PROTECTION OF CULTURAL HERITAGE

Apostolos Papaconstantinou[1], *Doctorate in Constitutional Law, Attorney in Supreme Courts*
Partner at **Ap. Papaconstantinou - G. Katrougalos - N. Hlepas & Associates Law Firm**

Which is the basic legal framework for the protection of cultural heritage?[1]

In order for the legal framework regulating the protection of cultural heritage to be more easily perceived, it is, initially, essential to state that, due to the particularity of her historical background, Greece's cultural heritage is of great importance. Perhaps, it wouldn't be an exaggeration to claim that Greece constitutes, almost entirely, an extensive and complex archaeological site. Indeed, both in the hinterland and most of the islands, there are many important archaeological sites with monuments relating to the era of ancient Greece, and, subsequently, the Roman times. Many of these monuments are protected via their inclusion in archaeological sites, while for others, perhaps most of them, the archaeological excavations have not progressed yet.

For the reason mentioned above, the legal framework for the protection of cultural heritage is particularly rigorous. The most important provisions in this form are, certainly, those contained in the article 24 paragraph 6 of the Constitution, whereby: «Monuments and historic areas and elements shall be under the protection of the State». This provision is specified by the law 3028/2002 which currently constitutes the backbone of the relevant legislation. Moreover, it is worth noting that the existing legal framework is supplemented by the international conventions relating to specific aspects of the protection of cultural heritage and ratified by Greece. Indicatively, we refer to the definitions of the International Convention of Granada in 1985 for the protection of architectural heritage in Europe, signed in the framework of the Council of Europe and, subsequently, ratified by the Greek Parliament with the law 2039/1992[2], the (revised) European Convention of Valletta of the 16th of January in 1992 on the Protection of the Archaeological Heritage, which was also signed within the framework of the Council of Europe and was, later, ratified by the Greek Parliament (law 3378/2005), the Convention of Paris of the 6th of May in 1969 on the protection of the archaeological heritage, also concluded in the framework of the Council of Europe and ratified with the law 1127/1981 as well as the International Convention of Paris of the 23rd of November in 1972 on the protection of the international cultural and natural heritage ratified with the law 1126/1981. It is noted that the above rules of the international law are of existing legal binding force, applying, therefore, in the national

1. Apostolos Papaconstantinou has taught Public Law for a series of years in Greek Universities, being at the same time in significant positions in the Public and Private sector.

2. See *Apostolos Papaconstantinou,* The Convention of Granada for the Protection of the Architectural Heritage and the Constitution, Law and Nature, 47 etc.

legal system on a superior-effect basis, compared to the common law, provided, of course, that they include provisions characterized as self-executing[3].

Which specific elements of the cultural heritage are currently protected?

According to the law 3028/2002 and in the protection context structured with it, the cultural heritage of the Country is included since the ancient times and up to the present day. This protection aims at preserving the historical memory for the sake of present and future generations as well as the upgrading of the cultural environment. The cultural heritage of the country consists of cultural assets within the boundaries of the Greek territory, including the territorial sea, as well as in other sea areas where Greece exercises such jurisdiction under the international law. The cultural heritage also includes intangible cultural assets.

It is noted that, specifically the notion of «immovable monuments» includes a) ancient monuments dating back to 1830, b) more recent cultural goods that are earlier than the last hundred years, being, subsequently, characterized as monuments due to their architectural, urban, social, racial, traditional, technical, industrial or generally historical, artistic or scientific significance, γ) more recent cultural goods falling within the period of the last hundred years, being, subsequently, characterized as monuments due to their architectural, urban, social, racial, traditional, technical, industrial or generally historical, artistic or scientific significance.

How can we practically implement the provisions for the protection of the cultural heritage?

It constitutes an incontrovertible fact that the jurisprudence of the Council of State, namely the supreme administrative Court of the country, plays a particularly important role in the implementation of the provisions for the protection of cultural heritage. As with the protection of the natural environment[4], the Court has developed a particularly strict jurisprudence establishing a regime of practically complete protection of cultural heritage.

In particular, according to its case-law, the aforementioned constitutional provisions «specifically introduce enhanced protection of the cultural environment, i.e. the monuments as well as other cultural goods originating from human activity and composing, due to their historical, artistic or scientific importance, the general cultural heritage of the Country. This protection includes, inter alia, the maintenance of these cultural elements in perpetuity. Therefore, any intervention near the monument shall, in principle, aim at protecting it and demonstrating its importance; it shall be attempted in view of the specific characteristics and nature of the monument and on the basis of scientific data, prohibited interventions and actions incompatible with the intended use of the monument. (CoS 2540/2005)» (see indicatively CoS 2332/2009). In this framework,

3. See *Apostolos Papaconstantinou,* State and International Law. The constitutional arrangement of national and international law relations, Athens, 2001

4. See *Apostolos Papaconstantinou*, The article 24 of the Constitution as the legal-political tension field in the recent case-law of the Council of State, Law and Nature site 1997, pp.573 and, recently, Judicial Activism and Constitution. The example of the environmental jurisprudence of the Council of the State, Environment and Law 2006, pp 222 et seq., The environmental Constitution :Modern aspects, Environment and Law, 2011.

«the Administration is due to take any necessary measure, apt for the protection and promotion of the importance of monuments» (CoS Plenary 88/2011). «This protection includes, inter alia, the maintenance in an invariant way and in perpetuity of these cultural elements as well as of the space needed for their emergence as an historical, aesthetic and functional module. This protection is of both preventive and repressive nature; in the latter case it includes the obligation to cease the infection of the cultural monument and restore its protected character» (CoS 293/2010). Indeed, «this protection includes, inter alia, the maintenance of these cultural elements in perpetuity and entails the ability to impose the necessary measures and restrictions of property rights as well as the obligation for owners and possessors to restore them to their original form, when damaged by time or other human actions or other incidents. These restrictions, imposed by the article 24 of the Constitution, may have a broader content compared to the general restrictions on the property included in the article 17 of the Constitution» (CoS 1587/2010, 2338/2009, 1652/2009, 3050/2004, 1097/1987 Plenary etc).

Additionally, according to the Court's judgment «the rule of validity of interventions near the monument applies only after obtaining the approval of the Minister of Culture; the relevant approval of the Minister of Culture for the building work shall be , specifically, granted if the distance from the immovable monument –in the sense of which its immediate surroundings are currently included in an explicit way- or the legal terms framing it, do prevent any danger of a direct or indirect damage to it. Subsequently, it is concluded that, the Minister of Culture evaluates the characteristics of the project and assesses the direct and indirect impact of the implementation of the project on the immovable monuments, i.e. those falling within the scope of protection of the archaeological law, in order to grant the permit to implement the project near monuments. In view of the above constitutional requirement as well as the provisions of the law 3028/2002, interpreted under the light of the above constitutional provisions on the protection of ancient monuments in perpetuity, the Minister of Culture, in the event that the implementation of the project and, specifically, the construction of a building have adverse effects on the protected monument, is obliged, with regard of the effective protection of the monument, to impose the appropriate conditions and building restrictions which, in the context of his reasoned judgment, will dissolve any harmful consequences to the monument (see CoS 2079/2003, 3258/2000, 2725/1997, 1853/1977)» (CoS 2332/2009).

In that regard, the Court has judged that «within the meaning of the provisions of the archaeological law, any intervention on the monument or near the monument shall be, in principle, designated to protect it and demonstrate its importance; subsequently, it shall be attempted in view of the specific characteristics and nature of the protected findings and on the basis of the data of the archaeological science, the prohibited interventions and actions incompatible with the intended use of the ancient monument (CoS Plenary 3454/2004, 3279/2003, 3824/2007, 2057/2007). Furthermore, the acts of the competent organs of the Administration, authorizing the execution of works or activities on or near the ancient monument, shall be specifically reasoned regarding the relevant judgment that these works or activities do protect, underline the importance or, in any case, do not substantially damage the monument or the surrounding areas. Conclusively, within the meaning of all the above provisions restrictively interpreted in the light of the article 24 of the Constitution, any activities that do not, due to their very nature or the innate dangers

resulting from their attempt, aim at protecting the monuments and the surrounding areas and demonstrating their importance, causing, furthermore, harm of them, are not developable within the limits of the characterized archaeological site» (CoS 293/2010).

All the above tend to render clear that the regulated protection context for the cultural environment, according to the case-law of the Council of State, is of an especially high standard. Subsequently, a strict legal framework is gradually structured which acknowledges the priority of cultural heritage and justifies drastic restrictions on ownership.

What is the effect of the implementation of the provisions for the protection of cultural heritage on the development of investment projects and in what way are the relevant legal issues dealt with?

The protection of cultural heritage often constitutes an obstacle in the development of investments. Instead of appearing as a factor attracting investment activities relating to the management of cultural heritage, it, not rarely, leads to delays or even cancellation of investments. This is mainly attributed to the inability of the Public Administration (especially the archaeological services) to respond within a reasonable time to the demands of owners and cooperate with them in order to achieve both the protection of monuments and the proper management of property. The legislative framework is also often highly complex, leading to different interpretations among all competent Services.

Furthermore, the Administration denotes, with great ease, extensive areas as archaeological sites, imposing at the same time on them an absolute prohibition for any use or imposing at least limited uses. Hence, it results in the legal binding of large areas without examining if there are actually documented findings as regards the existence or absence of antiquities in these areas. In addition, in many cases the legal binding of the areas is manifestly disproportionate in relation to the pursued aim of protecting these specific monuments.

The interested investors tend to deal with this issue on the grounds of conducting the appropriate Studies which substantiate in a scientific way the protection of cultural property, provided of course that this constitutes an option. The recent tendency is to render the functioning of the archaeological services more flexible in order to shorten the relevant procedures for licensing of establishments. The regulations of the law 4014/2011 modifying the procedures for environmental licensing of projects and activities in order to achieve simplification and acceleration of them constitute a characteristic example of the above.

Any legal obstacles, regarding the development of investment projects, caused by the strict application of the provisions relating to the protection of cultural heritage can be dealt with legal means (via the administrative or, if necessary, the judicial procedure), both preventive and punitive. More specifically, it is essential that, during the preparation of investment projects, any existing restrictions on the protection of cultural heritage are taken into account. It is, therefore, necessary to establish an examining process of the legal framework governing this area, as well as of the conditions laid down in the use of land in order to verify the compatibility of the investment project with them. Note that the

change of land use and the lifting of restrictions which were imposed for the protection of cultural heritage is, in view of the strict case-law of the Council of State, extremely difficult. However, in most cases the provision of special conditions in the Environmental Impact Study relating to the protection of cultural property may have a positive effect, when dealing with possible risks for the investment. It is, subsequently, an incontestable fact that the adequate technical and legal documentation of these studies is an essential condition for the successful judicial troubleshooting, if needed.