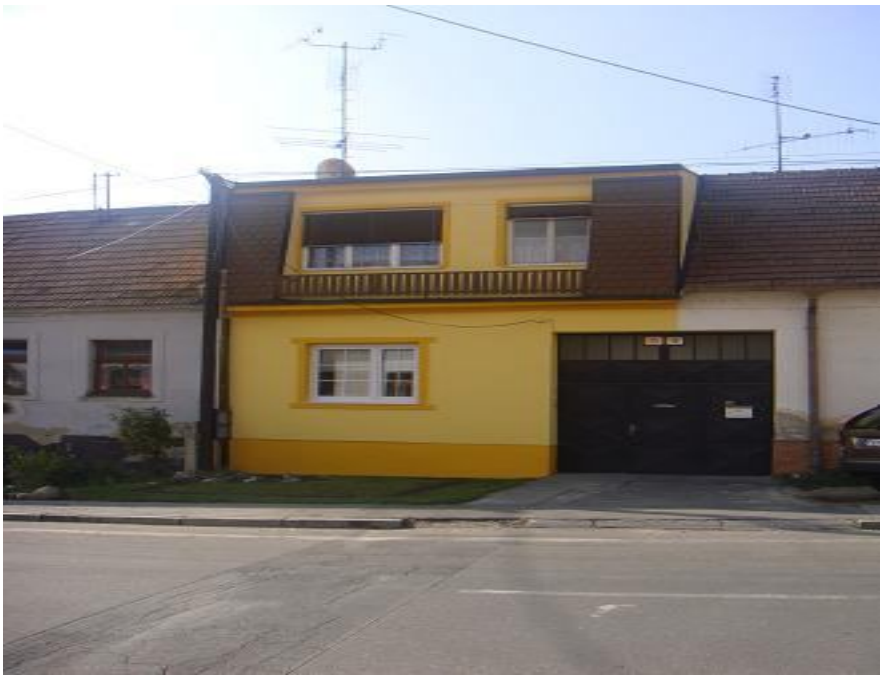
The owner must submit a *renovation plan* to the regional Monuments Board before carrying out any work. The regional Monuments Board will verify if the renovation program can be conducted without interfering into the cultural heritage value of the monument and at the end of the procedure it will adopt a *decision approving, rejecting or modifying the renovation plan.* The owner of the cultural monument is eligible to apply for a subsidy from Ministry of Culture or from a Municipality. However there is no legal entitlement to receive a subsidy due to a large number of applications. In majority of the cases the owner will have to rely on his own resources.

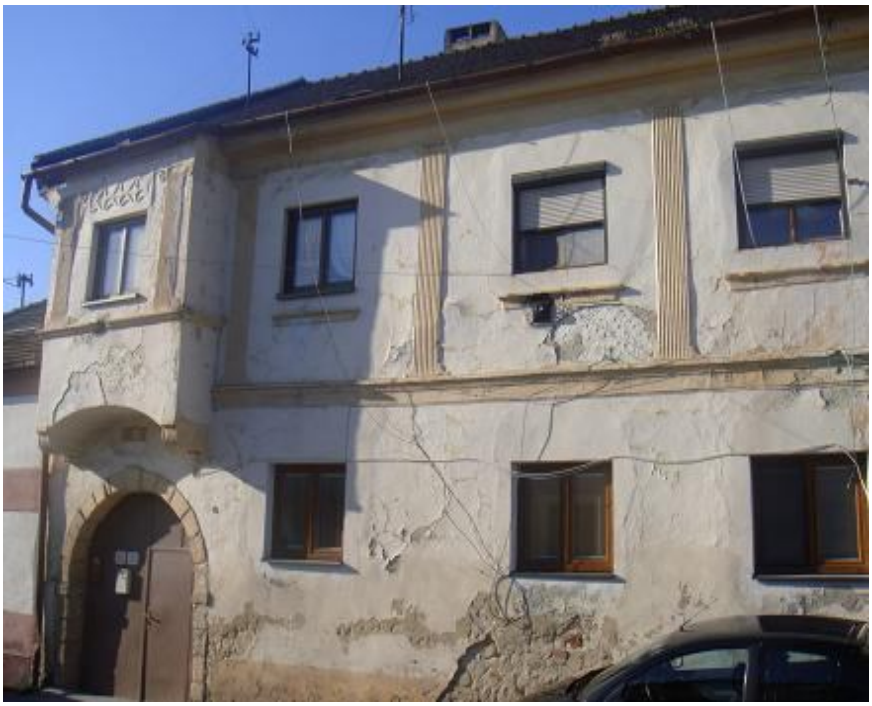
3.5 Rights and duties of the owners of real estate in historic reserves, historic zones and buffer zones

The owners of real estate situated in the historic reserves, historic zones or buffer zones do not have the same extent of right and duties as the owners of cultural monuments, because historic sites are subject of territorial protection as such, which means that their protection is ensured through common effort and cooperation of municipality, state authorities and owners of real estate. The owners individually are not eligible for any state funding and must entirely rely on their own resources, but the Ministry of Culture may contribute to the financing of a historic site as a whole.

[31] Lecture of Andrea Urlandová: Terminology and Principles of Heritage Conservation, 21st October 2009, Svätý Jur.

The protection of the urban historic reserve Svätý Jur is concretized in the document "Principles of Monuments protection" containing the requirements for the appropriate functional use of the reserve, for the conservation and regeneration of its historic ground plans and plots, the composition of objects, the height and spatial arrangements of the objects, arrangement of the streets, facades, roofs, small architecture etc.[32] The plastic windows, thermal insulation and residential attics are prohibited by these Principles. Despite these requirements we can see them all around in Svätý Jur.





[32] Adopted on the basis § 29 section 3 of the Monuments Act by Monuments Board in 1988.

3.6. Sanctions for breach of duty

One of the very essential demands is the basic protection of the monument, which the owner must carry out at his own cost. The breach of this duty is sanctioned; the amendment of the Monuments Act n. 208/2009 Coll. applicable from 1st June 2009 has significantly raised the sanctions. Individual may be imposed a fine up to 200 000 Euro, and in case of damage of UNESCO site, a double of this amount. The legal persons may be asked to pay a fine up to a 1 mil. Euro or a double of this amount in case of UNESCO site. The amendment provides the administration with one particularly effective tool to deal with recalcitrant owners – expropriation of a property, which can be viewed by some as a very heavy interference to the private interests of the owner. Nevertheless the expropriation is conform to the European legal standard based on the Granada Convention which has been ratified by Slovak republic.[33]

4. Conclusion:

We have seen that the whole constitutional and legal framework is based on the recognition that private interest of the owners must be limited by public interest to protect cultural heritage. The law regulates conditions of use, entry to, protection and renovation of monuments. The owners are no longer free in their disposal of the property and they may feel that it does not belong to them completely, but they have to pay for the high cost of its maintenance and renovation themselves in most of the cases. Since the Monuments Act does not clarify the meaning and practical application of the concepts of maintenance, conservation, repair adaptation and reconstruction this encourages the owners to let their property dilapidate. The other problem lies in the lack of technical capacity of Monuments Boards to enlist the objects which would deserve the inscription on the National Heritage List, thus many of the properties are waiting for the protection and we can only guess who is faster - the bulldozers of developers or state officials.

However there is a light at end of a tunnel. Due to negative experience in the past the amendment of the Monuments Act n. 208/2009 Coll. applicable from 1st June 2009 has significantly raised the sanctions for a breach of law and the balance has tilted more in favour of public interest then private interest unlike in the past years after the adoption of the

[33] See the note 1.

Monuments act in 2002. In addition to the sanctions the expropriation has been emphasized as a legitimate legal tool which is at the disposal of the state authorities. It should be used cautiously and only as a last resort when all other solutions failed and the owner is not listening to the administration. It would be better for both sides if the owners were involved in the protection of the cultural monuments through an organisation representing them and if their relationship with the administration was based on a cooperation and a mutual respect instead of violent legal confrontation where no compromise between the public and private interest is possible.

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