



INTERNATIONAL  
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**THE CONSTITUTIONAL  
REGULATION OF THE  
PROTECTION OF THE HELLENIC  
CULTURAL HERITAGE AND THE  
CONTENT OF THE RELEVANT  
HUMAN RIGHT**

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## Abstract

This dissertation was written as part of the MSc in Art Law and Art Management 2017-2018 at the International Hellenic University.

The protection of cultural heritage in the Hellenic constitution and the relevant right to culture is described in the provision of article 24.1. This article introduces an obligation of the state to protect cultural environment and every person's right to this protection. A further specification is made in article 24.6. This article along with the provisions of its implementing Law 3028/2002, and further constitutional provisions of articles 16.1 and 18.1 form a legal frame regarding the protection of culture. With the help of case-law, the content of the protection is presented. Furthermore, the content of cultural heritage in the international and EU context is presented and explained through research in depicted international and EU legal instruments, and a navigation in designated national constitutions worldwide. This enumeration results in a comparative evaluation and the highlighting of the distinction between the concepts of cultural heritage (*patrimoine culturel*) and cultural environment (*environnement culturel*).

Equally important is the presentation of the foundations of cultural rights, the explanatory description of the right to culture in the national constitutional context and an analysis of the content and legal function of this right.

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Keywords: (Culture, Protection, Human Right, Constitution, Environment)

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## **Preface**

This dissertation has the ambition to present to the academic and political communities the findings of research made during the last months of year 2018 regarding the protection of culture in the Hellenic 1975/1986/2001/2008 Constitution. It is not dealing with older Hellenic Constitutions, than the currently in effect constitution, and analyzes constitutional provisions in effect in Greece.

A literal approach of article 24 par. 1 and 6 of the constitutional text and articles 16.1 and 18.1 of the same text highlight the fragmented and unsystematic character of the provisions for the regulation of the protection of culture. This work is limited to explain the legal framework of the protection focusing on the constitutional text, its implementing laws, case-law on them and the regulation in international conventions Greece has assessed to. The description of the approaches of protective regulation in them can be very enlightening in revealing the modern developments in the field. This brings forward the question of the constitutional compliance to the recent developments in academic theory and social progress, with attention to the binary analysis of hellenic state's protective obligations and individual human right to culture.

During research in the area, it became evident that bibliography could relatively help. The consolidation of the concepts used for the protection since 1975 is an obstacle that can deter from dealing with the issue. A few academic writers suggested the particularities of the hellenic constitutional text. The help received by them was definitive. Their contribution made it possible to overcome challenges of access to bibliographical references and a modern view to the issue.

This dissertation is intending to contribute, with respect to words, to the continuing discussion about the need on constitutional revision. In this scope, it suggests and justifies a reason and a proposal for changes in the constitutional provisions in the subject matter of the protection of cultural heritage in Greece.



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## Introduction

Since the biennial period 1974-1975 and the political transition to Democracy, that occurred at that time, forming a period up to nowadays, alternatively known as the “Third Hellenic Republic”, Greece has enjoyed a historically prolonged era of legal and institutional stability. The new Constitution, introduced at the same time, enabled the upgrade of the legislative organization of the State and the guarantee of the citizens’ rights by maintaining and strengthening Rule of Law and by importing in the legal system innovative sets of political, civil and social rights for the people.

At the forefront of these newly adopted provisions, article 24 of the Constitution of 1975<sup>1</sup> structured and described the protection of the environment both natural and cultural, forming the so called “Environmental Constitution”

The profound choice of the constitutional legislative body to host under the same article the protection of the natural environment, as well as the protection of the cultural environment, may seem under the light of recent developments, from the technical legal view, odd, uncommon, inventive<sup>2</sup> or even eccentric<sup>3</sup>. Article 24 of the Hellenic Constitution incorporates a contradiction: it regulates within six paragraphs at the same provisions, the - distant from culture - notions of *natural environment, forest policy, spatial and residential planning*. The last paragraph though, refers actually to the protection of monuments, traditional areas and traditional elements.

The constitutional legislators of year 1975, adopted a spatial approach<sup>4</sup> in the protection of culture, excluding or, at least, not making use of the already known and established notions of “*cultural heritage*” or “*cultural goods*”, that by that time were well met in basic international convention’s texts. This legislative choice led to the further consequence of the depriving of the constitutional text of a specifically designed and focused set of provisions for the protection of and the establishment of the relevant human rights in cultural heritage, art, intangible culture, cultural policy, cultural and intellectual property, Greek culture and language in foreign soil and cultural diversity.

Furthermore, as the legal system abominates legal vacuum, it was jurisprudence and mainly legal texts of the inferior formal validity of a national law, that were used as the basis of a precise and integrated protection of culture. It is common knowledge that the so called “Archaeological or Cultural Law”, enjoys among

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<sup>1</sup> The Hellenic Constitution of 1975 is codified in Constitutional Law as Constitution 1975/1986/2001/2008, the first year 1975 being the date of its Resolution, while the consequent years being the dates of each Revision

<sup>2</sup> Trova, H. / Τροβά Ε. (2004) *Η εννοιολογική κατηγοριοποίηση του νόμου 3028/02 και το Σύνταγμα μετά την αναθεώρηση του 2001. Σύνταγμα και πολιτιστική πολιτική*] in *collective volume [Η πολιτιστική κληρονομιά και το δίκαιο]* Conference Proceedings 3-4 June 2003 Athens, European Public Law Center, ed. Τροβά Ε. p. 132, ISBN 960-301-784-1 Sakkoulas Publications, Athens, 2004.

<sup>3</sup> Trova, H. / Τροβά Ε. (2004) *Η εννοιολογική κατηγοριοποίηση του νόμου 3028/02 και το Σύνταγμα μετά την αναθεώρηση του 2001. Σύνταγμα και πολιτιστική πολιτική*] in *collective volume [Η πολιτιστική κληρονομιά και το δίκαιο]* Conference Proceedings 3-4 June 2003 Athens, European Public Law Center, ed. Τροβά Ε. p. 113, ISBN 960-301-784-1 Sakkoulas Publications, Athens, 2004.

<sup>4</sup> Christofilopoulos, D./ Δημ. Γ. Χριστοφιλόπουλος (2005) “Πολιτιστικό Δίκαιο - Προστασία Πολιτιστικών Αγαθών», ISBN 960-420-265-0 p. 42 Law & Economy P.N. Sakkoulas, Athens, 2005

experts in Greece an upgraded status, recognition, respect and primacy, that does not correspond to its legal nature of a simple typical law.

The question that arises is fundamental, regarding the nature of the Hellenic State as a culturally rich country: is this legislative choice of the Hellenic Constitution able to diminish the protection of the Hellenic<sup>5</sup> Cultural Heritage and the relevant human right, or the use of the notion of “Cultural Environment” leads to a broader and more satisfactory protection? In other words, what is the different nuance in the protection of “*cultural environment*” and “*cultural heritage*”, which is the connection and the interaction between them? The boundaries of the academic expedition to explore the answers on the above wider discussion might be set through the actual reference of the constitutional provisions of the Hellenic Constitution that protect culture, and in addition to this through a historical approach of the setting of the provisions and a literal interpretation of the above notions.

Moreover, a distinct and precise reference to the content, the holders and the nature of the constitutional fundamental right to culture, might be supportive for the scope of this work, in order to emphasize the obligations of the State to protect and guarantee the preservation and viability of cultural heritage. The three words that define the right to culture in the Hellenic Constitution, added as an amendment during the opportune time of the 2001 Revision of the 1975 Constitution, are worth-explaining.

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<sup>5</sup> The use of the adjectives “*Hellenic*” and “*Greek*” in the present work is made alternatively as they were having the same content. There is a slight distinction, though, between them, according to the accepted assumption that “*Hellenic*” is a formal type referring to the State, self-defined as “the Hellenic Republic”, and its institutions and cultural elements, as well as the legal notions regulated by the State’s legislation, whereas “*Greek*” is referring to a more common, informal and foreign perception of the geographical and ethnological determination (even sometimes hetero-determination) of the civilization, the people and their cultural creations throughout the globe and the ages of their existence. “*Culture*”, “*Cultural Protection*” and “*Constitution*” are for the purposes of this dissertation treated as formal legal notions of the Hellenic State, therefore they are accompanied by the adjective “*Hellenic*”.

## CHAPTER 1: THE PROTECTION OF CULTURAL ENVIRONMENT IN THE HELLENIC CONSTITUTION

The Hellenic Constitution was drafted by the 5<sup>th</sup> Revisionary Parliament, exercising its given constitutional power, as a symbolic basic and rudimentary step of an ongoing process of shaping a modern parliamentary democratic regime, based on the “Governmental Constitution Scheme” prepared by the Government of Konstantinos Karamanlis. It was voted on the 7<sup>th</sup> of June 1975 due to the 12<sup>th</sup> Resolution of the above Parliamentary Body and came into effect on the 11<sup>th</sup> of June of the same year 1975. At the period elapsed, the initial text was amended three times on 1986, 2001 and 2008. The Revision of 2001, that introduced new elements in the content of article 24, is of interest for the scope of the present work.

### ***Constitutional and Standard-Law Provisions for the Protection of Culture***

Constitutional provisions that regulate culture and offer protection to the cultural goods, heritage and production are to be found widespread in several articles. It is not an exaggeration to say that they may altogether form a “*Cultural Constitution*”.

#### *The legal system of the provisions of Article 24.1 and 24 .6*

The discussion about the constitutional protection of culture is, in most cases, restricted in the regulatory content of article 24 of the 1975/2001 Constitution<sup>6</sup>. This practice can be easily understood, due to the literal specialized character of the provision of article 24 paragraph 1 and paragraph 6<sup>7</sup>.

In the first paragraph, the constitutional legislator body, has introduced a clear and definite obligation of the Hellenic State to protect both natural and cultural environment, along with a relevant human right, that engages every person to this protection, as its own human right. Furthermore, in the next few words the constitutional text clarifies, that this obligation consists of special safeguarding measures, that is administrative actions, either preventive or repressive, ex-post actions. Those measures are bounded by the newly introduced in the text “principle of *sustainable development*”. The notion of “*cultural environment*” is rare, not frequently used in other constitutional or international texts, depicted by choice of the author of the constitutional executive summary. It can be welcomed as a useful innovation for

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<sup>6</sup> Inter alia, the used for this work and preferred translation of the Hellenic Constitutional text is the one that is proposed in the website of the Hellenic Parliament – source: [www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma](http://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma) hyperlink: <https://www.hellenicparliament.gr/User/files/f3c70a23-7696-49db-9148-f4dce6a27c8/001-156aggliko.pdf>, both accessed last on 17.01.2019.

<sup>7</sup> The full text of article 24.1 and 24.6 of the Hellenic Constitution is “*Article 24 1. The protection of the natural and cultural environment constitutes a duty of the State and a right of every person. The State is bound to adopt special preventive or repressive measures for the preservation of the environment in the context of the principle of sustainable development....*”....6. *Monuments and historic areas and elements shall be under the protection of the State. A law shall provide for measures restrictive of private ownership deemed necessary for protection thereof, as well as for the manner and the kind of compensation payable to owners*”.

the European Continent, despite of the systematic problems, it created. The 1975/2001 Constitution introduced to the Hellenic legal system guarantees for the protection of the natural and anthropogenic environment, which are part of the set of third generation human and social rights. According to *Kassimatis, G. (2004)*<sup>8</sup> and *Papadimitriou, G. (1994)*<sup>9</sup>, the source of the relevant provisions was article 9 of the Italian Constitution and articles 85-87 of the Yugoslavian Constitution, effective at that time. Similar is the approach of *Trova, H. (2004)* who characterizes the notion of “*cultural environment*” as “a modern notion of the law that appears in an autonomous way in “advanced” legal systems, even if further down criticizes the notion as “constitutional invention”<sup>10</sup>”

The 1974 “Governmental Constitutional Scheme” (article 27) mentions the above two provisions, that is article 9b of the 1948 Italian Constitution and articles 85-87 of the 1974 Yugoslavian Constitution, as its sources of influence. The final form of the provision is a work of the Assembly of the appointed Commission for 1975 Constitution under the decisive influence of the then Deputy Secretary of State for Public Works K. Mpiris, as evident from the formal proceedings of the Hellenic Parliament. The content of these provisions<sup>11</sup>, however, can serve as a partial and distant influence, because it lacks the regulatory density that the Hellenic Constitutional provision enjoys. Another finding, of a literal approach of the Italian passage is that there is no substantial reference to the environment, while the

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<sup>8</sup> Kassimatis, G./ Κασσιμάτης Γιώργος, (2004), «Η μετάβαση στη Δημοκρατία και το Σύνταγμα του 1975» editorial in website [www.constitutionalism.gr](http://www.constitutionalism.gr), source: <https://www.constitutionalism.gr/1811-i-metabasi-sti-dimokratia-kai-to-syntagma-toy-1975/>, accessed late on 17.01.2019.

<sup>9</sup> Papadimitriou, G. / Παπαδημητρίου Γιώργος, (1994), «Το Περιβαλλοντικό Σύνταγμα, Θεμελίωση, Περιεχόμενο και Λειτουργία» (1994) editorial in website [www.nomosphysis.org.gr](http://www.nomosphysis.org.gr), source: <https://www.nomosphysis.org.gr/7006/to-periballontiko-suntagma-themeliosi-periexomeno-kai-leitourgia-oktobrios-1994/>, accessed late on 17.01.2019.

<sup>10</sup> Trova, H. / Τροβά Ε. (2004) *Η εννοιολογική κατηγοριοποίηση του νόμου 3028/02 και το Σύνταγμα μετά την αναθεώρηση του 2001. Σύνταγμα και πολιτιστική πολιτική*] in collective volume [Η πολιτιστική κληρονομιά και το δίκαιο] Conference Proceedings 3-4 June 2003 Athens, European Public Law Center, ed. Τροβά Ε. p. 113, ISBN 960-301-784-1 Sakkoulas Publications, Athens, 2004.

<sup>11</sup> Article 9 of the Italian 1948 Constitution: “*The Republic promotes the development of culture and scientific and technical research. It safeguards the natural landscape and the historical and artistic heritage of the Nation*” source of the preferred transl: [www.constitutionnet.org/sites/default/files/Italy.Constitution/pdf](http://www.constitutionnet.org/sites/default/files/Italy.Constitution/pdf) accessed last on 17.01.2019

Article 192 of the Constitution of the Socialist Federal Republic of Yugoslavia “*Man shall have the right to a healthy environment. Conditions for the realization of this right shall be ensured by the social community*”

Article 193 b of the Constitution of the Socialist Federal Republic of Yugoslavia “*Everyone shall be bound to preserve nature and its goods, natural landmarks and rarities, and cultural monuments*”

Article 85 of the Constitution of the Socialist Federal Republic of Yugoslavia “*Land, forests, waters, watercourses, the sea and seashore, ores and other natural resources, goods in general use, also real property and other objects of special cultural and historic significance shall, as goods of general interest, enjoy special protection and shall be used under conditions and in the way specified by statute*”.

Article 87 part of chapter 11 Conservation and Improvement of the Human Environment “*Working people and citizens, organizations of associated labour, socio-political communities, local communities and other self-managing organizations and communities shall have the right and duty to assure conditions for the conservation and improvement of the natural and man-made values of the human environment, and to prevent or eliminate harmful consequences of air, soil, water or noise pollution and the like, which endanger these values and imperil the health and lives of people*”

Source of the preferred transl: [www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf](http://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf) accessed last on 17.01.2019

Yugoslavian text is the main source of inspiration for the Hellenic constitutional body, as far as it combines in the same chapter and articles natural and human-made environment.

The reference to “*culture*” in the environmental context shall be distinguished from the term “*nature*”, as “*culture*” is used to describe the artificial and humanmade intervention to the environment, otherwise referred to as “anthropogenic”. It consists of the entity of cultural elements and goods, that serve as evidence for the human impact and relation to the environment. One can argue that “*culture*” of article 24.1 contains *cultural heritage along with residential environment*. Systematically, this seems incoherent, as it produces an image for culture, that does not take its value under consideration. Placing under the same roof creations of outstanding value with creations of moderate importance, does not help to define the means of their protection. This is possibly, the aim of paragraph 24.6: to establish a *stricto sensu*, however still partial and inadequate, statement for “*culture*” containing the enumeration of: *monuments, traditional sites and traditional elements*. Each of these notions, even if attributed by the legislator to cultural environment, belongs to the more specific field of “cultural heritage”.

To underline the distance in meaning between “cultural environment” and “cultural heritage” is sensible and practical. Evidence to the difference is the fact that Law 3028/2002, that followed the revised content of article 24.1 of the Constitution, felt the need to refer directly to “*cultural heritage*”, as its regulatory field, in a way that the constitutional text failed to do. The kind of the protective policies of the State are mainly designated by the value of the protected item or monument.

In order to make the protective (preventive or ex-ante and repressive or ex-post) measures conceivable, one must comprehend, prior to this, which is the object of the protection that article 24.1 and 24.6 of the Hellenic Constitution aspires to encompass. To define in a more satisfactory level the ambiguous concept of “*cultural environment*”, article 24 of the 1975/2001 Constitution, out of its 409 words<sup>12</sup> devotes 13 of them to list general-term examples of cultural environment assets. This listing, which is, to the author’s personal opinion, conclusive, restricts the constitutional protection in three cases: *monuments, traditional sites and traditional elements*. In other words, the constitutional legislative body made the profound choice to reserve the exclusive superior care to the above three aspects of cultural environment and only.

By accepting the *a contrario* argument, the notion of cultural environment is broad, including cultural heritage, and at the same time narrow containing a spatial approach of this heritage, excluding from the enhanced constitutional protection of article 24 numerous forms of cultural activity, as, par example, intangible cultural heritage, the ethnic dimension of culture as expressed in works that are situated currently out of the State’s borders created by Greek expats in foreign countries, a problem growing in the modern social context of increased immigration, and the worth protected value of cultural diversity. Enlightening to this direction is the definition of the term “environment” that can be found in article 2 Law 1650/1986 “Protection of environment”: “*Environment is the group of natural and humanmade factors and elements that interact and affect ecological balance, the quality of life, the health of the inhabitants, the historical and cultural tradition and the aesthetic values*”.

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<sup>12</sup> of the Greek text

The content of the above constitutionally protected assets (*monuments, traditional sites and traditional elements*) is not determined in the text - something that is expected due to its regulatory platitude - it is left, though, to the legal instrument of a typical statute of standard effect and to cas-law to determine, in full, the meaning of the terms and the various aspects of the intended protection. Unlike “*monuments*”, who are feasibly and exhaustively described in the Constitution’s implementing laws (*vide infra*), the notions of “*traditional areas*” and “*traditional elements*”<sup>13</sup> are more complex. *Christofilopoulos, 2005*<sup>14</sup>, draws a line between “*monumental cultural assets*” that constitute cultural heritage regulated by Law 3028/2002 and “*traditional cultural assets*” that constitute the “*architectural cultural heritage*” regulated by article 6 Law 4067/2012, in conjunction with Law 2039/1992 (Convention for the Protection of the Architectural Heritage of Europe, Granada 1985) and with Law 1126/1981 (UNESCO Convention Concerning the Protection of the World Cultural Heritage, Paris 1972), as both incorporated to the Hellenic National Law. This categorization is practical, rational and solves the problem of describing the complex notions of traditional areas and elements, attributing them to the architectural heritage.

Equally interesting is the distinction evident in *Christofilopoulos, 2005*, between cultural environment *stricto sensu* that is consisting of the above mentioned monumental and traditional cultural assets, and cultural environment in a broader sense, that also includes residential environment and intellectual property. This distinction is necessary and comes as a result of the extensive regulatory field of the unusual theoretical idea of cultural environment, that, to my opinion, complicates and distorts the protection of culture.

#### *The legal system of the provisions of implementing Laws 360/1975 and 3028/2002*

An early attempt to define the content and aspects of the term “*cultural environment*” was manifested in Law 360/1976 “*On Spatial Planning and Environment*” (Official Gazette A 151). This statute, which was eventually codified in Pres. Decree 14/1999 (Official Gazette D 580 27.07.1999) in article 1 paragraph 6, in lack of a constitutional interpretation, provided of a definition of the term “*cultural environment*”: “*The humanmade elements of culture and characteristics, as they were*

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<sup>13</sup> It may be argued that traditional elements are intangible cultural elements. This is an interpretation that one should be reluctant to adopt, as this term is closely related to tangible elements as monuments and spatial elements as traditional areas. Most of the cases, traditional intangible heritage is not an object of individual property and is not, due to its nature, bound to be protected through restrictive property measures. The idea of this term “*traditional elements*” may be referring to partial traditional architectural tangible structures, like traditional taps and fountains, traditional threshing floors, mills, pigeon-houses, doors and windows, an approach that is closer to the productive will of the constitutional legislator body. This interpretation of the obscure concept of traditional elements is consistent to the theory of “*strict constructionism*”, the legal approach to the Constitution that supports that its comprehension shall be based to the strict letter of the text and shall take into consideration the will of the makers. However, the approach of Hellenic case law is different: aiming not to exclude cultural aspects from the enhanced constitutional protection of article 24.6, attributes all aspects of cultural heritage to the term “*traditional elements*” ΣτΕ 3893/1981 Plenary source: NOMOS Legal Information Database [https://lawdb.intrasoftnet.com/nomos/3\\_nomologia\\_rs\\_sub.php](https://lawdb.intrasoftnet.com/nomos/3_nomologia_rs_sub.php)

<sup>14</sup> Christofilopoulos, D./ Χριστοφιλόπουλος Δημ. (2005) *Πολιτιστικό Δίκαιο - Προστασία Πολιτιστικών Αγαθών*, p. 7 ISBN 960-420-265-0 Law & Economy P.N. Sakkoulas, Athens, 2005

*shaped by the intervention and the relations of human with the natural environment, including historical places, as well as the artistic and cultural heritage of the country in general*<sup>15</sup> Significant for the formulation of this early definition was the need behind it to express and define the newly then (in 1976) introduced constitutional term of cultural environment, the distinction of the influence of human activity in the natural environment, and, above all, the connection with the artistic and cultural heritage of the country.

The latest statute that regulates, applies and serves as the implementing legislative interpretation of article 24.1 and 24.6 of the Hellenic Constitution is Law 3028/2002 *“on the protection of antiquities and Cultural Heritage in general”*<sup>16</sup>, (Official Gazette A 153), else known as *“archaeological”* or *“cultural law”*. This statute bears a *“sui generis”* weight in the Hellenic legal order, that few laws enjoy, and a recognition for its regulatory content above experts, forming a cultural institutional frame. According to the Explanatory Memorandum of the draft law<sup>17</sup>, this statute is governed by the following distinct fundamental principles: the Categorization and Expansion of the notion of cultural heritage, the equal treatment of monuments of different periods, the social dimension of the protection of cultural heritage, the enrichment of the protection, the complementarity between state obligations and the obligations of citizens, the regulation of ownership and possession of monuments, the regulation of the cultural assets trafficking, the integration of the monuments in the space, the facilitation of the citizens’ access to the cultural heritage elements, the establishment and conduct of research and the enlargement of exchanges with other foreign countries.

Among its various provisions of enhanced regulatory density, the first article of the law defines its regulatory scope, to be the protection of the cultural heritage of the Country, from the ancient years until this day. Furthermore, the first article<sup>18</sup> provides a substance for the cultural heritage (in a way the Constitution fails to do so), consisting of cultural assets located within the borders of the Hellenic territory,

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<sup>15</sup> Article 1 paragraph 6 Presidential Decree 14/1999 (Official Gazette D 580 27.07.1999), transl. by the author source: [https://lawdb.intrasoftnet.com/noms/2\\_nomothesia\\_rs\\_sub.php](https://lawdb.intrasoftnet.com/noms/2_nomothesia_rs_sub.php), accessed on 19.01.2019

<sup>16</sup> The title and text of Law 3028/2002 was adopted for the needs of this work in its translated form in English by the World Intellectual Property Organization (WIPO) source: <https://www.wipo.int/edocs/lexdocs/laws/en/gr/gr228en.pdf> accessed on 19.01.2019

<sup>17</sup> Explanatory Report of the draft Law *“for the protection of Antiquities and Cultural Heritage in general”* accessed last on [https://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/g-arxaio.eis\\_1.pdf](https://www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/g-arxaio.eis_1.pdf)

<sup>18</sup> *Article 1 “Scope”* of Law 3028/2002 (Official Gazette A 153/28.06.2002), has the following content in full: 1. From the ancient years until this day, the cultural heritage of the Country falls into the protection provided by the provisions of this law. This protection aims at the preservation of historical memory in favor of the current and future generations, and at the improvement of the cultural environment. 2. The cultural heritage of the Country consists of the cultural assets located within the borders of the Greek territory, including the territorial waters, as well as within other sea zones on which Greece has relevant jurisdiction in accordance with the international law. Cultural heritage also includes the intangible cultural assets. 3. In the context of the international law regulations, the Greek State also procures for the protection of cultural assets originating from the Greek territory, regardless of the time these were taken abroad. The Greek State, always in the context of the international law, also procures for the protection of cultural assets that are historically linked to Greece, regardless of their location article 1 in its translated form in English by the World Intellectual Property Organization (WIPO) source: <https://www.wipo.int/edocs/lexdocs/laws/en/gr/gr228en.pdf> accessed on 20.01.2019

including territorial waters, and intangible cultural assets. Being concise to the notion of Hellenic cultural heritage, the cultural law supplements and expands its scope with the special interest of the Hellenic state for the protection of cultural assets of Greek origin taken abroad, or historically linked to Greece (in case of immovables) regardless of their location. This last paragraph offers a declaration of interest for Hellenic cultural heritage worldwide, even if this interest is limited, narrowed and bounded by the provisions of international treaties. The clear and consistent ethnic approach of cultural heritage of the implementing Law 3028/2002 makes evident the distinction to the diffident and spatial approach of the constitutional provisions.

Equally important, article 2 provides a definition of the assets protected by the Law and the Constitution, referred to as “*monuments*”. Whilst Law 3028/2002 gives an overall substance to the notion of “*cultural assets*”, as the testimonies of the existence and the creativity of humankind, either individually or collectively, explicitly distinguishes a subtotal of cultural assets that names them as monuments, or in the Greek word “*mnimeia*”, word that in the Greek language bears the meaning burden of the object that serves as a memory carrier, as a historical trace for the future generations<sup>19</sup> (Argyropoulos Chr. 2004). This term is a functional, tested, yet innovative, solution, as it covers the movable elements of cultural environment as well as the immovable ones. It is consequent to the actual wording of international treaties, and, at the same time, to the wording adopted by article 24.6 of the Hellenic Constitution, forming a consistent legal expression. Law 3028/2002 introduces a criterion based on, intrinsic rather than extrinsic, value, when it clarifies that “*monuments*” is this sort of cultural assets, that serve as material testimonies, belong to the cultural heritage of the Country, adding an ethnical dimension, and as such are in need of special protection measures. In addition to this, the above cultural law forms a protection system based on three monument categories: ancient monuments, recent monuments and immovable monuments.<sup>20</sup> It is fair to say, however, that

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<sup>19</sup> Argyropoulos Chr. / Αργυρόπουλος Χρ (2004) *Τα μνημεία ως αντικείμενο συναλλαγής και εμπορίου in collective volume [Η πολιτιστική κληρονομιά και το δίκαιο] Conference Proceedings 3-4 June 2003 Athens, European Public Law Center, ed. Τροβά Ε. p. 238, ISBN 960-301-784-1 Sakkoulas Publications, Athens, 2004.*

<sup>20</sup> For reasons of legal accuracy, article 2 “Definition of terms” of Law 3028/2002 (Official Gazette A 153/28.06.2002), has the following content in full: “For the implementation of the provisions of this law: a) Cultural assets are the testimonies of the existence and of the individual and collective creativity of man. b) Monuments are the cultural assets that constitute material testimonies, belong to the cultural heritage of the Country and call for special protection based on the following categories: aa) Ancient monuments or antiquities are all cultural assets dating back to prehistoric, ancient, Byzantine and post-Byzantine times up to 1830, subject to the provisions of article 20. The ancient monuments also include caves and paleontological remains, for which there is evidence that they are linked to human existence. bb) Recent monuments are the cultural assets that are dating after 1830 and call for protection due to their historical, artistic or scientific significance, in accordance with the distinctions of articles 6 and 20. cc) Immovable monuments are the monuments which have been attached to and remain on the ground or the seabed or on the bed of lakes or rivers, as well as the monuments which are found on the ground or the seabed or on the bed of lakes or rivers and cannot be removed without damage to their value as testimonies. The immovable monuments also include installations, constructions and decorative and other elements, which form an integral part of the monuments, as well as their immediate surroundings. dd) Movable monuments are the monuments that are not deemed as immovable. c) Archaeological sites are areas on land, in the sea, in lakes or in rivers that contain or there is evidence that they contain, ancient monuments, or which have constituted or there is evidence that they have constituted monumental, residential or burial groups from the ancient times up to 1830. The

“monuments”, from a technical point of view, are the cultural elements, listed and registered on the National Archive of article 4 Law 3028/2002.

The basic reason for the comprehensive reference to the primary provisions of the standard effect Law 3028/2002, is to stress out the distinction between a statute, in one hand, that is legally consistent and made the choice of its terms in a methodical and systematic way and the constitutional provisions of article 24.1 and 24.6, on the other hand, that are being criticized as novel, at their time, yet outdated, under the recent developments of theory and international legal texts.

To sum up, it may not be a misstatement to say that the protection of culture in article 24 resembles to a broad dome, that is incomplete without the necessary correlation to the definitions of cultural law, a statute out of the constitutional text, and, in addition to that, to numerous provisions of international treaties of superior effect, that claim appliance. Given this, it is fair to say that, even if there is no lack of protection of the cultural assets and the cultural heritage in the Hellenic legal system as a whole, the system of the legal protection of cultural environment by the Hellenic Constitution cannot serve by itself as an integrated broad symbolic provision to this scope, due to its ambiguity and partial spatial approach.

#### *Content of the protection*

To emphasize the complementarity between article 24.1 of the Hellenic Constitution and its implementing cultural<sup>21</sup> Law 3028/2002, a distinct mention to their cultural protective provisions should be made.

The constitutional text shapes two layers of protection: an overall protection (art. 24.1) and a specialized enhanced protection (art. 24.6 for certain tangible spatial cultural assets). The overall protection deems necessary because of the determination of the measures of the protection (which can be both preventive and repressive) and the connection made after the 2001 Constitutional Revision to the principle of sustainability. It is, however, the specialized protection of article 24.6 that attributes value to the protected elements. Setting those layers together, the State’s obligation to protect and preserve culture diachronically, arises as apparent. This way is

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archaeological sites also include the necessary open space that allows the extant monuments to form a historical, aesthetic and functional unity. d) Historical places are areas on land, in the sea, in lakes or in rivers that constitute or there is evidence that they have constituted the place of important historical or mythical events, or areas where there is evidence that they contain monuments dating after 1830, or composite works of man and nature dating after 1830, which form characteristic and homogenous sites that can be topographically demarcated and must be protected due to their folkloric, ethnological, social, technical, architectural, industrial or their general historical, artistic or scientific significance. e) Intangible cultural assets are the expressions, activities, pieces of knowledge and information, such as myths, customs, oral traditions, dances, proceedings, music, songs, crafts or techniques that constitute testimonies of the traditional, popular and literary culture. f) Service is the responsible Central or Regional Service of the Ministry of Culture. g) Board is the ad hoc competent advisory body that acts collectively, as stipulated in the provisions of articles 49 to 51.” article 2 in its translated form in English by the World Intellectual Property Organization (WIPO) source: <https://www.wipo.int/edocs/lexdocs/laws/en/gr/gr228en.pdf> accessed on 20.01.2019

<sup>21</sup> Law 3028/2002 usually for reasons of comprehension, is referred to as “archaeological” or “cultural” law. This work uses the latter as accurate.

introduced a “cultural established right”,<sup>22</sup> an “*Acquis Culturel*”. Further dimensions of the State’s obligation for protection, is the perpetual preservation of a given cultural asset, as inherited from past generations, its safeguarding from a present danger, its incorporation in the social and economic context, and the scientifically accepted documentation and restoration (or reconstruction, if this is the case).

The State’s obligation, can be distinguished into two variations: on the positive side, the State is bound to assume the obligation to enact multilevel governmental measures (legislative, administrative and punitive) for the preservation of the cultural environment, or to act in the State’s competence in a way compatible with the scope of article 24.1 of the Constitution, by applying even directly its regulative content. And on the negative side, not to adopt measures, contrary to the above scope of the Constitution. This obligation also means that all State authorities bear the bound competence to not act in contrary to the provision of article 24.1 of the Constitution, or to abstain from the enablement of unconstitutional measures. And to preserve and to take care of the cultural heritage elements (cultural assets worth protected for the generations to come), not allowing activities that can cause destruction, deterioration, even mild alterations or degradation of the above elements of cultural heritage.

Having these statements in mind, *Tachos (1995)*<sup>23</sup> points out that “the nature of the environmental protection is clearly interventional. Provided that the protected legal object is endangered by activities of individuals. Therefore, the rules of law should aim to the protection of environment from the economic activities of individuals.... The constitutional protection is incomplete, regarding its coverage... The scope of the constitutional protection can be materialized by the intervention in the self-centered, for-profit, economic activity of individuals”.

Regarding culture, though, Constitution demands a more specialized approach for the protection of the environment, as its legal aim. In Greece, the protection of culture, in its narrow sense, is proportional, according to the particular category of cultural assets.

a. Protection for cultural assets mentioned and regulated by the cultural Law 3028/2002, better described as “monumental cultural heritage”, lies on article 3 of the above cultural law<sup>24</sup> and consists of the following indicative actions and policies: to

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<sup>22</sup>The term underlined in Christofilopoulos, D. / Χριστοφιλόπουλος Δημ. Γ., (2005) *Πολιτιστικό Δίκαιο - Προστασία Πολιτιστικών Αγαθών*, p. 18 ISBN 960-420-265-0 Law & Economy P.N. Sakkoulas, Athens, 2005

<sup>23</sup> Tachos, A.I. / Τάχος Α.Ι. (1995) *Δίκαιο Προστασίας του Περιβάλλοντος*, p. 48 ISBN 960-301-184-3 Sakkoulas Publications, Thessaloniki, 1995

<sup>24</sup> For reasons of legal accuracy Article 3 Content of the Protection of Law 3028/2002 (Official Gazette A 153/28.06.2002), has the following content in full: 1. The protection of the cultural heritage of the Country mainly refers to: a) the location, research, registration, documentation and study of its elements, b) the preservation and prevention of its destruction, alteration and any direct or indirect damage on it, c) the prevention of illegal excavation, theft and illegal export, d) the maintenance and restoration, wherever this is necessary, e) the facilitation of access and contact with the cultural heritage for the public, f) the promotion and integration of the cultural heritage into the contemporary social life and g) the education, and also the aesthetic training and awareness of the citizens on the cultural heritage. 2. The protection of monuments, archaeological sites and historical places is included in the goals of all kinds of land layout, developmental, environmental and urban planning or plans of equivalent results or substitutes of the above. article 2 in its translated form in English by the World Intellectual Property Organization (WIPO) source: <https://www.wipo.int/edocs/lexdocs/laws/en/gr/gr228en.pdf> accessed on 20.01.2019

locate, research, registry, document and study the cultural heritage elements, to preserve it and prevent destructions alterations and damages, to prevent illegal excavations, theft and illegal exports, to maintain and restore cultural heritage elements, to facilitate access and contact for the public, including education aesthetic training and awareness, and, last, to promote and integrate it into the social life and environmental planning.

b. Protective policies for cultural assets mentioned and regulated by article 6 Law 4067/2012 in conjunction with Law 2039/1992 (Convention for the Protection of the Architectural Heritage of Europe, Granada 1985, adopted in 3rd October 1985 in Granada Spain, and came into force on 1<sup>st</sup> December 1987) and with Law 1126/1981 (UNESCO Convention Concerning the Protection of the World Cultural Heritage, Paris 1972), as both incorporated to the Hellenic National Law, better described as “architectural cultural heritage” are introduced in form of the State’s obligation to adopt “integrated conservation policies”<sup>25</sup> which “include the protection of the architectural heritage as an essential town and country planning objective and ensure that this requirement is taken into account at all stages both in the drawing up of development plans and in the procedures for authorizing work, promote programmes for the restoration and maintenance of the architectural heritage; make the conservation, promotion and enhancement of the architectural heritage a major feature of cultural, environmental and planning policies; facilitate whenever possible in the town and country planning process the conservation and use of certain buildings whose intrinsic importance would not warrant protection within the meaning of Article 3, paragraph 1, of this Convention but which are of interest from the point of view of their setting in the urban or rural environment and of the quality of life; and foster, as being essential to the future of the architectural heritage, the application and development of traditional skills and materials”.

c. Supplementary to the aforementioned statutes, is Law 3658/2008 (Official Gazette A 70/22.04.2008) titled: “*Measures for the Protection of Cultural Assets and other provisions*” that aims to the protection and recovery of movable monuments mainly, setting technical and administrative institutions and details for the aim mentioned. This statute, according to its Explanatory Memorandum, supplements the existing legal frame for the protection of cultural assets, set by Law 3028/2002, to the provisions of which, constantly refers.

The above legal provisions of standard or superior effect complement the constitutional legal protection frame as its implementing statutes, and act and function as an integrated grid of provisions.

#### *Further constitutional provisions for the protection of culture*

The provisions of article 24.1 and 24.6 of the Hellenic Constitution is the umbilicus of the legal system established for the protection of cultural heritage in the Hellenic constitutional text. However, there are a few provisions that are relative to the protection of culture, in general, that can be found in different areas of the Constitution. This systematical choice of the constitutional legislative body of the 1975

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<sup>25</sup> Article 10 “*Convention for the Protection of the Architectural Heritage of Europe*”, Granada 1985 source: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007a087>, accessed last on 24.01.2019

parliament, can be justified by the absence of a clear provision for the protection of cultural heritage, and the regulatory accession of the specialized aspects of protection (for instance the property aspects, or the educational aspects of culture) in the relevant provisions.

Working to avoid a clash of provisions between the right to property, a fundamental right for the western economic system, and the right to cultural environment, the constitutional legislator body adopted the provision of article 18 par. 1 and par. 5 of the Hellenic Constitution, that leaves it to an implementing law to regulate issues and restrictions of ownership and possession of archaeological sites and treasures<sup>26</sup>. These provisions by literal interpretation, are enabling the common legislator to provide for exclusive rights on behalf of the State for special categories of assets – in this work’s case, archaeological sites and treasures – , of great sensitivity and social and economic importance, that should not be subject to the common property regulations. The provision refers to archaeological sites and treasures, unsystematically and incoherent to the frame adopted in article 24.1 and 24.6 of the Constitution, regarding the protection of cultural environment, monuments, traditional areas and elements. The content of the terms, however, was to be determined by the implementing law which in this case is also Law 3028/2002, as long as it contains rules that affect ownership and possession of movable and immovable cultural objects.

Equally important for the regulation of cultural production, is the provision of article 16 par. 1<sup>27</sup> that offers constitutional guarantees for the freedom of art and science, research and teaching, by setting an obligation for the State to develop and promote them. Even though, not referring directly to the past, the provision sets its regulatory field, the freedom of art, within the notion of cultural environment as mentioned in article 24.1 of the Hellenic Constitution, included in its extended and broad scope.

The same can be argued for every person’s right to free expression and propagation, established by article 14 par. 1 of the Constitution<sup>28</sup>, according to which, everyone enjoys the freedom of choosing the ways to express everyone’s self, for instance, by cultural creation, and disseminate thoughts and feelings to a selected audience, without prejudice or restrictions, other than the state laws.

Before Constitution 1975/1986/2001/2008 came into effect, in particular when its 2001 Revision supplemented article 24.1 with the right to the protection of cultural environment, the absence of an exclusive provision referring to the right to culture, was compensated by the general provision for the free development of personality and participating to the social, economic and political life of the country. The right to culture is a mere aspect of the right to participate to the social life of the country, to the extent that social life includes cultural life. The aforementioned right to one’s

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<sup>26</sup>The full text of article 18.1 of the Hellenic Constitution is *“Article 18 par. 1. The ownership and disposal of mines, quarries, caves, archaeological sites and treasures, mineral, running and underground waters and underground resources in general, shall be regulated by special laws. Par. 5 In addition to the cases specified in the preceding paragraphs, the law may provide for other necessary deprivations of the free use and enjoyment of property, owing to special circumstances.”*

<sup>27</sup> The full text of article 16.1 of the Hellenic Constitution is *“Article 16 par. 1. Art and science, research and teaching, shall be free and their development and promotion shall be an obligation of the State...”*

<sup>28</sup> The full text of article 14.1 of the Hellenic Constitution is *“Every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State”*

personality is diachronically present in Hellenic constitutional texts and the latter 1975/2986/2001 Constitution in article 5 par. 1<sup>29</sup>. This provision due to its explicit and functional wording, is still active and remains modern and updated.

A last key provision for the legal protection of cultural environment is a rather neglected one: Article 28<sup>30</sup> of the Hellenic Constitution regulates for the superior legislative power of generally recognized international law rules and the operative international conventions' provisions and their place in the Hellenic legislative system. Granted that, during the last decades, the production of international rules regarding the protection and regulation of cultural heritage, is increasing, the importance of this constitutional provision is evident and is to be analyzed further in correspondence with international legislation on the matter.

The above provisions of the Constitution although widespread in the constitutional text and not consistent in their used terms,, along with article 24 par. 1 and 6, the constant work of Hellenic courts' jurisprudence and the provisions of international treaties, Greece has adopted, establish an integrated frame for the protection of cultural environment in the Hellenic legal context, that seems adequate for the intended scope.

### ***The role of case law in the application of the Constitutional protection***

In lack of a constitutional definition regarding the content and various aspects of "cultural environment", the Hellenic judicial system attempted throughout the years to define and explain this term, and sometimes to cover deficiencies of the protective legal provisions. Scientifically interesting for the scope of the present work, is jurisprudence that has developed since the 1975/1986/2001 Constitution came in effect, by the Hellenic Council of State, as the Supreme Administrative Court of Greece, in its jurisdiction to decide on issues of administrative law disputes. According to *Chrysanthakis Chr. 2003*<sup>31</sup>, case law assumed this task radically, either correcting the relevant provisions or via an explanatory expansion of their content.

Within the restricted scope of this work, an indicative listing of decisions of the Supreme Court (Council of State) that clarified the protective object of article 24.1 of the Hellenic Constitution, defining cultural environment, and the function of this protection, and has established fundamental principles deriving from the constitutional text, can prove extremely supportive on indicating the advantages or deficiencies of the legislative protection system of articles 24.1 and 24.6 of the Constitution.

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<sup>29</sup> The full text of article 5.1 of the Hellenic Constitution is *"All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages"*

<sup>30</sup> The full text of article 28.1 of the Hellenic Constitution is *"The generally recognized rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The rules of international law and international conventions shall be applicable to aliens only under the condition of reciprocity"*

<sup>31</sup> Chrysanthakis Chr./ Χρυσανθάκης Χρ., (2003) Η προστασία της πολιτιστικής κληρονομιάς μέσω της διοικητικής διαδικασίας *in collective volume [Η πολιτιστική κληρονομιά και το δίκαιο] Conference Proceedings 3-4 June 2003 Athens, European Public Law Center, ed. Τροβά Ε. p. 238, ISBN 960-301-784-1 Sakkoulas Publications, Athens, 2004.*

Regardless of the terms the constitutional legislative body used in its aim to regulate culture<sup>32</sup>, the Supreme Court (Council of State), in Plenary session, accepted that the object of the enhanced state protection article 24.1 provides for, is the cultural environment, its monuments and other elements. The appointed protection has the meaning that the State is obliged to undertake special legislative measures, to ensure the sustainable and perennial protection, with aim to preserve the Hellenic cultural heritage for the generations to come.<sup>33</sup>

Equally important for setting basic guidelines, is No 3146/1986 Court Decision<sup>34</sup> that establishes State's obligations to protect cultural heritage elements from any interference that results to their destruction, alteration or in any way decay, to preserve them perennial and, if possible, to the place (*in situ*), they were situated or found. These obligations were by courts' decision considered to have their origin directly in articles 24.1 and 24.6 of the Constitution.

Since the early 1974, case law adopted a simple prerequisite regarding guarantees for the action of civil services: The supreme Court established the need of a permit by the Archaeological Service for works in the area of an archaeological site, making irrelevant the existence of a permit by the urban-planning service<sup>35</sup>. Supplementary to the above case law, is a recent court's decision that obliges the archaeological service in the process of granting this permit to investigate the aims of the cultural legislation<sup>36</sup>

Furthermore, jurisprudence expanded the protection of a cultural monument by accepting that the protection refers also to a peripheral zone, to its surrounding space, even to tangible equipment or inside elements<sup>37</sup>.

Identically consistent is the answer that case law reserves to the question of the clash between the protection of culture and the protection of property, both enshrined in the constitutional text. On this interaction, case law of the Supreme Court has to offer its view in favor of the concise superiority of article 24.1 of the Constitution towards article 17 for the protection of property.<sup>38</sup> It is a fact, that the protection of cultural environment dominates even towards the legal relationships formed between individual rights, as this provision is serving the public interest ("horizontal effect")<sup>39</sup>.

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<sup>32</sup> "cultural environment" in article 24.1, "monuments" in article 24.6, "archaeological treasures" in article 18.1 of the Constitution

<sup>33</sup> ΣΤΕ 3893/1981 Plenary, ΣΤΕ 797/1987, ΣΤΕ 3183/1989, ΣΤΕ 4808/1987 source: NOMOS Legal Information Database [https://lawdb.intrasoftnet.com/nomos/3\\_nomologia\\_rs\\_sub.php](https://lawdb.intrasoftnet.com/nomos/3_nomologia_rs_sub.php)

<sup>34</sup> ΣΤΕ 3146/1986 Plenary, ΣΤΕ 3135/2002 Plenary source: NOMOS Legal Information Database [https://lawdb.intrasoftnet.com/nomos/3\\_nomologia\\_rs\\_sub.php](https://lawdb.intrasoftnet.com/nomos/3_nomologia_rs_sub.php)

<sup>35</sup> ΣΤΕ 1974/1974 Plenary source: NOMOS Legal Information Database [https://lawdb.intrasoftnet.com/nomos/3\\_nomologia\\_rs\\_sub.php](https://lawdb.intrasoftnet.com/nomos/3_nomologia_rs_sub.php)

<sup>36</sup> ΣΤΕ 868/2001 source: NOMOS Legal Information Database [https://lawdb.intrasoftnet.com/nomos/3\\_nomologia\\_rs\\_sub.php](https://lawdb.intrasoftnet.com/nomos/3_nomologia_rs_sub.php)

<sup>37</sup> ΣΤΕ 2934/1985, ΣΤΕ 4735/1995, ΣΤΕ 5448/1996, ΣΤΕ 2727/1997 and ΣΤΕ 530/2003, ΣΤΕ 1098/1987, ΣΤΕ 361/1988 source: NOMOS Legal Information Database [https://lawdb.intrasoftnet.com/nomos/3\\_nomologia\\_rs\\_sub.php](https://lawdb.intrasoftnet.com/nomos/3_nomologia_rs_sub.php)

<sup>38</sup> ΣΤΕ 1526/1981, ΣΤΕ 1239/1982 source: NOMOS Legal Information Database [https://lawdb.intrasoftnet.com/nomos/3\\_nomologia\\_rs\\_sub.php](https://lawdb.intrasoftnet.com/nomos/3_nomologia_rs_sub.php)

<sup>39</sup> ΣΤΕ 2801/1991 Plenary, ΣΤΕ 1712/2002 source: NOMOS Legal Information Database [https://lawdb.intrasoftnet.com/nomos/3\\_nomologia\\_rs\\_sub.php](https://lawdb.intrasoftnet.com/nomos/3_nomologia_rs_sub.php)

All things considered, the greatest contribution of Supreme Court case law is the legal consolidation of the principle that the protection of cultural environment serves public interest, as the collective memory of the nation<sup>40</sup>.

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<sup>40</sup> ΣτΕ 1365/1981, ΣτΕ 868/2001 source: NOMOS Legal Information Database  
[https://lawdb.intrasoftnet.com/nomos/3\\_nomologia\\_rs\\_sub.php](https://lawdb.intrasoftnet.com/nomos/3_nomologia_rs_sub.php)



## CHAPTER 2: THE CONTENT OF THE “CULTURAL HERITAGE” CONCEPT IN THE INTERNATIONAL AND THE EU CONTEXT – DISTINCTION FROM THE LEGAL CONCEPT OF “CULTURAL ENVIRONMENT”

### *Cultural heritage references in basic international legal instruments*

Various attempts to present a content for culture, have been made in the last decades. Legacy of culture or cultural heritage exists worldwide for groups of people sharing common origins and historical path. It is their priority to pass these legacy features to their descendants, as a bonding aim between them and for group sustainability protection reasons.

The first systematic attempt for the regulation of this concept in a legal basis, is an UNESCO initiative: the Hague Convention of 1954, the “Convention for the Protection of Cultural Property in the Event of Armed Conflict”, signed in The Hague, Netherlands on 14 May 1954 and entered into force on 7 August 1956.<sup>41</sup> This early reference in the notion of cultural heritage, set a rather restricted legal frame, which was the outcome of compromise and settlement between state parties. It was also the outcome of the extreme challenges, imposed by times of war. According to article 1 of the Convention<sup>42</sup> “Definition of cultural property”, the term “cultural property” was linked to objects or assets of high value to the *cultural heritage* of every people, following a case by case list of examples, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property; buildings whose main and effective purpose is to preserve or exhibit the movable cultural property such as museums, large libraries and depositories of archives, and refuges intended to shelter, the movable cultural property, centers containing a large amount of cultural property, known as “centers containing monuments”. Furthermore, Article 2, gives a content to the protection of cultural property, to be the safeguarding of and respect for such property. The 1954 Hague

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<sup>41</sup> The Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention was enshrined in the Hellenic legal context under Law 1144/1981 (official Gazette A 6/1981), as in effect to date.

<sup>42</sup> For reasons of legal accuracy: “**Article 1. Definition of cultural property** For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centers containing monuments’. **Article 2. Protection of cultural property** For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.” Source: [http://portal.unesco.org/en/ev.php-RL\\_ID=13637&URL\\_DO= DO\\_TOPIC&URL\\_SECTION= 201.html](http://portal.unesco.org/en/ev.php-RL_ID=13637&URL_DO= DO_TOPIC&URL_SECTION= 201.html), as accessed last on 30.01.2019

Convention due to its implementation restrictions, was much criticised as inadequate, and, therefore, followed by two supplementary protocols.

Nevertheless, times of peace presented different types of legislative challenges. To respond to these challenges, international law developed an updated content for “cultural heritage”, maintaining the term, yet enriching its concept. The intend of a regulatory framework for the globalization for the natural and cultural protection and, according to *Trova H. 2018*<sup>43</sup>, of detaching cultural heritage from its monumental feature and attach it and harmonize it to natural space, was materialized by the adoption of another UNESCO initiative, the Paris 1972 Convention, or “Convention concerning the Protection of the World Cultural and Natural Heritage 1972”, signed in Paris, France on the 16<sup>th</sup> of October 1972 (17<sup>th</sup> UN session)<sup>44</sup>. A vast number of state parties<sup>45</sup> accredited a revised version of assets qualifying as “cultural heritage” in the first article of the Convention: a list of assets containing: *monuments*: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of *outstanding universal value* from the point of view of history, art or science; *groups of buildings*: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science, *sites*: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.<sup>46</sup> To support the above listing, the Convention cleverly allows ethnic services to identify and document national cultural heritage in extensive lists, forming, if added, a universal catalogue database.

Evident is the significance of the World Heritage Convention for the defining of the legal concept of “world cultural heritage”, setting a standard every national statute could follow. The notion by time prevailed over other verbal approaches of culture and became a universal standard. At the same time, the legal combining between nature and culture brought to light the correlation between the natural environment and the humanmade features, and inspired national statutes, to follow this, among them the Hellenic Constitution. *Therefore, it can be argued that the World Heritage 1972 Paris*

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<sup>43</sup> Trova H/Τροβά Ε. *Η πολιτιστική κληρονομιά της Ευρώπης Έννοια και περιεχόμενο*, ISBN 978-960-568-914-8, Sakkoulas Publications, Athens Thessaloniki, 2018, p. 269

<sup>44</sup> The UNESCO “Convention concerning the Protection of the World Cultural and Natural Heritage 1972” Paris, 1972, was enshrined in the Hellenic legal context under Law 1126/1981 (official Gazette A 32/1981), as in effect to date, a statute adopted six years after the Hellenic Constitution came in effect.

<sup>45</sup> 191 states have signed it, to date.

<sup>46</sup> For reasons of legal accuracy: “**Article 1.** For the purposes of this Convention, the following shall be considered as “cultural heritage”: monuments : architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings : groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science ; sites : works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view. science or conservation; **Article 3** It is for each State Party to this Convention to identify and delineate the different properties situated on its territory mentioned in Articles 1 and 2 above” Source: [http://portal.unesco.org/en/ev.php-URL\\_ID=13055&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13055&URL_DO=DO_TOPIC&URL_SECTION=201.html), accessed last on 30.01.2019.

*Convention is a probable influence on the natural and cultural environmental approach of Article 24.1 of the Hellenic Constitution, regarding the regulatory combination of natural and cultural environment. The argument can be supported by the time proximity between the Paris 1972 Convention and the adoption of Hellenic Constitution, the eleven-year residence of the leader of the party that formed the 1975 Constitution and prime minister Konstantinos Karamanlis in Paris in 1972, and the influences of international law in a reborn democracy, even if the 1972 Paris Convention was integrated in the national law six years later.*

### *Cultural heritage references in basic EU legal instruments*

A context often overlooked, is the EU legislative context<sup>47</sup>, containing definition of “cultural heritage” in various, mostly soft law legal instruments. Among those, significant for the understanding of cultural heritage in its European dimension, that concerns states of cultural origin, as Greece and Italy, are:

- the 1997 early definition of “cultural heritage” in the Decision No 2228/97/EC of the European Parliament and of the Council of 13<sup>th</sup> of October 1997, establishing a Community action programme in the field of cultural heritage (the “Raphael” programme)<sup>48</sup>, article 2, where cultural heritage is accepted to consist of movable and immovable heritage (museums and collections, libraries and archives including photographic, cinematographic and sound archives), archaeological and underwater heritage, architectural heritage, assemblages and sites and cultural landscapes (assemblages of cultural and natural objects).

- the Council of Europe’s indicating perception of “cultural heritage” described in “Council of Europe Framework Convention on the Value of Cultural Heritage for Society”, Faro, Portugal, 27.X.2005<sup>49</sup>; as a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of

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<sup>47</sup> No reference to the Constitutional Treaty is made since its ratification was rejected.

<sup>48</sup> Decision No 2228/97/EC of the European Parliament and of the Council of 13<sup>th</sup> of October 1997, *Article 2* Without prejudice to the powers of the Member States to define cultural heritage, for the purposes of the scope of the programme:- “*cultural heritage*” shall mean movable and immovable heritage (museums and collections, libraries and archives including photographic, cinematographic and sound archives), archaeological and underwater heritage, architectural heritage, assemblages and sites and cultural landscapes (assemblages of cultural and natural objects), “*preservation*” shall mean all activities contributing to better knowledge, management, conservation, restoration, presentation and accessibility of cultural heritage.” *Official Journal L 305*, 08/11/1997 P. 0031 – 0041, source: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31997D2228>

<sup>49</sup> “Council of Europe Framework Convention on the Value of Cultural Heritage for Society”, Faro, Portugal, 27.X.2005 *Article 2 – Definitions* For the purposes of this Convention, a cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time; a heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations. *Article 3 – The common heritage of Europe* The Parties agree to promote an understanding of the common heritage of Europe, which consists of: all forms of cultural heritage in Europe which together constitute a shared source of remembrance, understanding, identity, cohesion and creativity, and the ideals, principles and values, derived from the experience gained through progress and past conflicts, which foster the development of a peaceful and stable society, founded on respect for human rights, democracy and the rule of law. Source : <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/09000016>, accessed last on 30.01.2019

their constantly evolving values, beliefs, knowledge and traditions, which also includes all aspects of the environment.

- the most recent definition of cultural heritage in the European context comes from Decision (EU) 2017/864 of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural Heritage (2018): “The Council, in its conclusions of 21 May 2014, stated that *cultural heritage encompasses a broad spectrum of resources inherited from the past in all forms and aspects* — tangible, intangible and digital (born digital and digitised), including monuments, sites, landscapes, skills, practices, knowledge and expressions of human creativity, as well as collections conserved and managed by public and private bodies such as museums, libraries and archives. Cultural heritage also includes film heritage”.

### *The definition and functions of contemporary cultural aspects in other international legal instruments*

UNESCO, the United Nations Educational, Scientific and Cultural Organization, is the appointed UN agency for the protection of cultural heritage worldwide. It is the carrier of a specific mandate and vision for culture: “By promoting cultural heritage and the equal dignity of all cultures, ... strengthens bonds among nations ... stands up for freedom of expression as a fundamental right”<sup>50</sup>. To serve its mandate, UNESCO has prepared drafts, negotiated and produced, to the benefit of its member states, numerous international legal instruments, that set the protection or safeguarding of cultural heritage as their scope. Among them, scientifically interesting and worth referring to, due to their universal acceptance, the incorporation of the “cultural heritage” concept and their specific regulatory content, are<sup>51</sup>:

a. The “*Declaration of Principles of International Cultural Co-operation*” (UNESCO General Conference, Paris 14<sup>th</sup> session on 4.11.1966),<sup>52</sup> that contributed to cultural civilization by recognizing in article I, the dignity and value of each culture, the right of every people to culture, and the fact that all cultures form part of the common heritage in their variety and diversity. And the relevant “*Mexico City Declaration on Cultural Policies*”<sup>53</sup>, (adopted by the World Conference in Mexico City, on 6.8.1982), that, from the early 80’s, refers to Cultural Heritage of a people, in points 23 and 24 defining it as the sum of distinct works, expressions and values, tangible and intangible. The World Conference, consequently, reached as an outcome, based on

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<sup>50</sup> UNESCO Vision as presented in UNESCO website, source: <https://en.unesco.org/about-us/introducing-unesco>, accessed on 31.01.2019.

<sup>51</sup> This part of the dissertation refers solely to international conventions by UNESCO, and leaves out of reference partial, local or soft-law legal instruments for the reason mentioned. Also, it leaves aside the 1954 Hague Convention and the 1972 World Heritage Paris Convention, as these were sufficiently presented in p. 15-16.

<sup>52</sup> Source: [http://portal.unesco.org/en/ev.php-URL\\_ID=13147&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13147&URL_DO=DO_TOPIC&URL_SECTION=201.html), accessed last on 31.1.2019.

<sup>53</sup> *Point 23*: “the cultural heritage of a people includes the works of its artists, architects, musicians, writers and scientists, and also the work of anonymous artists· expressions of the people’s spirituality, and the body of values which gives meaning to life. It includes both tangible and intangible works through which, the creativity of that people finds expression: languages, rites, beliefs, historic places and monuments, literature, works of art, archives and libraries” Source: <https://unesdoc.unesco.org/ark:/48223/pf0000054668>, , accessed last on 31.1.2019.

this definition, that “every people, therefore, has a right and a duty to defend and preserve its cultural heritage...”.

b. The international community expressed its sensitivity of the matter of illicit market transactions regarding cultural heritage, disrespectful of their particular intrinsic value for certain groups of people, by adopting in the UNESCO forum, the “*Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*” (General Conference in Paris, 16<sup>st</sup> session on the 14<sup>th</sup> of November 1970). Only two years before the enactment of the World Heritage Convention, the international community introduced in a bounding legal instrument the term “cultural property” as a consisting part of a state’s “cultural heritage”, and expressed its profound concern for illicit practices that affect national cultural heritage as a whole “impoverishing” it.<sup>54</sup> It may be argued that apart from the obvious concern for cultural property items, exhaustively listed in the Convention text, the protected object is the integrity of nation’s or ethnic groups’ cultural heritage, as a continuing protection in times of peace for the protection awarded in 1954 Convention and its Protocols. If the 1970 UNESCO Convention, regulates cultural heritage protection aspects from a public law point of view, the instrument that incorporated the international ambition for a uniform private law regulative scope is the “*UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*” (negotiated and adopted following a request of UNESCO by UNIDROIT Institute in Rome on 24.06.1995, entered into force on 01.07.1998). Being complementary to the 1970 Convention, it shares with the 1970 Convention the same definition of cultural property, bearing at the same time a different approach emphasizing on illicit trafficking of cultural property and functioning through the state members’ courts.<sup>55</sup>

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<sup>54</sup> For reasons of legal accuracy the Convention text has as follows: *Article 1* For the purposes of this Convention, the term ‘cultural property’ means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs ; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments. **Article 2** 1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from. 2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations. Source: [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html), as accessed last on 31.01.2019.

<sup>55</sup> *Article 2* For the purposes of this Convention, cultural objects are those which, on religious or secular

c. The next step occurred on 2001, when the UNESCO *“Universal Declaration on Cultural Diversity”* was adopted (General Conference in Paris, 31<sup>st</sup> session on 2<sup>nd</sup> November 2001)<sup>56</sup>. This legal instrument took the form of a Universal Declaration, to introduce to all nations the notion of cultural diversity, as necessary to humankind. The parallelism to biodiversity makes the concept clear and comparable to nature concepts. The Declaration, - therefore, the states, signing it,- consider cultural diversity to be “a common heritage of humanity” (article 1), a feature of “cultural pluralism” (article 2) and “a factor in development” (article 3). The interaction between cultural diversity and human rights becomes evident, since the Declaration considers them to be “guarantees of and an enabling environment for cultural diversity” (articles 4 and 5), establishing at the same time an access right for all people (article 6).

d. At the same UNESCO Conference, was negotiated and agreed a new Convention of specific scope *“on the Protection of the Underwater Cultural Heritage”*

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grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention” source <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1995-unidroit-convention/>, hyperlink Text of the Unidroit Convention, accessed last on 31.01.2019.

<sup>56</sup> For reasons of accuracy the Convention text has as follows: *“IDENTITY, DIVERSITY AND PLURALISM Article 1 – Cultural diversity: the common heritage of humanity* Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations. *Article 2 – From cultural diversity to cultural pluralism* In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life. *Article 3 – Cultural diversity as a factor in development* Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence. *CULTURAL DIVERSITY AND HUMAN RIGHTS Article 4 – Human rights as guarantees of cultural diversity* The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope. *Article 5 – Cultural rights as an enabling environment for cultural diversity* Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms. *Article 6 – Towards access for all to cultural diversity* While ensuring the free flow of ideas by word and image care should be exercised so that all cultures can express themselves and make themselves known. Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge, including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity. Source: [http://portal.unesco.org/en/ev.php-URL\\_ID=13179&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html), accessed last on 31.01.2019.

(General Conference in Paris, 31<sup>st</sup> session, on 2<sup>nd</sup> November 2001). Even though the Hellenic State has not yet proceeded to its ratification, due to policy evaluations, the Underwater Heritage Convention provides the legal world with a renewed minimal definition of cultural heritage in Article 1<sup>57</sup>, considering as such “all traces of human existence having a cultural, historical or archaeological character”. The narrow scope of the Convention towards underwater heritage, should not hide the progressive consolidation of the term “cultural heritage”, that occurred in international legal texts in the recent decades.

e. To supplement the forming complex of international legal instruments, UNESCO adopted the “*Convention for the Safeguarding of the Intangible Cultural Heritage*” (General Conference in Paris, 32<sup>nd</sup> session, on 17th October 2003). Aiming to safeguard the intangible cultural heritage this legal instrument defines it, for purposes of legal language harmonization, by listing its features and examples. The crucial contribution of the definition is, to the authors’ opinion, that a clear point is made regarding the essence of “heritage”. Its main elements are “*the transmission from generation to generation, the constant recreation by communities and groups in response to their environment, their interaction with nature and their history, ... and the promotion of respect for cultural diversity and human creativity.*”<sup>58</sup> This definition set an approach that enriched the context of cultural heritage in a way the Hellenic Constitution leaves out of article 24.1 and 24.6 regulatory field.

f. As a further indication of the majority of states, to manifest their commitment to cultural heritage protection, UNESCO focused its efforts and concluded the adoption

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<sup>57</sup> For reasons of accuracy the Convention text has as follows *Article 1 – Definitions* For the purposes of this Convention: 1. (a) “Underwater cultural heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character. Source: [http://portal.unesco.org/en/ev.php-URL\\_ID=13520&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html#ENTRY](http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html#ENTRY), accessed last on 31.01.2019.

<sup>58</sup> For reasons of accuracy the Convention text has as follows: *I. General provisions Article 1 – Purposes of the Convention* The purposes of this Convention are: (a) to safeguard the intangible cultural heritage; (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned; (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; (d) to provide for international cooperation and assistance. *Article 2 – Definitions* For the purposes of this Convention, 1. The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development. 2. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship. Source: [http://portal.unesco.org/en/ev.php-URL\\_ID=17716&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html#ENTRY](http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html#ENTRY), accessed last on 31.01.2019.

of the latest insofar “*Convention on the Protection and Promotion of the Diversity of Cultural Expressions*” (General Conference in Paris, 33<sup>rd</sup> session, on 20<sup>th</sup> October 2005). Although the Convention scope focuses to the enrichment of cultural diversity and diversity of cultural expressions, at the same time in article 4 of the Convention<sup>59</sup> the content of diversity of cultural expressions is directly associated with “the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted” to the generations to come.

g. Out of the UN and UNESCO habitat, a specific international law instrument for tangible cultural heritage, the “*Convention for the Protection of the Architectural Heritage of Europe (Granada, 1985)*”, was adopted on 3<sup>rd</sup> October 1985 in Granada (Spain) and came into force on 1<sup>st</sup> December 1987 (Council of Europe Treaty Series no. 121)<sup>60</sup>. The literal interpretation of the Granada Convention, formed on a motivation by the Council of Europe, offers a listing of architectural assets, described as Europe’s cultural heritage, shown into three categories: monuments, groups of buildings and sites. This spatial architectural approach resembles to the wording of article 24.6 of the Hellenic Constitution, even though the Hellenic constitutional regulation “covers the scope of the Granada Convention and goes beyond, granting a satisfying protection of architectural assets”<sup>61</sup>. The Granada Convention influenced the Hellenic courts’ case law regarding the scope of cultural property protection, introducing the “heritage” concept in the Hellenic jurisprudence. This legal instrument confirms the spatial approach of article 24.6 of the Constitution and as *Papakonstantinou, (1999)* points out, there is no doubt that in this constitutional provision the protected object is a series of architectural works, in their essence as tangible assets, for instance, monuments, monumental complexes, traditional areas. It is an interpretation that supports the argument that “traditional elements” of article 24.6 of the Constitution

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<sup>59</sup> For reasons of accuracy the Convention text has as follows: *Article 4 – Definitions* For the purposes of this Convention, it is understood that: 1. Cultural diversity “Cultural diversity” refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used. Source: [http://portal.unesco.org/en/ev.php-URL\\_ID=31038&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html), as accessed last on 31.01.2019.

<sup>60</sup> For reasons of accuracy the Convention text has as follows: *Definition of the architectural heritage Article 1* For the purposes of this Convention, the expression “architectural heritage” shall be considered to comprise the following permanent properties: monuments: all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings; groups of buildings: homogeneous groups of urban or rural buildings conspicuous for their historical, archaeological, artistic, scientific, social or technical interest which are sufficiently coherent to form topographically definable units; sites: the combined works of man and nature, being areas which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest. Source: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007a087>, accessed last on 31.01.2019.

<sup>61</sup> Papakonstantinou A. / Παπακωνσταντίνου Α. (1999) Η Σύμβαση της Γρανάδας για την Προστασία της Αρχιτεκτονικής Κληρονομιάς και το Σύνταγμα (Μάρτιος 1999), editorial in “NOMOS+PHYSIS” (LAW AND NATURE) website, available in <https://nomosphysis.org.gr/8390/i-sumbasi-tis-granadas-gia-tin-prostasia-tis-arxitektonikis-klironomias-kai-to-suntagma/>, accessed on 1.2.2019.

are tangible parts of architectural works<sup>62</sup> and do not refer to intangible aspects of architectural heritage.

h. To an end of this listing, equally worth mentioning is the regulatory provisions of the “*European Convention on the Protection of Archaeological Heritage*” (product of the efforts of the Council of Europe and agreed by its member states), which was adopted on the 6<sup>th</sup> May 1969 in London UK and came into force on the 20<sup>th</sup> November 1970 (Council of Europe Treaty Series no. 066)<sup>63</sup>. In this Convention the reference to remains and objects and other traces of human existence describes the content of the notion of archaeological heritage set in the title. Adopted in the European forum and synchronous to the 1970 UNESCO Convention embraces its terminology to describe a specific type of heritage, one of great importance for Greece. This convention was diagnosed as requesting an updating supplement, therefore, it was revised, and replaced by “*Convention for the Protection of the Archaeological Heritage of Europe (revised)*” (adopted on 16<sup>th</sup> January 1992, in Valletta Malta and came into force on the 25<sup>th</sup> of May 1995 (Council of Europe Treaty Series no. 143), transferred to national legal system by Law 3378/2005 official Gazette A 203/2005).<sup>64</sup>. One of the reasons that a revision was demanded, was for member states to describe in an explicit way the concept of “archaeological heritage”, in its dimension as a source of “European collective memory”. A list of archaeological assets was added, however, the origin reference to “remains and objects and other traces of human existence” is still present.

The above indicatively listed international and European legal instruments (UNESCO Conventions and Recommendations as well as CoE Treaties) play a key role in the protection of cultural heritage in the Hellenic context, since Greece has ratified and transferred to national law the vast majority of these instruments. In this point, what is relevant to the scope of the work is to remember: a. that in all international and European legal texts no reference to environment is being made. The terminology of their provisions excludes the concept of cultural environment which is actually confirmed to be a national concept. The Hellenic constitution found no inspiration in, and was not influenced by the international conventions existing during its adoption in 1975 and during the numerous revisions of 1986/2001/2008, b. all the listed international legal instruments consist national law with the enhanced power that

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<sup>62</sup> Presented above in detail in footnote 14.

<sup>63</sup> *Article 1* For the purposes of this Convention, all remains and objects, or any other traces of human existence, which bear witness to epochs and civilizations for which excavations or discoveries are the main source or one of the main sources of scientific information, shall be considered as archaeological objects. Source: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680072318>

<sup>64</sup> *Definition of the archaeological heritage Article 1* 1. The aim of this (revised) Convention is to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study. 2 To this end shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs: i. the preservation and study of which help to retrace the history of mankind and its relation with the natural environment; ii. for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and iii. which are located in any area within the jurisdiction of the Parties. 3. The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water. Source: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007bd25>, accessed on 31.01.2019.

article 28 par. 1 of the Hellenic Constitution grants them. From this point of view, the protection of cultural heritage is adequate due to the sole existence of the signature of Hellenic State in combination with the constitutional provision of article 28.1 and c. Flakes of appreciation to the interconnection between culture and nature are to be found in various conventions, however, the constant object of their protective scope is consolidated and, by the years that passed and every new convention to be adopted, became mainstream: *the valuable cultural heritage*.

### *Comparative evaluation of the different approaches*

The narrow selection out of an extended enumeration of legal instruments defining cultural heritage and, in particular, European cultural heritage<sup>65</sup>, has been made to underline three key expressions that are of crucial importance for the concept of “cultural heritage”. First, that it entails *numerous resources coming from the past*, second, it concerns *tangible and intangible cultural assets* and, last, that large groups of people cherish them to be *“a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions”*.

Those three features suggest a clear and concise definition for cultural heritage, that, in addition to the listings of international UNESCO Conventions, exhaustively describe the content of the term, and result to a broad acceptance in use of the constitutional texts of States that have formed their constitutional legislation regarding cultural protection in the recent years.

Unfortunately, this is not the case of the Hellenic Constitution. The fundamental choice back in 1975 was to adopt a broad reference to “cultural environment” and a diffident spatial approach, that did not take under consideration the modern various intangible and transnational and diverse aspects of culture.

As aiding factors (“deus ex machina”) in the attempt to interpret and introduce the characteristic features of cultural environment, came the implementing standard laws of the Constitution, most importantly the cultural Law 3028/2002, the case law of the Supreme Court (Council of State) and the numerous Treaties and Conventions the Hellenic Democracy is member state to, which according to article 28 of the Constitution enjoy the legal status of superior legislative effect.

Comparing the two approaches, the cultural environmental approach of the Hellenic Constitution to the cultural heritage approach of the international and EU legal instruments, that have been thoroughly examined above, it shall be indicated that the two notions have a distinctively different content. “Cultural environment” as noted in article 24.1 of the Constitution, has a broader regulative scope with emphasis to the spatial and territorial dimension, as it includes cultural heritage and residential environment (settlements, housing areas, cities), whereas “cultural heritage” has the more specific meaning, described in the article 1 par. 2 of the Cultural Law 3028/2002 and a further temporal character. This notion is alternatively referred as *“cultural environment stricto sensu”* (Christofilopoulos D., 2005, p. 37)<sup>66</sup>.

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<sup>65</sup> Plethora of them is included in Trova Η/Τροβά Ε. Η πολιτιστική κληρονομιά της Ευρώπης Έννοια και περιεχόμενο, ISBN 978-960-568-914-8, Sakkoulas Publications, Athens Thessaloniki, 2018, p. 304-315

<sup>66</sup> Christofilopoulos, D. / Χριστοφιλόπουλος Δημ. Γ., (2005) *Πολιτιστικό Δίκαιο - Προστασία Πολιτιστικών Αγαθών*, p. 37 ISBN 960-420-265-0 Law & Economy P.N. Sakkoulas, Athens, 2005

Correspondingly, in Voutsakis V<sup>67</sup>, 2004, p. 143, the question of the differences in the two concepts, has a similar answer, being noted that, bearing an independent value, “*cultural heritage either as a whole, or in specific forms of it, consists part of culture... and shall be protected as such.*”

In either case in Trova H., 2018, p. 248-249, is offered a conclusive general statement by pointing out that “*cultural environment and the partial assets and concepts that includes (humanmade environment, monuments, ancient elements, landmark buildings) is an interesting field for research for the scholars of legal language...whereas at the same time the term “heritage” is full of symbolism and underlines a connecting feature with the past and historical continuity and succession, putting emphasis in national identity*<sup>68</sup>”.

### ***References to cultural heritage and cultural environment in designated national Constitutions worldwide***

The protection of culture in the international legal instruments has not prevented the development of forming a national regulation legal frame. On the contrary, many of the later constitutional texts have included specific provisions either to the regulation of the culture preservation, or to the establishment of the human right to culture. The general states’ awareness of the need to set rules regarding the preservation of national cultural heritage led to an increased production of relevant constitutional provisions. The states worldwide reserved the legislative prerogative to form a supplementary to their international commitments, legal framework in all sorts of normative instruments (out of 197 charts, codes, constitutional provisions, decisions, decrees, measures, standard laws or by-laws).

The legal technical method they followed, is the subject matter of a comparative analysis, that aims to concentrate primarily to the original attempts of regulative constitutional provisions by culture rich countries (Italy, Greece, Spain) that formed a standard setting initiative , and secondarily to the representative paradigms of newer constitutional texts, that have utilized and benefited from the accumulated experience of humankind in the area of culture.

The first and oldest still in effect constitutional provision, is considered to be article 9 of the 1947 Constitution of the Italian Republic, adopted on 22.12.1947 and entered into force on 1.1.1948. Italy, due to its vast and unprecedented cultural production that formed a massive and differentiated cultural heritage, developed sensitivity on the matter that led to significant rule setting<sup>69</sup>. An overview of the provision “*The Republic promotes the development of culture and scientific and technical research. It safeguards the natural landscape and the historical and artistic*

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<sup>67</sup> Voutsakis V. / Βουτσάκης Β. (2004) *Το δικαίωμα στην προστασία της πολιτιστικής κληρονομιάς φορείς, θεμελίωση, λειτουργία* in collective volume [Η πολιτιστική κληρονομιά και το δίκαιο] *Conference Proceedings 3-4 June 2003 Athens, European Public Law Center, ed. Τροβά Ε. pp. 137-171, ISBN 960-301-784-1, Sakkoulas Publications, Athens, 2004*

<sup>68</sup> Trova Η/Τροβά Ε., *Η πολιτιστική κληρονομιά της Ευρώπης - Έννοια και περιεχόμενο*, ISBN 978-960-568-914-8, Sakkoulas Publications, Athens Thessaloniki, 2018, p. 248-249

<sup>69</sup> Trova Η/Τροβά Ε. *Η πολιτιστική κληρονομιά της Ευρώπης - Έννοια και περιεχόμενο*, ISBN 978-960-568-914-8, Sakkoulas Publications, Athens Thessaloniki, 2018, p. 237-248

*heritage of the Nation*<sup>70</sup> reveals the connection between culture and the Italian national identity. This approach formed a basis for is called in *Trova H. (2018) p. 254*, “the national identity constitutionalising”, followed as a standard by the Constitutions of Algeria, Armenia, Cuba, Egypt, Spain, Hungary, Ireland, Indonesia, Lebanon, Morocco, FYROM, Poland, Romania and Serbia<sup>71</sup>.

The Spain 1978 Constitution as revised on 2011, in its article 46 of chapter 3 provides that “*the public authorities shall guarantee the preservation and promote the enrichment of the historical, cultural and artistic heritage of the peoples of Spain and of the property of which it consists, regardless of their legal status and their ownership. The criminal law shall punish any offences against this heritage*”. The use of the term “cultural heritage” consists an influence from the developed in theory and international legal instruments wording. Consequently significant, is the provision of article 9 and article 78 of the Portugal 1976 Constitution as revised on 2005<sup>72</sup>. The combination of regulation regarding cultural heritage, natural environment, natural resources and habitual planning, with the right and obligation to cultural enjoyment and creation, is an integrated regulation that can serve as a paradigm of proper and exhaustive constitutional ruling.

The French 1958 Constitution, as revised on 2008, does not contain, due to its age, a distinct provision, for culture, however, in its preamble to constitution of 7.10.1946 in effect, provides that: “*The Nation guarantees equal access for children and adults to instruction, vocational training and culture. The provision of free, public and secular education at all levels is a duty of the State*”.

Another approach of great interest is the one adopted by Belgian 1831 Constitution, as revised last on 2014, that introduces the individual right to human dignity in its association to cultural and social fulfillment<sup>73</sup> Malta, on the other hand, in article 8 of the 1964 Constitution, as revised on 2016, under the title “Promotion of culture etc.” is satisfied to point out that “The State shall promote the development of **culture** and scientific and technical research”.

For many decades Egypt did not pertain to the state’s legal system a constitutional provision for the protection of its large numbers of monuments. Now in possess of a newest Constitution (2014), enjoys of an exemplary provision, the article 50, that is rarely met in other texts and covers numerous aspects of culture: “*Egypt’s material and moral civilizational and cultural heritage of all types and from all of the Pharaonic, Coptic, Islamic, and modern periods are a national and human heritage that the state commits to protect and maintain. The same applies to the modern architectural, literary and artistic cultural stock. Any attack thereon is a crime*”.

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<sup>70</sup> source of the preferred transl: [www.constitutionnet.org /sites/default/files/Italy.Constitution/pdf](http://www.constitutionnet.org/sites/default/files/Italy.Constitution/pdf) accessed last on 17.01.2019

<sup>71</sup> All references to translated provisions of national constitutional excerpts have been reproduced from the repository of the Comparative Constitutions Project, as distributed on website: [www.constituteproject.org](http://www.constituteproject.org), accessed last on 2.2.2019

<sup>72</sup> *Article 9* Fundamental tasks of the State “**e.** To protect and enhance the Portuguese people's cultural heritage, defend nature and the environment, preserve natural resources and ensure proper town and country planning”; *Article 78* 1. “Everyone shall possess the right to cultural enjoyment and creation, together with the duty to preserve, defend and enhance the cultural heritage”.

<sup>73</sup> *Article 23* “Everyone has the right to lead a life in keeping with human dignity. To this end, the laws, federate laws and rules referred to in article 134 guarantee economic, social and cultural rights taking into account corresponding obligations, and determine the conditions for exercising them. These rights include among others: ...5. The right to cultural and social fulfilment”.

*punishable by law. The state gives special attention to maintain the components of cultural diversity*". The particularity of this provision, is that it contains the statement that its cultural heritage has an international character, being heritage of all mankind, and secondarily, it inaugurates cultural diversity to a constitutional subject matter of protection.

Furthermore, one of the richest in culture countries of the world, Peoples' Republic of China, established the foundations of the protection of its cultural past in the provision of article 22 of the 1982 Constitution: *"The state protects places of scenic and historical interest, valuable cultural monuments and relics and other important items of China's historical and cultural heritage."*

Between the States that base their regulatory frame in the concept of *cultural heritage*, owners of constitutional texts of the last few decades and influenced in the process of their constitution generating, by the achievements and the development of legal thinking on the cultural field, worth mentioning provisions are those of article 21 of the 1993 Peruvian Constitution<sup>74</sup>, article 59 of the 1998 Albanian Constitution<sup>75</sup>, article 15 of the Armenian 1995 Constitution<sup>76</sup>, article 190 of the Serbian 2006 Constitution<sup>77</sup>, article 78 of the Swiss 1999 Constitution as revised on 2014 that can be distinguished for the joint regulation of natural and cultural heritage<sup>78</sup>, the article 42 of the Tunisian 2014 Constitution<sup>79</sup>, section 50 of the person-centered Thailand 2017 Constitution<sup>80</sup>, and, to maintain the indicative and representative character of this listing, article 51A of the 1949 Constitution of India<sup>81</sup>, and articles 44, 72 and 114 of the 1993 Constitution of the, then, Russian Federation<sup>82</sup>

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<sup>74</sup> "Archeological sites and remains, constructions, monuments, places, bibliographical documents and archival materials, art objects, and tokens of historical value, expressly declared cultural assets and those provisionally presumed to be so, are the **cultural heritage** of the Nation, irrespective of whether they are private or public property. They are protected by the State. The law guarantees ownership of such **cultural heritage**".

<sup>75</sup> 1." The state, within its constitutional powers and the means at its disposal, aims to supplement private initiative and responsibility with: [...] g. protection of national **cultural heritage** and particular care for the Albanian language".

<sup>76</sup> "The Armenian language and the **cultural heritage** shall be under the care and protection of the state".

<sup>77</sup> "The municipality shall, through its bodies, and in accordance with the Law: ... 6. be responsible for environmental protection, protection against natural and other disasters; protection of **cultural heritage** of the municipal interest"

<sup>78</sup> "The protection of natural and **cultural heritage** is the responsibility of the Cantons.

In the fulfilment of its duties, the Confederation shall take account of concerns for the protection of natural and **cultural heritage**. It shall protect the countryside and places of architectural, historical, natural or cultural interest; it shall preserve such places intact if required to do so in the public interest. It may support efforts made for the protection of natural and **cultural heritage** and acquire or preserve properties of national importance by contract or through compulsory purchase".

<sup>79</sup> "The state shall protect **cultural heritage** and guarantees it for future generations."

<sup>80</sup> "A person shall have the following duties: ... 8. to cooperate and support the conservation and protection of the environment, natural resources, biodiversity, and **cultural heritage**"

<sup>81</sup> "It shall be the duty of every citizen of India-f. to value and preserve the rich heritage of our composite **culture**"

<sup>82</sup> "Everyone shall be obliged to care for the preservation of the cultural and historical heritage, and to protect monuments of history and **culture**.[...] 1. The following shall be within the joint jurisdiction of the Russian Federation and constituent entities of the Russian Federation: [...]f. general issues of upbringing, education, science, **culture**, physical education and sport [...]1. The Government of the

Different from the cultural heritage approach, that incorporate in their constitutional provisions, the majority of states, is the “cultural environment” approach, outlined in article 24.1 of the Hellenic constitution. A comparative search for countries having embraced the same view, or influenced by this novelty, reveals that Greece is nearly in this field a “minority of one”. Apart from Greece, Georgia in article 37 of its 1995 Constitution<sup>83</sup>, and the culture export statute of Luxemburg, in article 11bis of its 1868, revised in 2009 Constitution<sup>84</sup>, have the same regulatory scope and spatial and environmental subject-matter.

In a word, cultural heritage as the sum of assets, tangible and intangible, to be protected by national legislation, has evolved to be a standard notion, prevailing in the development of new revised and amended constitutional provisions. It is considered nowadays a common scientific language term, so that all persons interested to protection of culture can share its regulatory content. This content has been, in the last decades, explicitly and definitively, formed through the work of international legislators of legal instruments in the area of art and culture.

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Russian Federation: c. shall ensure the implementation in the Russian Federation of a uniform State policy in the sphere of **culture**, science, education, health, social security and ecology”

<sup>83</sup> “Everyone shall have the right to live in a healthy environment and to use the natural and **cultural environment**. Everyone shall be obliged to protect the natural and **cultural environment**”.

<sup>84</sup> “The State guarantees the protection of the human and **cultural environment**, and works for the establishment of a durable equilibrium between the conservation of nature, in particular its capacity for renewal, and the satisfaction of the needs of present and future generations”

### CHAPTER 3: THE HUMAN RIGHT TO CULTURE OF ARTICLE 24.1 OF THE HELLENIC CONSTITUTION

#### ***The universal legal foundations of cultural rights and the constitutional regulation of the right to culture in the national context.***

Cultural rights, often unofficially referred to as “third-generation rights”<sup>85</sup>, are broadly characterized as an “underdeveloped category of human rights” or, to put it another way, as a “neglected category of human rights”<sup>86</sup>. According to *Symonides (1998)*, this term is broadly accepted and suggests “that, in comparison with other categories of human rights, civil, political, economic and social, cultural rights are the least developed as far as their scope, legal content and enforceability are concerned”.

Cultural rights appear as a formulated concept in the post war period. The *United Nations’ Universal Declaration of Human Rights*, adopted by the UN General Assembly on the 10<sup>th</sup> December 1948, has the enviable honor to host the relevant regulation, providing in its article 27: “1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. At the same instrument, article 22 provides: “everyone, as a member of society [...] is entitled to the realization, through national effort and international cooperation, [...] of the economic, social and cultural rights, indispensable for his or her dignity and the free development of his or her personality”.

Subsequently, the concept of cultural human rights developed further, in correspondence to the increased need for universal rules. This development found its advanced form in article 15 of the United Nations’ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the UN General assembly on the 16<sup>th</sup> December 1966, and in force on 3<sup>rd</sup> January 1976<sup>87</sup>. Supplementary to the

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<sup>85</sup> The division of human rights to categories according to their appearance (generations) was initially introduced in 1979 by the Czech- French university professor and jurist Karel Vasak at the International Institute of Human Rights in Strasbourg. According to this categorization first-generation human rights or “blue” rights are distinguished by their civil and political features, second-generation rights bear economic and social substance, while third generation-rights, also known as “green rights” and contains a list of rights regarding group and collective rights of differentiated scope.

<sup>86</sup> Symonides, Janusz (1998), “Cultural rights: A neglected category of human rights”, *International Social Science Journal*, Dec. 1998, Issue 158, p.559, available in website <http://www.iupui.edu/~anthkb/a104/humanrights/cultrights.htm>, accessed last on 2.2.2019.

<sup>87</sup> The robust provision adopted by the UN, points out: “*Article 15* 1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields”. Source: [https://treaties.un.org/doc/treaties/1976/01/.../ch\\_iv\\_03.pdf](https://treaties.un.org/doc/treaties/1976/01/.../ch_iv_03.pdf), accessed last on 2.2.2019.

aforementioned, is article 27 of the *United Nations' International Covenant on Civil and Political Rights*, adopted by the UN General Assembly of the 16<sup>th</sup> December 1966 and entered into force on 23<sup>rd</sup> March 1976, which grants persons belonging to ethnic, religious or linguistic minorities the right to openly enjoy participating in their own culture, practicing their own religion and speaking their own language.

To summarize the content of those international instruments and their provisions related to presenting the content of cultural human rights, *Symonides J, (1998)* enumerates the adopted guidelines “concerning the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress, to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production. The States Parties, in the context of the implementation of the right to participate in cultural life, are requested to provide information on availability of funds for the promotion of cultural development and popular participation; the institutional infrastructure established for the implementation of policies to provide popular participation in cultural promotion of cultural identity as a factor of mutual appreciation among individuals, groups, national or regions; promotion of awareness and enjoyment of the cultural heritage of national ethnic groups and minorities and of indigenous peoples; role of the mass media and communications media in promoting participation in cultural life; preservation and presentation of mankind's cultural heritage; legislation protecting the freedom of artistic creation and performance; professional education in the field of culture and art; any other measures taken for the conservation, development and diffusion of culture”<sup>88</sup>.

To demonstrate the limitations the Hellenic constitutional text presents, cultural rights in the Hellenic legal context are regulated in article 24.1, in article 25.1, in article 16.1, in article 25.1g and, originally, in article 5.1. Although not coherent or systematically organized in a unified part of the Constitution, those provisions form a complex that guarantees to my opinion, adequately the right of culture. The initial constitutional protection of cultural rights was based on article 5.1 that recognized every person's right to freely develop his/her personality and to participate to the country's social, economic and political life. In lack of a specific provision, until the 2001 Constitutional Revision, this article played the role of the frame for guarantee of every person's right to participate to social life and its mere aspect, to the cultural life of the country. The need of a clearer regulating provision resulted to the addition of four words in article 24.1 of the Hellenic constitutional text by the 2001 Revision: The protection of the natural and cultural environment is an obligation to the state “*and every person's right*”. This consisted the legal foundation of the right to culture in the constitutional context.

### ***Content and legal function of the right to culture***

The provisions above mentioned, establish a private right to the country's cultural heritage without extending their regulatory scope to defining the legal consequences for the infringement of this right, the procedure for every person to claim protection and the various claims against violators. A literal interpretative

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<sup>88</sup> Symonides, Janusz (1998), “Cultural rights: A neglected category of human rights”, *International Social Science Journal*, Dec. 1998, Issue 158, p.559, available in website <http://www.iupui.edu/~anthkb/a104/humanrights/cultrights.htm>, accessed last on 2.2.2019.

approach of the provision reveals that, by the 2001 Revision, was introduced to the legal complex of article 24.1 a right for every person, however, not an obligation. The obligation continues to be a responsibility of the State, which is bound to the interests of its citizens as a whole. The state's obligation and the individual private right of every person are autonomous concepts, not dependent to each other and at the same time both applicable. The establishment of a private fundamental right reserved not only for the citizens of the country, but for every person, consists of numerous features: it contains the freedom to act, a claim against person that infringe it, a claim against the State for the preservation of the cultural environment in terms of sustainability.

Right-holder, and beneficiary of this right is every person, a flexible notion often met in other constitutional provisions, as par example for the right to free expression of article 14 of the Constitution or for the right to legal protection by the country's courts of article 20. This right can be exercised either individually or collectively by groups of people sharing the same perception of culture.

From a legal technical point of view, under a strict interpretation, the right offers to every person a claim to the protection and preservation of the cultural environment, in terms of sustainability, without providing for the core of the relevant right: there is no mention of the right of access to, participation in and enjoyment of culture. There is not a distinct reference to the enjoyment, profit and use of cultural heritage and cultural expressions, there is no regulation of the rights of communities to cultural diversity. And there is no regulation for individuals to the documentation, safeguarding and transfer of their cultural aspects to the future generations.

All these elements are to be specified and supplemented by case-law and the standard implementing laws. This process has initiated: it is generally accepted that civil law provision of article 57 of the Civil Code is in effect and can support the function of the right by court decisions. The interaction between article 57 of the Civil Code and Law 3028/2002 special provisions defines the subject matter of the protection, its extent, the means provided and the legal consequences. Every infringement of the right either by state acts or even in the field of the relations between individuals (the "horizontal effect" of fundamental freedoms), distorts the right to one's personality. This fundamental right fortifies the human substance and grants to its right-holder a legal claim to eliminate the results of the infringement, often with a retroactive effect, to obligate the offending person to abstain repeating the infringement in the future, as well as a claim to a remuneration or other moral compensation.

The legal system of article 24.1 of the Constitution as revised in 2011, and its implementing or relevant civil laws form an effective protection for the human rights to personality and specifically to culture, granted to every person or group of people. It is the core of this right to allow access, participation, enjoyment, profit, education, scientific benefits, transfer to the descendants, safeguarding and every other use. In lack of a constitutional statement that enshrines the core of the right, the hard work falls under the efforts of administrative authorities and individuals.



## Conclusions

The constitutional provisions are particularly related to the social, political and scientific conditions, in effect at the time of their forming. According to Venizelos V. (2008), p. 115,<sup>89</sup> *“The Constitution is a product of History and the constitutional process, it is not a laboratory product, it obeys to correlations, to circumstantial needs, to feasibility and is a “palimpsest” in its substance, meaning it accumulates historical and regulative memories of different eras and times”*. The regulative content of each one of its provisions and rulings is influenced by the requirements and challenges set by a given social and scientific area.

For this reason, the legal system of the regulations for the protection of cultural environment followed the exact wording and vested with the enhanced constitutional protection in article 24.6 of the Constitution the three cultural assets: “monuments, traditional areas and traditional elements”. The oppressive housing and urban needs of the Greek society in the decades of 1960 and 1970, and the massive urbanization of the habitual environment, have exerted pressure to the historic areas, traditional parts of cities, archaeological sites and tangible monuments (especially buildings in need of preservation). That condition formed a priority for the legislative body to ensure safeguarding of those elements and extended areas, through a rigid regulative provision.

In the next decades academic and scientific research, as well as social and political priorities in the international context, have evolved. New fields for regulation have arisen, as evident from the enormous international legislative production. National cultural priorities for safeguarding of tangible cultural heritage, the concept of intangible cultural heritage, new multilateral agreements for the cultural cooperation between nations and an overall developed legal framework in the area of cultural rights have set challenges, that the Hellenic Constitution refrained for decades from answering to. The diffident addition to article 24.1 regarding every person’s right to the protection of culture, simply confirms this approach.

Since legislation and law in general, detests vacuum, it was the work of standard legislature production and of case law to undertake the task of supplementing, support and create modern regulative provisions, or even broadly interpret the substance of the existing ones. The result was successful from a point of view. No academic approach can claim that there is an imperfect protection in the Hellenic legal system for culture: international treaties of immediate and superior national effect, of which the Hellenic State is a part, an integrated legal complex of provisions in standard laws and the consolidation of case-law regarding the subject-matter of protection form an adequate system of protection, preservation and transfer of the Hellenic Cultural Heritage in all its dimensions to the next generations.

If this is the case, why does Greece should not be happy with its constitutional text? Is terminology an actual problem? Should the State move towards a revision of the established provisions? There is no doubt that the Hellenic Constitution regarding the protection of cultural heritage is outdated. The concept of cultural environment

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<sup>89</sup> Venizelos, Ev, / Βενιζέλος Ευ. (2018) Η Δημοκρατία μεταξύ συγκυρίας και Ιστορίας: Προσδοκίες και κίνδυνοι από την αναθεώρηση του Συντάγματος, ISBN 978-960-16-8211-2, Patakis Publications Athens, (2018),

consists a minority of one. Its broad character, containing both the habitual and cultural creations (in one word, every humanmade creation with no evaluation of its intrinsic value), is so indefinite, that it may refer to anything, being too complicated. This protection, albeit adequate, goes far beyond the scope of a specific and definitive protection of the “cultural heritage”, as assets valuable to the nation and to every person’s culture. Since the scope of the inclusion of article 24 to the Hellenic Constitution was to regulate urban development and planning, by not distorting the so far existing pure natural environment and the insofar humanmade cultural environment, one could argue, that article 24 is not a culture-focussed provision and, in its core, is not setting an authentic protection for culture. The protection provided is partial, a quasi-protection, since it is attributed only to the spatial aspects of environment.

This statement automatically leads to the recognition of the need for authentic protection for culture and cultural heritage. An authentic provision for the protection of cultural heritage presents the following benefits:

a. guarantees the systematic concentration and codification of the various fragmented constitutional provisions in a specific part of the Constitution,

b. promotes legal safety through harmonization of the different constitutional provisions with the international regulation for cultural heritage protection and the uniformity in terminology<sup>90</sup>. This ensures also the Hellenic Constitution can be a reference point for academic research or other constitutions.

c. the Constitution of the Hellenic Democracy should by definition be in the frontline of developments regarding cultural protection. Greece is a culture rich country that shall guarantee the integrity and the advance of cultural heritage protection in its legal system.

d. including provisions for intangible cultural heritage, cultural diversity, protection of cultural assets of Greek interest abroad, international cooperation in the cultural sector, and recognition of the Hellenic cultural heritage as the origin for the European and universal heritage, the constitutional text from a political point of view enhances its symbolic character and cultivates constitutional awareness and insight of the people.

e. the constitutional text is a long-term product that can be integrated, without suffering by the political considerations that balance the international treaties or by the risk of being changed according to the will of the government at a given time, in the way a standard legal text does.

f. in the final analysis, the Hellenic constitution must deploy its ethnic function as a power projection tool, as a cultural diplomacy carrier, that can organise either cooperation with other regional countries that share our common ancient and byzantine legacy, or discourage states that covet the Hellenic cultural heritage, in a time that the Hellenic national identity and the Hellenic Constitution is feeling pressure.

For those reasons, a constitutional revision of articles 24.1 and 24.6, as the supreme legal act of state modernization, offers, according to my opinion, more social and political benefits than leaving things as it is. Fulfilling the above requirements for

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<sup>90</sup> An example of the need to a uniform terminology is the approach of the unratified “Treaty establishing a Constitution for Europe” or Constitutional Treaty, to the notion of environment: Section 5 Article III-233, which refers solely to natural environment.

the integrity of the constitutional text, will lead to an advanced regulation for Hellenic culture that may form a “monumentum aere perennius” (Horace, Ode 3.30).-



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