

Text to a presentation held at the international conference in Slovenia on “The Right to Heritage as a Catalyst for Sustainable Development” on September 10, 2021, by Cyrill von Planta

Protecting Our Heritage for the Benefit of All Are the Laws to Protect Heritage Strong Enough? Is Heritage Protection Law “Soft Law”? An Austrian Perspective

Two points need to be made right at the start: I am not a lawyer or researcher, but an architect and entrepreneur in the field of heritage protection, building archaeology and archaeological services in Vienna. And this presentation does not strictly fit the theme of this conference. It'll be looking into a topic that is pressing in Austria.

Heritage is very important for the wellbeing and development of societies. Even more today as the last two years have shown quite impressively. Heritage is under pressure from a number of sides. When there is prosperity, buildings are replaced more easily and when there is poverty there is too little money for maintenance. There are many more reasons and the methods vary over time, but it has always been and will most probably always remain this way. And that is why we need effective Monuments Authorities on a sound legal basis.

As stated above only a practical point of view is offered here: As an adopter of the law and as an observer on how the law is enforced.

It is obvious that in Austria the law and the Federal Monuments Authority are struggling to fulfil their tasks and cannot do their work in an efficient and effective manner. This leads to a constant loss of our heritage.

Austria is known as a nation of culture, music and art. This image is spread around the world with great success. Tourism makes up for around 7,5% of GDP. And Austria is not only attractive for tourists: As a country it is growing by around 40'000 immigrants per year and the cities are growing even more as the internal migration to the cities and their surroundings is still ongoing. Combined with a greater average use of living space per inhabitant and the need to limit urban sprawl (just to name two out of many reasons) the pressure on city centres and existing buildings increases constantly.

Austria is a federal republic with substantial powers devolved to the provincial level. Especially important in our context are the building and zoning law. Zoning happens on a provincial level with municipalities managing the actual zoning. Municipalities set up their zoning plans that need to be approved by the provincial governments. The same applies to changes to these plans.

Building law is also provincial but administered by the municipalities in their own sphere of influence.

The Austrian Heritage Protection Law (Denkmalschutzgesetz – DMSG) on the other hand is federal law. The Austrian Federal Monuments Authority was set up as a technical authority to monitor it. The enforcement is left to the district administration. The present law was introduced

in 1923 and is almost 100 years old. A few amendments were made over time but essentially it is still at that same level.

The Monuments Authority's tasks as defined by the law are

- the assessment of heritage on a national level (there is no provincial level here),
- conduct the necessary administrative steps to put an object under protection,
- provide advice to heritage owners,
- administer the list of protected monuments,
- issue decisions when there is an application to change or destroy a listed monument,
- monitor construction that is happening and keep an eye on the existing heritage and
- start the legal procedure in case of a breach of the law.

Besides that, they also issue permits for the export of protected heritage and do the research into the origin and the administrative handling of the restitution of stolen art during the Second World War.

At the moment the Austrian Monuments Authority runs on about 200 members of staff.

Looking at this "predisposition" it is clear that there are problems in the implementation of heritage protection.

These circumstances basically mean that,

1. The Monuments Authority has a severe lack of manpower to cover all of its duties,
2. It is not automatically involved when the process of a building permit is started. Usually the applicant is informed by the building authorities that the building is protected and another permit from the Monuments Authority is required before construction can start but there is no institutionalised control by them if such a permit has been obtained or the stipulations set in a decision have been observed.

And **3.**, when something has gone wrong the Monuments Authority can file charges at the district administration. Sanctions such as fines etc. are then defined by the district director. Usually the expertise to assess the damage is not settled at that level which translates into unknowing district personnel setting fairly low fines.

Besides these "historically grown" structural problems the law still has quite a narrow understanding of what can be a protected monument. The development in the understanding of cultural heritage and the importance of a holistic approach to this topic in the light of sustainable development for open, pluralistic and democratic societies have passed without major changes in the law. It is missing, besides world heritage, aspects of the intangible heritage under discussion here at the conference.

Almost as narrow as the definition of heritage are the definitions of sanctions with maximum fines set in the law.

A series of additional “home-grown” reasons make it extremely interesting in Austria to replace old buildings with new ones. Just to name a few:

- Rent control only in old buildings built before 1945
- Zoning favouring new buildings as they permit higher densities
- Insufficient awareness of the relevance of historic buildings on almost all levels (i.e. not only in the general public but also in the general administration working with heritage)

The last census from 2011 states that 2'191'280 buildings existed in Austria in total at that time. 38'803 of them are protected buildings as of 2020 (source: <https://bda.gv.at/denkmalverzeichnis/>) That means that a share of 1,78% of the Austrian building stock is protected on the basis of the Heritage Protection Law. This illustrates the fact that very few buildings are protected due to a very narrow definition of what can be protected. This goes hand in hand with a lack of personnel, as stated before, at the Monuments Authority to expand the number of protected properties and to overlook the buildings already under protection.

This can be shown quite dramatically by the statistics: Between 1971 and 2011 about 38% of the building stock built before 1919 was demolished (this translates into 203'696 buildings).

(source: Statistik Austria:

https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/wohnen/wohnungs_und_gebaeudebestand/Gebaeude/074079.html)

If we applied this same ratio to the listed buildings of the general building stock, the number of protected buildings lost between 1971 and 2011 would be at around 3'600 buildings.

It is clear that this is not directly applicable this way, but my grand-mother used to say: “Exaggeration makes things obvious”.

As the Monuments Authority lacks the legal handle on the district or provincial level for an institutionalised exchange of information many things are only discovered after they have happened.

The modification of listed monuments is still seen as a trivial offence to many as the sanctions are usually small. This in combination with a general lack of staff leads to a subtle and constant loss of heritage – frequently under the eyes of the Monuments Authority's helpless or overburdened officers.

Sanctions

A first reaction to counter these developments could be to call for sanctions.

As mentioned above the situation on this in Austria is complex.

The law is very specific defining different levels of offences against heritage. It continues to state the limits of possible fines issued. Only the total destruction of a monument leaves the possibility to impose a sort of compensation fee.

In other cases the limit of fines as defined by the law is set to EUR 5'000,-, i.e. very low especially if a single wall or the like of the old building remains which qualifies as a major change of the property, not as a complete destruction. The judicature concerning sanctions so far has only concentrated on the physical building and not on the historic etc. values when it comes to the destruction.

As the Monuments Authority is not a party in these cases they are bound to the role of bystanders. It has to rely on the district administrations for the implementation of sanctions and that is a double-edged sword.

On the one hand, one would imagine that the people directly affected by the breach on “their” monuments could best assess the impact this act had (even though that was surely not the idea when the law was drafted). On the other hand, this closeness can become a liability as forcing charges against acquaintances or partners in other (political) areas raises issues of biased decisions. Being well connected usually helps to avoid big fines.

It is obvious that in Austria, at least, this system does not seem to be working to a satisfying level.

Major fines can only be imposed if a monument is erased totally. A high court decision is the basis for this interpretation and it has not been revised since.

As mentioned before that actually means that by leaving or reusing a part of it is not considered a destruction but only an illegal alteration of a monument – with the foreseeable results to heritage.

The talk about sanctions has been going on for a while but a significant point is usually left out: prevention and support

The discussion omits the fact that most listed buildings are owned by individuals and groups of people who are very closely connected to “their” monument. They take great care but hardly find any support, especially financially.

The missing possibility to deduct investments in historic buildings from your taxes, that are frequently higher than with new buildings, and the Monuments Authority limited funds for subsidies leaves many of these owners failing to maintain their buildings.

Maybe a little support on this end would help a lot more for a great number of monuments than stricter sanctions.

ex iniuris ius non oritur

A right does not arise from wrongdoing. Better: No right can arise from wrongdoing.

It has to be clear to everyone that destroying heritage should not pay off - but at the moment in Austria this is the case. Considering the issues raised before the Federal Monuments Protection Law is actually Soft Law – to answer the question set at the beginning of this presentation.

With the centennial of the law coming up ICOMOS Austria is preparing a proposal for a revision of the law. This involves taking a closer look at how other countries have formulated their laws and what their experiences have been. Input from colleagues is greatly appreciated.

Heritage deserves the best protection available which must include a sound legal basis.