THE EVOLVING LANDSCAPE OF MEXICAN CULTURAL HERITAGE

Jorge A. Sánchez Cordero*

> There is a temple in ruin stands,
> Fashioned by long forgotten hands;
> Two or three columns, and many a stone,
> Marble and granite, with grass o´ergrown!
> Out upon Time! it will leave no more
> Of the things to come than the things before!
> Out upon Time! Who for ever will leave
> But enough of the past and the future to grieve
> O´er that which hath been, and o´er that which must be:
> What we have seen, our sons shall see;
> Remnants of things that have pass´d away,
> Fragments of stone, rear´d by creatures of clay.
> "The Siege of Corinth", by George Gordon (Lord Byron)

I. Introduction

The Mexican System of Cultural Heritage acknowledges a myriad of laws resulting from its dispersion and diverse origin. This serves to reflect the sub-

* PhD. Univeristé Panthéon-Assas (Paris II).

ject's complexity in Mexican law and the enormous challenge faced by its systematization.

As pre-emption to our analysis, it is necessary to highlight the different laws concerning both tangible and intangible cultural heritage and their rationae materiae.

1. *Tangible Cultural Heritage*

The only law which is specifically concerned with the protection and preservation of tangible cultural heritage in Mexico is the federal law on archeological, artistic and historic monuments and zones. It was enacted on 6 May 1972 (the Law of 1972)[1] and rules over movable and immovable cultural property.

The other law worth mentioning regarding movable and immovable tangible cultural heritage is the General National Ownership Act (LBN) that rules over goods and ownership pertaining to the Mexican National State and establishes the criteria to be met in order for them to be considered as such.

It can therefore be maintained that the apex of the protection and conservation of Mexican tangible cultural heritage is the Law of 1972. Since its sanctioning, this law has been deemed sacred by the Mexican society; thus explaining why previous attempts to change it have been unsuccessful. The Mexican legal order of cultural heritage has been radically enriched in numerous ways by several legislations which have the clear intention of protecting and safeguarding Mexican cultural heritage.

2. *Intangible Cultural Heritage*

The protection and preservation of intangible cultural heritage can only be found in the amendments made to article 2 of the General Mexican Constitution, where the languages and particularities of the identity and culture of indigenous people are protected. The implementation of secondary legislation on a federal level is still pending. On a local level, diverse legislation has been specially enforced in those states where the indigenous population is the densest e.g. the States of Chiapas, Oaxaca and the State of Mexico.[2]

[1] La *Ley Federal sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas* (*The Federal Law on Monuments and Artistic, Historic and Archaeological Zones*), herein after the Law of 1972, was enacted on 6 May 1972.

[2] The Mexican leglislation can be consulted at: *www.juridicas.unam.mx* (on this site an english and french version of the General Mexican Constitution can be found) or *www.orden-juridico.gob.mx*.

A very recent development has been the approval of a constitutional amendment by the Mexican Congress which assures all citizens access rights to culture and also to the services provided by the National State. The National State is obliged to provide the means to render these rights effective and it is responsible for the promotion and development of cultural diversity in all its forms and with respect to creative freedom.[3] Furthermore, the General Congress has undertaken the responsibility of establishing the foundations of the different cultural heritage legislation within the Federation and the federal states. Nevertheless, the Federation reserves the right to legislate on tangible cultural heritage.[4]

II. The Mexican Legal Order Functionality

It is essential to provide a legal perspective on the functionality observed by the Mexican legal order, so that the analysis of the cultural heritage's legal regime may be fully comprehended.

1. *The Constitutional Order*

The influence of the United States of America on the Mexican Constitution was fundamental and carried with it substantial legal consequences, such as the legislative power granted to each State to rule on the subject of private law. Consequently, since the Mexican independence in 1821, private law has become an essential element in the sovereignty of each State, and has given rise to the great legislative diversity that Mexico holds in relation to private law, among others.

In its capacity as a national State, Mexico subsequently has three regulatory orders, the national or constitutional order, the federal order and the local order. Throughout the compilation of the Mexican legal order on cultural heritage, the international treaties have been of significant importance, which, prior to any analysis, compels us to take into consideration what the regulatory hierarchy of these treaties is in Mexican law.

2. *The Regulatory Hierarchy of the International Treaties. The Path to Globalization*

Unlike other Federal States, e.g. the United States of America, the treaties in Mexican law are self-applicable, since they do not require specific legisla-

[3] See amended article 4 of the General Constitution.

[4] See amended article 73 Chapter XXIX Ñ of the General Constitution.

tion for their implementation. This makes the performance of the national State in the undertaking of international commitments in internal Mexican law a complex issue.

In the latter part of the XXth century, the ratification of international conventions in Mexican law has periodically created controversy; especially regarding the manner in which the national State incorporated its various obligations to the international community into its legal system.

The constitutional debate is one of a very curious nature. The fundamental problem stems from the determination of the manner in which Mexico should comply internally with its commitments undertaken with other national States. Furthermore, the free-trade agreements signed in the last decade by Mexico and the international conventions concerning cultural heritage also have a part to play in this debate.

Article 133,[5] of the General Mexican Constitution, establishes the hierarchy of the applicable regulations and consequently determines the priority of each in its application. There is an antecedent to this article, namely, article VI, paragraph II, from the Constitution of the United States of America, the contents of which served as a model for the drafting of successive Mexican constitutional texts during the XIXth and XXth centuries. This constitutional text has given rise to many varied interpretations.

The controversy, which can clearly be recognized regarding the interpretation of this provision, has been, and is to this day, a result of the hierarchy of laws in our federal system which determine the priority of its performance. The Supreme Court primarily interpreted this constitutional provision by determining that the laws ensuing from the Constitution, alongside the international treaties signed by the Federal Executive Branch and approved by the Senate as being in accordance with the Constitution, held an immediate inferior position to that of the Constitution in the hierarchy of the Mexican legal order regulations.

This criterion is fundamental; it determines that when considering if a law is in accordance with the Constitution, only the content of the Constitution and the body of the law which is subject to dispute should be adhered to. Following this criterion, the statements of the international treaties

[5] The last amended version of article 133 sanctioned in 1934, states that: "This Constitution, the laws of the Congress of the Union which shall be enacted in pursuance thereof and all treaties in accordance therewith, celebrated or which shall be celebrated by the President of the Republic with the approval of the Senate, shall be a supreme law of the Union. The judges of the Federal District and of the States shall be bound thereby, notwithstanding any provision to the contrary in the local constitutions or local laws".

signed by Mexico would be overlooked.[6] There was an obvious conclusion: the law which was subject to controversy, contrary to a specific international treaty, failed to imply that it was in dispute with the Constitution. Hence, the international treaties did not overrule federal or local legislation.

This interpretation by the Supreme Court ordained an initial order of the General Constitution, followed by the laws imposed by Congress and ultimately the international treaties, as signed by the Federal Executive Branch with Senate approval. The jurisprudential criterion, as set by the Supreme Court, varied substantially in 1999. In accordance with this new interpretation criterion, the Constitution was held the supreme statute in the country; the international treaties that immediately followed the fundamental law were present in the hierarchy of laws, but with a higher hierarchal status than the federal law and the law of the States.

The consequences of this new criterion were substantial. The national State fully undertook the international commitments which linked the Mexican authorities, both local and federal, before the international community. The Federal Executive Branch, as Head of State, was empowered with the administration of international treaties with the intervention of the Senate, as representative of the will of the States, and as such, bound all local and federal authorities.[7] Hence, international treaties prevailed over federal and local legislation.

This new interpretation by the Supreme Court, not unexpectedly, provoked nationwide criticisms which were documented in Mexican legal literature.[8] Some authors stated that while from an international law point of view, it was true that the national State was completely bound by international treaties, this affirmation could not in any way determine the hierarchy of international treaties in Mexican internal law.

It has been maintained that the interpretation by the Supreme Court culminated in confusion, due to the fact that the national State had undertaken international commitments with another national State. These commitments should not have had any repercussions on the regulatory hierarchy within the internal legal order. It is the national State, in its internal

[6] CD Rom, Jurisprudence, Seventh Edition, Tomo (Volumen) I, Suprema Corte de Justicia de la Nación (Supreme Court Justice of the Nation), Tesis (Thesis) 327, p. 302.

[7] CD Rom, Ninth Edition, *Semanario Judicial de la Federación y su Gaceta* (Weekly Judicial of the Federation), Tomo (Volumen) X, November 1999, Tesis (Thesis), PLXXVVLL/99. p. 46.

[8] See Cossio D., José Ramón. "La nueva jerarquía en los tratados internacionales (The new hierarchy of international treaties)", *Este País*, *Tendencia y opiniones* (*This Country*, *Tendencies and opinions*), Mexico, February 2000, p. 34.

order, which in a sovereign form, determines this hierarchy. On the other hand, it is the head of State who executes a treaty. This fact alone does not indicate the hierarchy of that treaty within the Mexican legal order.

The Supreme Court was also criticized for sustaining that the Senate of the Republic, as a collegiate body, was representative of the States, as its senatorial elections, destitution and the exercising of its powers were linked to its inhabitants and not to the States. Despite the latest criterion by the Supreme Court, it cannot be sustained that the Senate intervened as a representative of the will of the States. This notion has been widely surpassed. In our federal system, the General Constitution stipulates that the Senate of the Republic is comprised of 128 members. These are elected according to the principles of a direct vote and a proportional representation of the first minority. This form of election gives a clear popular representation of the senators.

In relation to the new criterion by the Supreme Court regarding the hierarchy of the treaties, there is a section of the Mexican doctrine which declares that its performance in internal law must be regulated by precisely the same internal law; even the Vienna Convention on treaties does not provide any grading regarding the hierarchy of laws and therefore no priority is placed regarding their performance.[9]

3. *The Mexican Codes Civils*

According to the regulatory order previously described, and following on from the American model, civil legislation was a bone of contention among the thirty two States. This explains why Mexico has the less than ideal status of having a total of thirty two Codes Civils.

[9] The international conventions relating to Cultural Heritage participate in the same debate. In this manner, the Supreme Court stated that the objectives of the 1970 UNESCO Convention could only be reached when the cultural good in question entered national territory. Thus, once the cultural good is identified, the possibility of its legal importation is considered so that the Mexican authority is in a position to decide the source of the requesting State. According to the criterion maintained by the Supreme Court, it is until the Mexican customs has carried out the necessary formalities, when the rules of the 1970 UNESCO Convention in the matter of cultural heritage acquire their preference according to article 133 of the General Constitution and it is until this time that the corresponding Mexican authorities are forced to prevent or to prohibit their importation. See CD Rom, Ninth Edition, *Primer tribunal colegiado en materias penal y civil del Cuarto Circuito* (First Court of the Fourth Circuits on penal and private matters), *Semanario Judicial de la Federación y su Gaceta* (Weekly Judicial of the Federation), Tomo (Volumen) X, August 1999, Tesis (Thesis), IV. Io. P: C: 3a, p. 731.

In the XXth century, based on the Mexican constitutional structure, it was concluded that each local and federal regulatory order should have its own legislation. To this effect, a decision was made to refer the Federal District's (Mexico City) Code Civil to the Republic on the issue of a federal order, along with the local issues in the Capital of the Republic, as was its natural vocation. Subsequently, the federal order was provided with a civil legislation. According to the federal regime at the time, the Federal District did not have its own legislative body. The General Congress was the competent legislative body there; one must consider that it was in Mexico City where the federal branches resided. This federal structure made this decision constitutionally viable.

Over the last few decades, the Mexican political evolution has varied substantially. To satisfy increasing social demand, the General Constitution has been amended and an individual legislative body ("Assembly of Representatives") has been introduced into the Federal District. This wields legislative power over civil matters, amidst other responsibilities. This legislative body tacitly received the Code Civil which had been in effect in its territory. In the federal order and without having explicit powers to that effect, the General Congress also conserved the same Code Civil, but referred to it as the Federal Code Civil.

Before the Constitutional amendment in 1966, the Codes Civils of each Mexican State were fundamental in the protection and preservation of cultural property. They ruled over the treasury regime and acquisitions by good faith or a non domino. Since the Constitutional amendment, the Federal Code Civil now rules over these matters. Nevertheless, issues can be raised if sales agreements of cultural property are federal or local. It is to be pointed out that the letter of the law mentions the former Code Civil for Mexico City. The letter of the law pertains to those remnants, found from time to time in the law.

To summarize, Mexico has 32 Codes Civils, one for each State, and one for Mexico City, applicable exclusively in their territory. In conjunction with these, a Federal Code Civil is in place dealing with federal issues.

III. General Issues

The Mexican legal system with its highly diverse legislation recognizes, within the categorization suggested, the following criteria:

1. *International Frame*

A. *The Hague Convention of 1954*[10]

The differentiation of cultural heritage, as a consequence of geopolitical circumstances, has not had the relevance in Mexico as in other latitudes. The precision is unavoidable: under no circumstances has the Hague Convention been addressed since its ratification. Additionally, a scrutiny of XXth century Mexican history shows a limited Mexican participation in recorded military events. Its participation has been purely symbolic. In the internal field there continues to be great debate over sending troops abroad, which can be attributed in part to the traditionally pacifist position held by the national State. The ratification of the Hague Convention to date has been merely a good will gesture of compliance, as a definition of armed conflict does not even exist in the domestic legislation.

B. *The UNESCO Conventions*

Mexico has ratified a significant number of UNESCO Conventions that have been incorporated into the Mexican legal system.[11]

Nevertheless, it should be pointed out that notwithstanding Mexico's ratification of the UNESCO Conventions of 1970 and 1972 and most recently the UNESCO Conventions on the Protection of the Underwater Cultural Heritage, on the Safeguarding of the Intangible Cultural Heritage, and on the Protection and Promotion of the Diversity of Cultural Expressions, no secondary legislation has been implemented to date.

2. *The Internal Legal Order*

The Law of 1972 does not allow the possession of cultural heritage that is protected by Mexican law. Pre-1972 ownership and possession is still a

[10] The deposit of the ratification of this Convention was made by Mexico on 14 May 1954.

[11] Mexico deposited the Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural heritage on 4 October 1972, The Convention concerning the protection of the World Cultural and Natural heritage on 23 February 1984, The Convention on the Protection of the Underwater Cultural Heritage on 5 July 2006, The Convention on the Safeguarding of the Intangible Cultural Heritage on 14 December 2005, The Convention on the Protection and Promotion of the Diversity of Cultural Expressions on 5 July 2006.

major issue; the Mexican Constitution expressly prohibits retroactivity in the law. In previous laws, it was compulsory to log the possession or ownership of pre-Colombian cultural objects in the ad hoc Register. This is cited as evidence, in international courts, that Mexican law allows private possession. Many possessors, national or international still argue in court that their possession is legal, because the acquisition occurred before the Law of 1972 was implemented. The Law of 1972 also refrained, for these reasons, from ruling on illegal possession of cultural heritage.

A. *The Rights of Communities, Groups or Individuals on Elements of Cultural Ownership or Heritage*

There are many aspects of major relevance which warrant a mention regarding the rights of communities, groups and individuals on elements of cultural ownership or heritage. There is no official definition of communities or groups. In Mexican legal traditions they are known as "pueblos indígenas o indios" which can be translated into English as "indian or indigenous people", and which encompasses individuals, communities and groups.[12]

The Mexican XXth century, along with other legal systems, was characterized by not acknowledging multi-culturalism until the end of the XXth and the start of the XXIst century. Therefore, a great portion of the legislation is modeled on the basis of the federal governmental declaration of tangible cultural heritage. It is only in recent times that one begins to observe an emergence of legislation that attributes the existence of such collective rights to the cultural areas.

B. *Constitutional Order*

Since the uprising of the indigenous people in the south eastern areas of the country, the Mexican Constitution has been amended to encompass the needs of these minorities, thereby protecting their cultural rights.[13]

[12] The whole legislation can be found on the website 'Red de información indígena' under "Leyes para los pueblos indios de México (Laws for the Indian people of Mexico)".

[13] See amended article 2 of the General Constitution that states: "The Mexican Nation is one and indivisible. The national State has a multicultural composition, originally sustained by its indigenous peoples, who are those regarded as indigenous on account of their descent from the population that originally inhabited the Country's current territory at the time of colonization, who retain some or all of their own social, economic, cultural and political institutions. ...This constitution recognizes and protects the indigenous peoples and communities right and, consequently, their right to autonomy, so that they may: ...- Decide

The constitutional text recognizes the multi-cultural nature of Mexico. The consciousness of indigenous identity is a fundamental criterion in determining to whom the provisions for indigenous peoples should apply.

To this end, the specification is that indigenous people are integrated into communities and form a social, economic and cultural unit that is rooted in a territory and which recognizes their own authorities in relation to their uses and customs.

The Constitution provides a clear mandate for the States. They must recognize the indigenous people and their communities in their respective constitutions and internal laws in coherence with ethno-linguistic criteria and physical settlements.

3. *Who Owns the Cultural Heritage?*

An analysis of the legislation on cultural heritage in modern Mexico requires prior exposure to the federalization process of Mexican cultural heritage. This analysis is essential for comprehending the issue of Mexican legislation on cultural heritage in the XXth century.

A. *The Horns of the Federalist Dilemma: The Jurisdictional Answer*

In the Mexican tangible cultural heritage domain, the regime of pre-Columbian heritage is undoubtedly the most controversial. The first technical problem which arose in the Mexican federal regime occurred while it was attempting to identify the relevant authority on the subject. A decision had to be taken as to whether the federal government or the States was in charge of the administration of the legal regime of Mexican pre-Columbian cultural heritage. The initial traces of this intense debate can be identified in the disputes arising from the challenging of contracts that were carrying out ex-

the ways of their community life as well as their social, economic, political and cultural organization. ... Preserve and promote their languages, knowledge and all those elements that constitute their culture and identity. ... To protect this right, in all trials and procedures to which they are party, individually or collectively, the particularities of their customs and culture must be taken into account, respecting the provisions of this Constitution. ... Guarantee and increase educational levels, favoring bilingual and cross-cultural education, literacy, the conclusion of elementary education by students, technical training and medium and higher education. ... To define and develop educational programs of regional content which recognize the cultural heritage of their peoples in accordance with the laws on the matter and consulting it with indigenous communities... To promote respect for and knowledge of, the diverse cultures in the Mexican Nation".

plorations of the zones and Mexican archaeological monuments. A perfect illustration of this difficulty is the famous contract executed by the Mexican Government in collaboration with the French archaeologist Charnay in the XIXth century.

Archaeological cultural heritage is the core of Mexican tangible cultural heritage. This fundamental proclamation dates back to the origins of the independence and has consistently been present in the country's legislation.

Consequently, at this point in time, archaeological heritage has a privileged legal regime allowing for its preservation that, in spite of its shortcomings, is more effective than the legal regime attributed to artistic and historic heritage, both of which chronically suffer from constant insufficient economic means, the lack of centralized protection and an absence of trained personnel. This preferential treatment has not come about by chance; it is linked to powerful and historic rationing.

In the archaeological field, the current legal regime is the result of provisions being in effect at different times and is a response to concrete situations which, at one time, led to the creation of the appropriate means. Even though the legislation is brought to task for being confusing and difficult to comprehend, a criticism which does hold an element of truth, it has allowed the federal government to have better control over this cultural heritage, whose ultimate beneficiary is universal knowledge. Unfortunately the same cannot be said regarding movable and immovable cultural heritage during other times.[14]

In the XXth century, the first sovereign act of the national State in the matter of cultural heritage concerned itself with the execution of an agreement which ensured that cultural heritage was available for public interest and ordered the acquisition of immovables located in the archaeological zone of Teotihuacan.

Furthermore, the national State was fully aware of its obligation to inspect and preserve archaeological monuments. It therefore resolved to sequest the lands of more than 163 owners[15] in one of old Mexico's largest ceremonial centers, the archaeological zone of Teotihuacan, where the monuments were built.

[14] See González, María del Refugio. "La protección de los bienes arqueológicos en México y su relación con la jurisprudencia (The protection of archaeological property in Mexico and it's relation to the jurisprudence)", *Arqueología y derecho en México* (*Archaeology and Law in Mexico*), México, UNAM, 1980, p. 72.

[15] See Olive Negrete, Julio Cesar, "Reseña histórica del pensamiento legal sobre arqueología (Historical Review of the Legal Theory on Archaeology)", *Arqueología y derecho en México* (*Archaeology and Law in Mexico*), México, UNAM, 1980, p. 40.

This agreement was intended to concile the rights of the owners involved in the private ownership system. However, in reality, the land owners were forced into selling their land to the federal government. They were surreptitiously warned that if they failed to reach an agreement, the land would be expropriated in the case of public interest.[16]

This agreement was later supplemented by the decree of 1964 which ordered the expropriation of neighboring lands in order to establish the archaeological zone of Teotihuacán.[17]

The federal protection of archaeological heritage dates back to the XXth century. Its origin lies in a judgment issued by the Supreme Court, and came about as a result of a dispute between the Federal government and the Southern State of Oaxaca, which possesses a very rich pre-Columbian cultural heritage, regarding the enactment of the 1932 law in that State.[18]

The dispute arose because the State of Oaxaca published a law on the dominion and jurisdiction of archaeological and historic monuments.[19] The federal government considered this law to be a breach of the legislative competition and deemed it unconstitutional, which resulted in its voidance.

The Supreme Court ruled over the case in accordance with the General Constitution[20] which procures that it is the highest interpreter of the Constitution and therefore must have knowledge of the constitutional disputes between the federal government and one or more States, focusing the legal scope of its jurisdiction on each one.

The State of Oaxaca argued its right to enact laws of this nature and reasoned that it did not, in any way, contravene the authority of the federal

[16] See the *Diario Oficial de la Federación* del 11 de julio de 1907 (The Official Newspaper of the federal government 11 July, 1907).

[17] See the *Diario Oficial de la Federación* del 30 de abril de 1964 (The Official Newspaper of the federal government 30 April 1964).

[18] See the *Semanario judicial de la Federación. Quinta época*, Tomo XXXVI (Weekly Judicial of the federal government. Fifth Edition. Volume XXXVI), México, Antigua Imprenta de Murguía, 1933, p.1071. In CD-Rom, Suprema Corte de Justicia de la Nación (Supreme Court Justice of the Nation), IUS 8, Jurisprudencia y Tesis Aisladas. 1917-1998.

[19] See article 1 of the law *sobre la propiedad y la competencia de monumentos arqueológicos e históricos* [property law and the competition of archaeological and historical monuments] that stated: "… They are under the dominion of the State and will be under the legal powers of the same archaeological and historical monuments ... (that) are located in the Oaxaca State]. Immediately after the law set out the requirements to be satisfied for the protection of these types of cultural heritage, specifying that the property had to receive the said protection."

[20] See article 105 of the General Constitution that states: "… the Supreme Court of Justice shall hear, under the terms set forth by the law, of the following matters:… I. Constitutional Controversies, except for those referring to electoral matters, arising between … The federal government and a State or the Federal District …".

government especially since the General Constitution did not grant such power to the General Congress.[21] Furthermore, in the State's opinion, admitting the arguments of the federal government would be equivalent to "constitutional deviation" which would place the heritage of the States in a "formidable central lock".[22]

The Supreme Court's decision was unanimously favorable towards the federal government, with the exception of one vote. It was argued that, although the General Constitution indicates that the powers are not specifically granted to the federal government, it is understood that they are transposed to the States. The roots of this draw water from the Constitution of the United States. This argument was not admitted in its entirety by the first Mexican Constitution and, according to the constitutional text, there are other matters where concurrent jurisdiction exists between the federal government and the States. In these instances, the jurisdiction corresponds with the power that has primarily exerted it, and if neither has exerted it, the national or local interest on the subject corresponding to the disputed jurisdiction, would govern.

The Supreme Court deemed that the federal government had undisputedly benefited, from the exercise of its jurisdiction over the ruins and archaeological monuments located within the territory of the Republic[23] almost since the country was established. To justify its assertion, it made reference to a series of legislative precedents that convincingly accredited it as such.[24] The common denominator of these legal texts stipulated that national antiques, monumental ruins and archaeological heritage such as the temples or pyramids, belonged to the national State.[25] These provisions showed that the federal government had maintained a constant legislation over the ruins and archaeological monuments and had exercised this juris-

[21] For this reason, the *Ley Federal del 3 de enero de 1930 sobre Protección y Conservación de Monumentos y Bellezas Naturales* (Federal Law of 3 January 1930 on the protection and conservation of monuments and natural wonders) was only applied to the Federal District (Mexico City).

[22] See, González, María del Refugio, *op. cit.*, p. 73.

[23] Supra note 16.

[24] The Resolution of the Supreme Court also alluded to the briefing dated 28 August, 1868 issued by the former Ministry of Justice, which prohibited the carrying out of excavations or future works in the archaeological zones without acquiescence from the federal government; to the law of 26 March 1894 on the occupation and distraction of uncultivated lands; to the Decree of 3 June 1896 approved by the General Congress; to the law of 11 May 1897 on archaeological monuments; to the Decree of 18 December 1902, and finally to the law of 30 January 1930.

[25] The treatment of these different types of goods varied very little, but all were integrated into the national heritage.

diction provided by the General Constitution[26] with regards to these national cultural monuments.[27]

The Supreme Court viewed that since the law of the State of Oaxaca only dated back to 1932, the federal government had instigated the application of the jurisdiction over the matter in question, and not the State of Oaxaca. Therefore, according to the legal rule invoked, the former had the jurisdiction and legislative power in this case, not the State of Oaxaca.

The State of Oaxaca's argument was rejected as it appealed to a power that was not in fact attributed specifically to the federal government, however it was held that certain powers "do not need to be literally or explicitly contained in the Constitutional Law ... therefore ... the legislative powers of the federal government are not those solely expressed in a provision determined by the General Constitution".

The Supreme Court also stated additional reasons to rationalize the validity of its decision, citing, among others, the feigned spirit of the first Constitution in this field and others. This is based on ancient antecedents like the Recopilación de Leyes de los Reynos de las Indias[28] (Laws of the Indies) in which this heritage was privately owned by the Spanish Crown and such heritage was untouchable and limitless.

The Court ruled that "…when the Colony won its independence, the rights of the Crown's private heritage, in relation to such laws as those of the Indies, were passed with all integrity and in full to the Mexican nation". The successor of the Crown's heritage was considered and decided on by the nation. Consequently, it was "undisputable that the ruins and archaeological monuments that are found in Mexican territory were also a part of the national heritage and not the States of the Republic, whose existence was not even well established".

It was clear to the Supreme Court that the federal government had foreseen the exertion of its jurisdiction on the subject, as in the terms of the

[26] See article 73 Section XXV of the General Constitution that states: "... The Congress shall have the powers: ...Paragraph XXV. To establish, organize and maintain throughout the Republic; arts and crafts institutions, museums, libraries, observatories and other institutions concerning the general culture of the Nation's inhabitants and to legislate on all matters concerning such institutions; to legislate on matters concerning ruins or vestiges, archaeological, artistic and historical monuments, whose conservation is of national interest …".

[27] Supra note 16.

[28] *Recopilación de Leyes de los Reynos de las Indias mandadas imprimir y publicar por la Majestad Católica del Rey Carlos II, Nuestro Señor, va dividida en Cuatro tomos con índice general*, Madrid, 1681.

General Constitution;[29] the considered heritage had never left the dominion of the national State, but was preserved with the same legal status as found in colonial times. The Supreme Court stated that under the Law of the Indies: "the temples, graves, houses and burial sites of the indigenous people were heritage of the Crown".[30] Thus, according to the Supreme Court, the Law of 1932, as initiated by the State of Oaxaca, encroached on the constitutional field of the federal authoritative powers, which was the qualified authority to legislate on this matter.[31]

The only contrary vote held that the antecedents referred to in the Spanish legislation, with regard to the disputed subject, were not acceptable as "... such legislative antecedents have nothing to do with the sovereignty of the States, nor with the powers of the federal government, since they refer to a system of political organization absolutely and radically different to the federal system...". It was also asserted that according to the General Constitution, the States did not assign the federal government with the right to exercise jurisdiction over this type of heritage. The particular vote sustained that the Law of the State of Oaxaca therefore did not invade the constitutional sphere of the federal government, nor was it initially void. Consequently this State should be acquitted from the demand imposed upon it by the federal government.

However, the Supreme Court advised that the State of Oaxaca, in its own local Constitution[32] provided that "goods which had originally not been heritage of the federal government constituted the heritage of the State".

[29] See article 27 of the General Constitution that states: "Ownership of lands and waters within the boundaries of national land territory is vested originally in the Nation, which has had and has, right to transmit title thereof to private persons, thereby constituting private property. No expropriations of private property shall be made but for public convenience and necessity, and subject to payment of indemnification. The National State shall at all time have the right to impose on private property such restrictions as the public interest may demand, as well as to regulate, for social benefit, the utilization of those natural resources which are susceptible to appropriation, in order to make an equitable distribution of public wealth, to conserve them, to achieve a balanced development of the country and to improve the living conditions of rural and urban population…the National State's control is inalienable and not subject to the statute of limitation and the exploitation, use or enjoyment of the resources in question by private persons or by companies incorporated in accordance with Mexican laws, may not be undertaken save by means of concessions granted by the President of the Republic and in accordance with the rules and conditions set forth by the Laws …".

[30] See *La Recopilación de Leyes de los Reynos de Indias* (*The Recopilation of the Laws of the Indies*), Tomo (Volume) III, Libro (Book) VIII, Título (Title) XII, Madrid, Cultura Hispánica, 1973, pp. 64-65.

[31] Supra note 16.

[32] See article 20 of the Constitution of the State of Oaxaca.

The resolution had a dramatic effect on Mexican Law and since then, the federal government has been competent to legislate on the issues regarding archaeological heritage. This criterion of the Supreme Court was adopted by the General Congress in the law of 1934,[33] providing that all archaeological immovable monuments and the goods located in them are dominion of the national State.

It suffices to analyze some examples[34] to show that, as of the resolution of the Supreme Court, the problem regarding the jurisdiction over archaeological heritage was finally resolved.

The Law of the State of Oaxaca of 1932 was replaced by the Law of 1942 over the protection of colonial, artistic and historic monuments of typical populations in which the submission to the federal government was more than apparent. This law applied to immovables pertaining to colonial architecture, located in the State of Oaxaca and whose protection and conservation presented a public interest based on their artistic or historic value and was applied to the monuments belonging to individuals as well as to the State, if in the latter case, their protection was not reserved and governed by federal laws.

For the protection of this heritage, the government of the State of Oaxaca was authorized to order their conservation or restoration, according to the procedure established by the law and for reasons of public benefit.[35]

On its part, the State of Yucatan in south-east Mexico, which also possesses a considerable pre-Columbian cultural heritage, classified historic monuments as all the immovables after the Conquest whose conservation would be of public benefit by virtue of its link with the history of the State

[33] See the *Ley sobre Protección y Conservación de Monumentos Arqueológicos e Históricos, Poblaciones Típicas y Lugares de Belleza Natural* (The Law on the Preservation and Protection of Archeological and Historical Monuments, Indigenous Peoples and Natural Wonders), was published in the *Diario Oficial de la Federación* (*The Official Newspaper of the Federal Government*) on 19 January 1934.

[34] See Chiapas State decree no. 135, 31 July 1972 and 25 September 1972, Periódico Oficial (Official Publication) 11 October 1972 L*ey de Protección de Monumentos y Sitios Arqueológicos de Chiapas* (Law of the Protection of Archaeological Sites and Monuments in Chiapas); Hidalgo State decree no. 29, 17 October 1949 and 19 October 1949, *Periódico Oficial* (*Official Publication*), 8 November 1949, *Ley de Desarrollo del Turismo y la Protección de Sitios de Belleza Natural y de Objetos de Interés Histórico y Artístico del Estado de Hidalgo* (Law of Tourist Developments and the Protection of Sites of Natural Beauty and Historic and Artistic Objects in Hidalgo State).

[35] See articles 2, 9 and 11 of the *Ley sobre Protección y Conservación de Monumentos y Bellezas Naturales* (The Law on the Protection and Conservation of Monuments and Natural Wonders) that was published in the *Diario Oficial de la Federación* (*The Official Newspaper of the Federal Government*) 31 January 1930 (herein after the law of 1930).

of Yucatan and for possessing an artistic and architectural value representative of the history and culture of the State of Yucatan itself. To benefit from the protection, both the private and public immovables should have been declared as such by the law. The regulation of the matter did not correspond with the General Congress. The indigenous nationalism of the post-revolution regimes, together with the centralization trend of Mexico between 1920 and 1935,[36] contributed to the fact that the cultural heritage was considered as being owned by the national State. This explains why the heritage pertaining to the colonial period and the later period had not been subject to the same attention as the archaeological heritage.

However, and as shown in the Mc Clain case[37] in the American Courts, the legislation derived from the resolution of the Supreme Court, was insufficiently precise regarding the ex lege ownership of the cultural heritage.

The pillaging suffered by Mexican cultural heritage in the 60s and which persisted until the execution of the Cooperation Treaty signed between the United States of America and Mexico concerning the restitution of cultural heritage induced Mexico to "federalize" the subject and to enact the federal Law of 1972 on archaeological, artistic and historic monuments and zones. It is as a consequence of this pillaging, along with the predictable effects of the Cooperation Treaty and the expansive scope of the law of 1970, that the Law of 1972 was enacted and is now currently in force.

Thus, in 1966, the General Constitution was amended and empowered the General Congress as the legislative body to establish, organize, and sustain, throughout the Mexican territory, the museums and other institutions linked to the general culture of the inhabitants of the nation and to legislate on everything related to these institutions, vestiges or fossils, archaeological, artistic and historic monuments, whose conservation is of national interest.

In the 1980s, Mexico entered a stage of profound transformation. At the present moment, along with other political events, there is an emergence of a new and authentic federalism. In cultural matters, the States have put forward important claims and it is in this context that the various legislative projects should be analyzed. The drafts are aimed at strengthening the authority of the States and forming the basis of a cultural collaboration between the federal government, the States, the Counties and the Government of the Federal District (Mexico City). Furthermore, the States will be encouraged to develop

[36] See Meyer, Lorenzo, *El primer tramo del camino, Historia general de México* (*The first step of the way, General History of Mexico*), Tomo (Volume) V, México, El Colegio de México, 1976, pp. 115-122.

[37] See United States vs. Mc Clain, 545F.2D 988.

or apply their legislation with a view to mitigating the centralized trend of the constitutional text in force.

B. *The Journey of the Nationalistic Model of Cultural Heritage*

An increasing nationalism combined with the unlimited practice of property law, chiefly explains the formulation of the notion of archaeological monuments as a basic concept of cultural heritage and its protection, as well as the parallel modifications on the concept of property law. The insurgence of a nationalistic model of cultural heritage was inherent to the reinforcement of the national State.

By the end of the XIXth century and the beginning of the XXth century the Mexican people didn't have access to the main archaeological sites, notably those located in South-East Mexico belonging to the Mayan culture like Uxmal and Chichen Itza to name just two. This was due to their being within the limits of "haciendas" which were large old Mexican farms in the private ownership realm. The climax of this event was the Thompson case. Thompson was acting as general consul for the United States in the Southern State of Yucatán and acquired possession of the Hacienda where the ceremonial centre of Chichen Itza is located. Thompson was the first to dredge the Sagrado Cenote, and most of the Mayan pieces found are now exhibited in the Peabody Museum at Harvard University.

a. The Law of 1897

The protection of national heritage emerges at the end of the XIXth century with a legal determination and a protection focused on archaeological monuments. The Decree of 1897 constitutes the first legislative text in which this sentiment was expressed. This would later become a genuine dogma with a touch of nationalism in the Mexican system of cultural heritage protection.

However, there was still ambiguity in the Code Civil that regulated the private heritage regime of archaeological movables; the difference between archaeological movable and immovable monuments as regulated by the Decree of 1897 was to be expressed in various ways through the following legislations.

i. Immovables

A new specificity in the notion of immovables was surreptitiously introduced into Mexican legislation. This decree detailed monuments belonging to the national State as; the ruins of cities, large houses, troglodyte housings, forts, palaces, temples, pyramids, stone sculptures or their inscriptions and, in general, all constructions that for any reason had relevance to the study of the history of the inhabitants of ancient Mexican civilizations.[38]

The first annotation to the notion regarding immovable monuments was tantamount, as is the legal regime to which they were subject. The great innovation was the deeming of all archaeological monuments in the Mexican territory as being national heritage and a decree that nobody could exploit, displace or restore them without the express acquiescence of the federal government.[39]

This criterion was corroborated by the Law of 1902 in which archaeological heritage was placed in the public dominion and, to this effect, the national State destines archaeological monuments and historical remains for such uses, and subjects archaeological immovables to the authority, regime and effects of the notion of res extra commercium.

ii. Movables

In the case of archaeological movables, these included Mexican "antiques": codices, idols, amulets and whichever other good the federal government considered relevant to the study of the civilization and history of the aboriginal, indigenous peoples and ancient inhabitants of the American continent, Mexico in particular.[40]

The archaeological movables could be goods of private ownership and in accordance with XIXth century Mexican legislation, the only limitation was a prohibition of exportation. This is apparent in the precedent of the request by the French archaeologist Auguste Le Plongeon in the middle of the XIXth century. Auguste Le Plongeon requested authorization from the Mexican Government to export pre-Columbian goods for an exhibition in the American city of New Orleans which would consist of many pieces taken from the archaeological zone of Chichen Itza. He was denied the

38 See article 2 from the Decree of 1897.
39 See article 1 from the Decree of 1897.
40 See article 6 from the Decree of 1897.

authorization by the Mexican Government, on the mere suspicion that he might have had the intention to sell them.[41]

iii. The Trafficking of Cultural Heritage

A contravention of this prohibition of exportation carried a sanction of a meta-contractual nature consisting of a fine or, in some cases, criminal liability. Nevertheless, in Mexico, the internal trafficking of archaeological movables was perfectly legal. These movables were pertained to be on the market and were deduced as private heritage.

The federal government was obliged, by law, to deposit all the acquired Mexican "antiques" into the National Museum in Mexico City. This imposition carried the implicit understanding that archaeological movables were, as declared by the Supreme Court, "subject to appropriation by individuals separate from the national State".[42]

b. The Law of 1930

The law of 1930 abandoned the case-by-case method, instead imposing a criterion of artistic, archaeological and historic value which would differentiate the protection of movables and immovables.[43] Despite the relinquishment of a case-by-case criterion, the legal text specifically highlighted the codices, incunabulum (books printed prior to 1501), rare books or those of exceptional value, drawings, engravings, plans and geographic maps, medals and all architectural structures or constructions corresponding to the aforementioned values and therefore of public interest.

The Law of 1930 introduced a different perspective on the protection of cultural heritage. The core element of national heritage was no longer confined to archaeological monuments and movables whose protection, conservation and maintenance was of public interest, but monuments with historic and artistic value were also integrated into the law.

[41] See Litvak Jaime y Sandra L. López Varela, *El patrimonio arqueológico, Concepto y usos* (Archeaological Heritage, Concepts and uses), In the collective work Patrimonio Cultural Mexicano (Mexican National Heritage), Enrique Flores Cano (coord.), Consejo Nacional para la Cultura y las Artes (National Agency of Culture and Arts), Fondo de Cultura Económica, México 1997, p. 191.

[42] See the *Semanario Judicial de la Federación*, Quinta época, Primera Sala, Tomo LXXIX (Weekly Judicial of the federal government, Fifth Edition, First Bench,Volume LXXIX), p. 548.

[43] See article 1 of the law of 1930.

The new legislation was better still: only immovables or movables of an archaeological nature whose protection and conservation were in the public interest due to their artistic, archaeological and historic value were the rationae materiae of the 1930 law; other cultural heritage was subjected to the general system of the Code Civil.

The Law of 1930 provided a specific contractual sanction, an absolute voidance, as well as a system of damage and loss in case the purchaser was found guilty of fraud or bad faith. The feasibility of the federal government claiming tenure of archaeological monuments at all times when found in possession of a third party, whomever the possessor may be, reinforced the State heritage rights.

It is evident that there is symmetry between the legal consequences of the legitimate situation in movables and immovables. Immovables and movables which satisfied the aforementioned conditions were considered national heritage if, at the time of the 1930 law's enactment, they were in the holdings of the federal government, or if they were declared to be of that nature.

The public collections of the museums were considered ipso jure, as monuments whose protection and conservation were of public interest due to their artistic, archaeological or historic value. These movables alone would be subjected to the authority, regime and effects of the res extra commercium notion and were destined for common use. They were therefore considered inalienable and nobody could acquire the right of ownership per statute of limitations nor any other actual right over such monuments.

Moreover, they would not be liable for seizure and the mortgage or pledges that may have been held over them would be considered void alongside all direct or subsidiary consignment that could be made as a security of economic liability.[44]

Additionally, the archaeological heritage was destined for common use. The monuments classed as movables or immovables in private ownership, could be freely alienated. However, the State had a right of pre-emption over them and, therefore, the prerogative to acquire an archaeological monument at the same price as any other buyer and through a purchase agreement submitted to the same form, terms and conditions.

The difference between the legal systems of movables and immovables disappeared and both became subject to the same heritage regime founded on the principle of State heritage which holds the traits of inalienability, a non liability for seizure and not being subject to a statute of limitations or liens.

[44] See Article 8 of the law of 1930.

The notion of a federal governmental declaration mechanism was introduced and has been one of the pivotal elements in the conceptual determination of the archaeological monument as both movable and immovable. The composite nature of the cultural heritage was determined by a federal governmental resolution which consisted of a cultural sovereign act; but it also had the purpose of obeying the due process constitutional mandate. The Constitution decrees that nobody can be deprived of life, freedom or heritage, possessions or rights, but may undergo a trial before established courts which comply with the essential formalities of the proceedings in accordance with previously enacted laws (Due process constitutional mandate).[45]

The federal governmental declaration had the effect of submitting a movable to a specific heritage regime as long that there existed a clear change in the heritage of an individual.

As time slowly elapsed, the legal evolution of the archaeological monument regime and the purpose and effects of the federal governmental declaration also varied.

There existed, of course, a juris et de juris presumption which considered the following as pertaining to cultural heritage; movables and immovables, public collections belonging to museums or State galleries, and even heritage which was under government care.

Initially, this federal governmental resolution resulted in enabling the practice of pre-emption rights, but it also meant a substantial reduction in the heritage rights of owners, since the resolution itself was recorded in an ad hoc Public Register and this prevention of an acquiring third party implied a real decrease in the value of the heritage.

The great innovation of the Law of 1930 was the creation of a presumption of immovable heritage and in the transitory articles[46] of the Law of 1930, all persons and entities who claimed ownership rights over a movable or immovable monument prior to the Conquest were obliged to present their deeds before the ad hoc Public Register. A failure to do so would result in a "presumption of the heritage in favor of the national State, who then assumed control of the monuments... if not already held under another title".[47] Henceforth, the law considered the federal government as a good faith possessor.

The prohibition of exportation applied to both movables and immovables by purpose or destination.[48] Excavations were severely limited: nobody was permitted to prospect or carry out excavations with the intention of

[45] See infra 58.

[46] See transitory article 2 of the law of 1930.

[47] See transitory Article 3 of the law of 1930.

[48] See article 19 of the law of 1930.

discovering goods or constructions of artistic, archaeological or historic interest without express acquiescence from the federal government.

The allocation of the ownership of treasures which have been discovered by chance, was subject to the Code Civil, however, the Law of 1930 granted the federal government the authority to "acquire the discovered goods at a fair price at an appropriately deemed time".

In spite of this, the Law of 1930, along with the Law of 1902, explicitly recognized the private possession of archaeological monuments, whether they were movables or immovables. In the case of immovables, the laws provided that the owners and the federal government would agree, amid themselves, the conditions regarding free access. This constitutes conclusive evidence of the existence of a private heritage regime.

The decision to extend this presumption is therefore fundamental. The legal presumption is defined in Mexican law as consequences derived by the law from a known fact to an unknown fact; it is stated in the presumption that there is not "a release of evidence but simply a displacement of the burden of proof".[49]

In Mexican law, the legal presumptions do not always carry the same force; some, e.g. the simple presumptions, may be challenged with contrasting evidence; with the effect of reversing the burden of proof. Other presumptions e.g. juris et de jure, are considered undisputable, possessing not only elements of conviction, but also the inability to be challenged with any contrasting evidence.

In the issue in question, the presumptions of ownership relate to a simple presumption whose contrasting evidence is limited: only the presentation of the deed, whose onus probandi corresponds to the individual, may remove this presumption of ownership. However, the effects are manifold; in general, an assertion by the national State of its control over archaeological monuments encouraged individuals to present their deed. This allowed the federal government to review the legitimate deed which the individuals held for the archaeological monuments and they could therefore facilitate a stronger defense against a case of dispute. Similarly, it favored the registration of archaeological monuments in the provided catalogue, which fundamentally served as a form of control.

The formulation of immovable heritage presumptions in the Mexican legal system on cultural heritage generated a new property regime specific to archaeological monuments. As a result, archaeological immovable monu-

[49] See Carbonnier, Jean, *Droit civil, Introduction* (*Civil Law, Introduction*), Eighteenth Edition, Paris, France PUF, 1990, p. 311.

ments would be submitted to rules and legal consequences different from those relating to immovables.

This metamorphosis is profound indeed: without the need to apply an explicit expropriation, the national State notably increased its cultural heritage and, at least in appearance, simultaneously conciliated its actions with respect to private ownership.

c. The Law of 1934

The Law of 1930, with a scope of validity limited to Mexico City, and some serious elements of uncertainty, was soon replaced by the Law of 1934[50] that had a federal scope[51] and included archaeological monuments, exports of archaeological and historic monuments, historic monuments of national heritage, and sites of natural beauty owned by the national State or under federal jurisdiction. Through this preventive legislative measure, the General Congress tried to highlight its foremost legislative right to rule over cultural heritage and to banish the State's argument of vindicating any right to do so.

This new law intended to mitigate the ambiguities of its predecessor and defined monuments as any movable or immovable of an archaeological origin, or whose protection and conservation derives from its historic value to the public interest. Archaeological immovable monuments were classified as ruins dating from indigenous civilizations prior to the Spanish Conquest.

The Law of 1934 made a return to differentiating between archaeological movables and archaeological immovables and submitted them both under different legal regimes. Archaeological immovables were considered as national heritage and therefore, by reasoning, so were the movables contained in the archaeological immovable monuments, that by a legal fiction were considered as immovable.

This property regime became dogmatic and implied an expropriation, in practice. Within this regime the national State was given the power to set up its cultural heritage, with a core element that consisted and still consists of archaeological immovable monuments.

[50] See article 12 of the *Ley sobre Protección y Conservación de Monumentos Arqueológicos e Históricos, Poblaciones Típicas y Lugares de Belleza Natural* (*The Law on the Preservation and Protection of Archeological and Historical Monuments, Indigenous Peoples and Natural Wonders*), herein after the law of 1934.

[51] See *Semanario judicial de la Federación* (Weekly Judicial of the federal government), Quinta época, Segunda sala (Fifth Edition. Second Bench), Tomo (Volume) LXXVII, p. 2914.

Seemingly, the chronological criterion purveyed a specific limit ondates but it was technically controversial and insufficient seeing as the Conquest did not occur simultaneously across all of Mexico's current territory.[52]

The ad hoc Public Register, implemented on the subject, had effects that were beyond simple cataloguing or publicizing; the registration had creative and evidentiary effects on property law.

In the absence of a registration of the right of ownership by private parties over both movable and immovable archaeological monuments the introduction of the corresponding Register transformed the presumption of juris tantum ownership into a juris et de jure presumption, by the law and with regards to the law.[53] The intention was overtly obvious: by submitting the archaeological immovable monument to a new heritage regime, the Mexican Government, in practice, was quietly making an expropriation.

It was presumed that archaeological cultural heritage not logged in the ad hoc Public Register was encompassed in immovable archaeological monuments and was therefore under national control.

In the Mexican legal system, national control of immovable archaeological heritage is a notion that has been fully attained.

The Law of 1934 also introduced a substantial change to the general system of the agreement that governs rights in rem. The definition of rights in rem in the civil law countries is well known as being a right that acts directly on goods (jus in rem) and purveys to its holder all or part of the economic exploitation of the said goods.[54]

A difference between rights in rem in an almost universally accepted classification in codified systems, abides by two approaches; some jus in rem are administered on the materiality of goods; while other jus in rems apply to their economic value.

Ownership is the essence of a jus in rem. The acquisition of the ownership takes place in two ways: through free will or by virtue of the law and it is through the second form of acquisition that the mechanism of accession is developed.

When determining that constructions do indeed belong to a landowner, the juris tantum presumptions are introduced in the matter of immovables; however, there is a possibility of dissociation: the constructions may belong to other persons, and not necessarily to the owner of the land where the constructions are located.

[52] See Olive Negrete, Julio Cesar, *op. cit.*, p. 41.

[53] See Olive Negrete, Julio Cesar, *op. cit.*, p. 312.

[54] See Carbonnier, Jean, *Civil Law. Les Biens* (Ius in rem), Eighteenth Edition, Paris, France, PUF, 1990, p. 66.

The rules established by the law in this area permit a stating of the mechanisms for resolving disputes between the owner of the land and the owner of the constructions.

The Mexican Law of 1934 equally dissociated the heritage law on archaeological immovable monuments: it bestowed the federal government with the rights to the surface of archaeological immovable monuments and bequeathed the ownership of the soil to individuals. It produced a mechanism for solving exceptional disputes between the federal government and the landowner which differed entirely from that stated by the property rights regime.

This dissociation of immovable heritage, federal government surface rights, and the inalienable archaeological immovable monuments without statute of limitation, breached the landowner's ownership rights and made the acquisition of their ownership impossible under free market conditions.

The expropriation of the soil was the principal option considered as a resolution for this dispute or possibly the sale to the federal government under precarious conditions. Additionally, it favored the owner of the construction by exerting the basic civil principle of accession which defines it as the effect of an attractive force gravitating around the notion of the soil. The constructions were considered as the principal, and the soil as an accessory. This implied that soil hosting an archaeological monument should be subjected to the same providence as reserved for the latter.

Preventative measures were taken against the presumption of archaeological immovable heritage and by this reckoning, the presumption of national heritage of archaeological movables or immovables not recorded in the ad hoc Public Register.

The prohibition of exporting archaeological movable monuments had an element of flexibility. Exportation was authorized in instances when the federal government considered that retaining these movables in national territory was not essential, and henceforth temporary exhibitions were permitted.

Finally, because of public benefit, the national State held back its power of expropriation on historic or archaeological monuments, the lands under which such monuments or movables were found, the surrounding lands and lands necessary for prospecting works.

Archaeological excavations carried out in Mexican territory were at the heart of a dispute and the concern was justified. No exact inventory had ever been made of the archaeological sites and the treasures contained in such sites were therefore unknown. The inadequate use of archaeological heritage could restrict the acquisition of universal knowledge of pre-Columbian cultures and a lack of national territory control, together with a difficulty in accessing archaeological sites which are generally located in the

tropical jungle, notably aggravated this situation; all this entirely justifies the national State's natural distrust regarding archaeological excavations.

Excavations were prohibited, but the Law of 1934 introduced a get-out clause: the federal government could grant a concession for work involving the discovery of archaeological monuments as well as for the exploration of previously discovered monuments; if two goods of similar importance were found, the federal government could give one of these away, on the grounds that it wasn't useful to museums, national institutions or to a State.

Historic monuments were movables or immovables dating from the post-Conquest era. Their conservation was in the public interest because they were linked to the political and social history of Mexico, or because their artistic and architectural value defined them as witnesses to cultural history.

The federal governmental declaration mechanism continued to be relevant but was now limited to the historic heritage and, as a result of this declaration, the federal government could enjoy a right of pre-emption over such heritage, a feature that in the event of a sale would seriously limit the exercising of the right of ownership by its bearer. The annotation was evident: archaeological monuments were submitted to the res extra commercium heritage regime and required no declaration.

Any reconstructive, restorative and repair work or research of historic monuments, along with any new construction linked to and supported by them, should have express approval from the federal government.

Finally, the federal government could declare as being of public interest; the protection and conservation of physical and unique aspects of the populations or certain areas of notable and particular natural beauty.[55]

In the last quarter of the XXth century, and for the first time in Mexico, the concept of national cultural heritage was developed and encompassed anything holding cultural significance, be it in an artistic, historic, traditional, scientific or technical field.

During the 1960s, Mexico underwent a period of radical nationalism and the publication of a certain article had explosive effects. It was written by Clemency Coggins, a famous American art historian, who denounced the systematic destruction of archaeological sites and monuments in southeast Mexico and Central America.[56]

The publication of the above mentioned article generated an international movement composed of, among others, archaeologists and ethnog-

[55] See article 21 of the law of 1934.

[56] See Sanchez Cordero Dávila, Jorge, *Les Biens Culturels Précolombiens, Leur Protection Juridique*, (The Pre-Colombian Cultural Heritage, Its Legal Protection), Librairie Générale de Droit et de Jurisprudence, Paris, France, p. 172.

raphers, and Americans in particular, demanding measures to prevent the clandestine archaeology; it condemned the approach of the museums, collectors and art dealers of the developing countries who promoted this destruction and suggested introducing export regulations to restrict the exportation of cultural heritage, as well as an export permit which would be granted by the heritage's origin State.[57]

The collector's rights were under sensitive social scrutiny; the prevailing ideology stigmatized them as destroyers and mutilators of archaeological sites and monuments and accused them of having "malicious intent", supplying foreign collectors with the pieces they required; it was taken to such extremes that the collector was declared as "the catalyst in the destruction of archaeological heritage".[58]

d. The Law of 1970[59]

The international pressure pushed Mexico into replacing the Law of 1934 with the Law of 1970 which introduced a basic concept: goods holding a cultural value would be determined as cultural heritage, whether they were in federal governmental possession or private ownership; this cultural heritage would retain its rights over goods with no more limitations than those established by law.

The determination of considering the ownership of national cultural heritage drastically limited private ownership and these limitations depended on the nature of the heritage. Some could serve as a security or be subject to a transfer of ownership by obtaining prior written acquiescence from the federal government; they had to be recorded as national cultural heritage in the ad hoc Catalogue and Public Register.

The federal government had the right of pre-emption in cases of transference of ownership of heritage, which could not be removed or disbanded without prior acquiescence from the federal government.

The cultural heritage in private ownership could be subject to expropriation, occupation and full or partial seizure.

[57] See Merryman, John Henry, *Thinking about the Elgin Marbles*, *Critical Essays on Cultural Property, Art and Law*, The Hague, Kluwer Ltd, p. 179.

[58] See Matos Moctezuma, Eduardo. "Las normas jurídicas y la investigación en México (Legal rules and the research in Mexico)", *Arqueología y derecho en México* (*Archaeology and Law in Mexico*), Mexico, UNAM, 1980, p. 126.

[59] La "Ley Federal del Patrimonio Cultural de la Nación (The Federal Law on National Cultural Heritage)" was published in the *Diario Oficial de la Federación* (*The Official Newspaper of the Federal Government*) on 16 December 1970 (Herein after as the Law of 1970).

Notwithstanding the expansive nature of the Law of 1970 which authorized the expropriation and the temporary acquisition of privately owned cultural heritage, it nevertheless implicitly recognized the existence of this ownership, as indicated in the ad hoc Public Register namely "Catalogue of goods determined as national cultural heritage".

The Law of 1970 lists the monuments that form part of the national cultural heritage by provision of the law and by virtue of their cultural value. Among others, it refers to archaeological, historic and artistic movables and immovables, manuscripts, incunabulum, editions, books, documents, periodic publications, maps, drawings, brochures and important or rare engravings, along with the collections; the ethnological, anthropological and paleontological pieces, the type-specimens of flora and fauna, the museums and typical and picturesque places, as well as sites of natural beauty.

According to Mexican legal tradition, the metamorphosis of a good into cultural heritage was done through a federal governmental declaration or by provision of the law.

The Law of 1970 supported the same definition of archaeological monuments and included all the movables and immovables pertaining to the cultures in existence before the establishment of the Hispanic culture in Mexico.[60] These archaeological monuments and the movables were declared as national heritage and attributed to national heritage by provision of the law. They were liable to the effects of public control such as inalienability, a non liability for seizure and not being subject to a statute of limitations or to any lien.

Regardless of the expansive trend, this law permitted an arrangement between the government and the permit holder, or the economic sponsor of the archaeology works, to keep one or several archaeological pieces where they were found, as long as there were several pieces and they were not rare or held exceptional cultural value. The differentiation in the law on the regimes of archaeological movables and immovables was very clear.

However the intention of the law was not to recognize the artistic value of privately owned heritage merely its possession.

The presumption of ownership in favor of the national State was maintained and extended to archaeological movable goods that were not recorded in the ad hoc Public Register, along with those not under any request to be recorded, and goods whose possessor was considered to be of bad faith.

The other element to be considered was once again the federal governmental declaration mechanism. The archaeological movables recorded in this Register, which consisted of those that were unique, rare or exceptionally

[60] See article 50 of the Law of 1970.

valuable pieces due to their aesthetic quality or other characteristic and those that were in private possession, would be subject to temporary acquisition and then expropriation. The other registered archaeological movables would remain on the market and could even eventually be considered for exportation.

The federal governmental declaration also contributed to a cultural hegemony. It was the bureaucratic officials who had the power in the determination of cultural heritage. The cultural merit of goods being held in private collections was purely and simply ignored; the nature of the declaration was therefore one of a unique sovereign cultural act, attributed exclusively to the national State; it was this and only this that could regulate the retrieval of cultural heritage.

Another important effect of the federal governmental declaration was the assuaging of the constitutional due process mandate. As previously stated, the declarations had to be consistent with the constitutional text[61] since this declaration carried modifying effects in the private heritage regime.

Needless to say, it does not take a stretch of the imagination to realize that the Law of 1970 overwhelmingly favored the black market in archaeological movable monuments.

The legal ambiguity continued: on the one hand, and by virtue of the due process constitutional mandate, retroactive effects of the law being prohibited, it was compulsory to recognize the private ownership of archaeological movables, but on the other hand, the need to reaffirm national State owned archaeological movables or immovables as genuine links to the preservation of Mexican cultural heritage prevailed.

Historic monuments included all movables and immovables created since the Hispanic culture was established in Mexico in relation to the so-

[61] See Articles 14 and 16 of the General Constitution which state that: "… Article 14. No law shall be enforced ex post facto in the detriment of any person. No person may be deprived of life, liberty, property, possessions or rights, unless the matter involved has been tried before previously established courts, in accordance with laws enacted before the facts and subject to due process of law. In criminal trials, it is forbidden to impose, by mere analogy or reasonable belief, any penalty which is not expressly set forth in a law applicable in every respect to the crime in question. In civil trials, final judgment must be rendered in accordance with the letter of the law, or with legal interpretation and in the absence thereof, in accordance with general principles of law. Article 16. No one may be disturbed in his person, family, home, papers or possessions, except by written order of a competent authority, duly grounded in law and fact which sets forth the legal cause of the proceeding. No arrest warrant may be issued except by the judicial authority upon previous accusation or complaint for the commission or omission of an act which is described as a crime by the law, punishable by imprisonment, and unless there is evidence to prove that a crime has been committed and that there are sufficient elements to believe that the suspects in criminally liable ...".

cial, political, economic, cultural and religious history of the country; artistic monuments were defined as paintings, engravings, drawings, sculptures, architectural works and other goods possessing a permanent artistic value.

Astonishingly, the Law of 1970 decreed that foreign cultural goods illicitly imported into Mexican territory were not to be sold, and had to be returned to their country of origin at the request of the interested government and by means of a resolution by a competent federal authority. These regulations of internal law were clear symptoms of enforcement in national law of the international commitments contracted by the Mexican government in the UNESCO Convention of 1970.

The Law of 1970 preserved the system which was introduced by the Law of 1930 and imposed contractual sanctions on the purchase and sale of goods belonging to the national cultural heritage with full voidance rights.[62]

The damage to public cultural heritage caused by public control of cultural heritage, along with the unlimited expansion of the res extra commercium principle, which was a true reflection of radical nationalism and was unsustainable, made it impossible to comply with the law and seriously threatened artistic creativity.

e. The Law of 1972

i. Introduction

The Law of 1970 was rapidly substituted by the Law of 1972, which is currently in effect, and in order to make its application feasible, the rationae materiae of this new law was limited and solely ruled over movable and immovable tangible cultural heritage.

The expansive notion of cultural heritage contained in the law of 1970 was eliminated but the basic concept of archaeological, artistic and historic monuments was preserved as a line of defense in Mexican cultural heritage.

The Law of 1972 honored the tradition in the Mexican legal system and further developed the specificity of the notions of archeological, historic and artistic monuments, both movable and immovable and consolidated a special regime, parallel to the general regime governed by the Code Civils. As a correlative notion of this specificity, the Law of 1972 created the ex lege tangible cultural heritage, that is to say: archeological monuments both movable and immovable, historic monuments as mentioned in the law, but not privately owned, and artistic monuments. The Law of 1972 employed

[62] See article 45 of the law of 1970.

the federal governmental declaration mechanism as the tool to ensure the specificity of the notion of monuments, attributing different legal effects depending on the nature of the monuments. The ex lege tangible cultural heritage was subject to the res extra commercium principle in varying degrees. The Law of 1972 provided a Registration system, whose unique purpose was the logging of facts. Sensitive to the context of the preservation and protection of tangible cultural heritage, the Law of 1972 introduced the notion of cultural zones.

The public dominion and the principle of res extra commercium were also seriously limited, but they remain determining factors in the protection of archaeological movables and immovable monuments declared as national heritage, and therefore continue to be inalienable, not liable for seizure and not subject to a statute of limitations or exposable to any lien.

The rationale of the protection of cultural heritage is a Eurocentric notion, but the protection of archaeological heritage has been used as the cohesive element of nationality, since the outset of Mexican independence. The Mexican State wanted, as all national States do, the Mexican society to see itself and to be seen in an illustrious light and the pre Colombian world provided an effective realm.

ii. The specificity of the Monuments notion

The notion of "monuments" was fundamental in the production of the legal protection of Mexican cultural heritage but its progress suffers from serious legal ambiguities, mainly in regards to the legitimacy of the goods and their trafficking.

According to our legal tradition on the subject, archaeological movable and immovable monuments pertain to cultures in existence before the establishment of the Hispanic culture in Mexico, including human remains and flora and fauna vestiges relating to those cultures.

Along with those historic monuments subject to federal governmental declaration, the ex lege criteria for historic monuments movable and immovable, are those relating to the history of the Mexican nation since the establishment of the Hispanic culture in Mexico, such as cult constructions from the XVI to the XIX century and their surroundings like presbyters, convents and other immovables destined for educational and religious activities. Movables like private works located in these immovables such as images, paintings, sculptures and also manuscripts pertaining to Mexican history such as books, brochures and other printed material from the XVI to

the XIX century and any other collections and techniques associated with these works are all considered historic monuments. Needless to say this notion has expansive effects.

In terms of respective federal governmental declarations or by determination of the law, artistic monuments are works of outstanding aesthetic value.[63]

The criteria to distinguish immovable from movable in the notion of monuments is not provided by the Law of 1972, but can be found in the Federal Civil Code. One of the defining elements in distinguishing between movables and immovables is mobility, which, in the recent past has proved to be insufficient and therefore the element of utility has also been introduced as a distinctive note. Hence movables or immovables would be considered as such depending on the correlation between their mobility and utility.

The insufficiency of the mobility element in tangible cultural heritage is attestable, as can be seen in the Fresques de Casenove case in France, the Monument of Suvorov in Saint-Gotthard, Switzerland, the Temples of Philae or Abu Simbel in Egypt and the Fresques of Teotihuacán.[64]

Particularities of Tangible Immovable Cultural Heritage

The Federal Code Civil, following the French Code Civil, introduces the general rule where all goods are considered as movables, unless otherwise deemed as immovables following casuistic criteria.

Over time, the law disassociated the lands from the constructions and considered the latter as archaeological monuments, coupled with movables and immovables of an archaeological origin and movables, whose protection and conservation was in the public interest owing to their historic value. Following this criteria archeological constructions are considered as State owned due to the classification of their importance for Mexican cultural heritage, whereas the soil can be deemed as privately or State owned.

A form of conciliation was proposed in which private heritage granted the national State the authority to expropriate, for the cause of public benefit, land under which immovables monuments were located or the surrounding lands and also lands necessary for prospecting works.

63 See articles 27, 33 and 35 from the Law of 1972.

64 See Sanchez Cordero Dávila, Jorge, *Les Biens Culturels Précolombiens. Leur Protection Juridique* (The Pre-Colombian Cultural Heritage. Its Legal Protection), Librairie Générale de Droit et de Jurisprudence, Paris, France. p. 111.

This progression towards a public control of archaeological immovable heritage meant a continued expansion of the res extra commercium principle, one of the sides of the public order prism, where the main effect was to classify them as unattainable for private ownership.

Particularities of Tangible Movable Cultural Heritage

The legal system of movables was even more controversial. In principle, the specific legislation on the matter acknowledged that archaeological movables could be limited to private ownership but it prohibited exportation and added a meta-contractual sanction. In this manner, the Supreme Court resolved the issue in the Thompson case[65] when it declared that Mexican "antiques" could be privately owned, but their use and holding was confined to national territory.

This criterion was maintained for a large part of the XXth century, when the logging of those goods in the ad hoc Public Register was required and the effect of this registration was specified in the same law; therefore the Supreme Court was able to maintain: "**...** so, if the law recognizes the possibility that persons may be owners and may acquire goods of an archaeological origin with the only limitations being those established by the law itself, it is clear that the law is in favor of the persons appropriating historical relics, and cannot be upheld over those already existing and, according to the Law of 1897, the rights of national ownership on all archaeological monuments, are only restricted regarding their exportation, this restriction specifically indicates that the possession and holding of those goods, by persons within the national territory, have been allowed by the public authority (Italics are the author's own)".[66]

iii. The notion of Cultural Zones

The Law of 1972, now in force, also introduced a new concept; one of zones containing monuments of different variants subject to federal jurisdiction. Archaeological monument zones are defined as an area where several archaeological immovable monuments are located, or where their existence is surmised; artistic monument zones are sectors integrating several artistic monuments in association with: open spaces, topographic elements

[65] See *Semanario Judicial de la Federación* (Weekly Judicial of the Federal government), *Quinta época*, Primera Sala, Fifth Edition. First Bench, Tomo (Volume) LXXIX, p. 458.

[66] Supra note 64.

and each other, and as a collection, has outstanding aesthetic value. Ultimately, historic monument zones are areas that hold several historic monuments related to a national event or affiliated with facts from the past which are relevant to the country.[67]

iv. The Federal Governmental declaration mechanism

As provided by the Law of 1972, archeological, artistic and historic zones and monuments are those considered ex lege cultural heritage of the Mexican national State or by a declaration of the federal government.

The Executive Branch can issue the mentioned declaration concerning historic or artistic monuments on its own initiative or by private or communitarian request. It should be mentioned that the declaration issued by the federal government is subject to a very slow bureaucratic procedure.

A clear distinction should be made between archeological, historic and artistic monuments and zones regarding the declarations system.

A. Archeological monuments, both movable and immovable and zones are considered to be under national ownership and this situation can not be challenged in court. There is no need for a declaration issued by the federal government where monuments are concerned; however archeological zones need federal declaration and its extension can be challenged in court.

That is to say, once an archeological monument is found, it will immediately be considered as being under national ownership and can only be remedied through compensation. This would have, in practice, the effect of an expropriation.

B. Only historic monuments and zones, as defined by the Law of 1972, and not privately owned, are considered to be under national ownership. All other historic monuments need a declaration issued by the federal government and can be challenged in court. This has been a common occurrence in many controversial court cases. It is to be pointed out that the owner does not lose the property but is, however, subject to serious ownership limitations. Where historic monuments are concerned, the declaration issued by the federal government does not have the effect of an expropriation.

C. For monuments and zones to be considered as artistic, a declaration must be issued by the federal government and this can be challenged in court. Where artistic monuments are concerned, the declaration issued by the federal government does not have the effect of an expropriation; in

[67] See articles 38, 39, 40 and 41 from the Law of 1972.

theory, the federal government is obliged to foster acquisition of artistic movable monuments.

The Mexican legal system established an administrative Institute, run by the federal government, which is responsible for all types of appraisals and evaluations regarding compensatory matters. It should be mentioned that due to the different free trade treaties signed by Mexico, expropriation has been practically eradicated from Mexican governmental practice.

In the recent past, the Mexican Supreme Court has stated that the federal government has contravened the Mexican Constitution by issuing a declaration provided by the Law of 1972. The main reason cited by the Court when overruling the declaration, was that the federal government did not observe the due process constitutional mandate by refusing to concede the opportunity to challenge it in the court. Moreover, the Supreme Court ruled that the Law of 1972 is, in this respect, in conflict with the General Constitution, because it only allows individuals to challenge the logging of monuments in the register, and not the ability to refute its classification as a monument.[68]

v. The aftermath of the res extra commercium notion

The distinction should be made between artistic and historic monuments and zones; as archeological heritage can only be State owned. They have serious ownerships limitations: Owners cannot start maintenance works without having the National Institute's of Anthropology and History (INAH's)[69] or the National Institute's of Fine Arts (INBA's)[70] approval, but are entitled to technical and financial support, although the former is subject to bureaucratic times, and the latter is non existent.

Neighbors of artistic and historic monuments also have ownership limitations. They have to request INAH's or INBA's authorization to carry out any maintenance, demolition, construction or excavation work needed for the protection of historic and artistic monuments.

[68] See *Semanario Judicial de la Federación* (Weekly Judicial of the Federal government), Novena Época, Primera Sala, Ninth Edition, First Bench, Tomo (Volume) XI, March 2000, p. 96; Tesis P. XXIX/2000. Amparo en revisión número (number) 608/2006 from 12 May 2006; Amparo en revisión número (number) 3153/78 from 22 May 1989; 608/2006; Amparo en revisión número (number) 1094/98 from 15 February 1994; Amparo en revisión número (number) 1078/2007 from 23 of January 2008.

[69] The INAH was created in December, 1938.

[70] The INBA was created in January, 1947.

Public dominion and the principle of res extra commercium continue to be principle notions in the protection of archaeological movable or immovable monuments that are declared as national heritage. Public dominion is a notion acquired once and for all in the Mexican legal system, like the principle of res extra commercium in which both archaeological movable and immovable monuments are inalienable, not liable for seizure, not subject to a statute of limitations and cannot be exposed to any lien.

In general terms, the Federal Code Civil and State's Codes Civils protect the bona fide purchaser, as well as the a non domino acquirer. In terms of the Codes Civils, it is the owner who carries the burden of proof. Of course compensation is given to a good faith purchaser in day to day trading. Needless to say, purchases made in a public auction are considered to be in good faith. It is worth mentioning that all dealers of artistic and historic monuments should be registered with INAH or INBA.

In general, it is permitted to trade cultural property within the borders of Mexico without having to acquire special permission, but again we must differentiate between artistic, historic and archaeological cultural objects.

A. Artistic cultural monuments, that is to say those subject to a declaration issued by the federal government, can be traded, but special permission is required for their temporary or permanent exportation and oversees trading and even then, if obtained, would only be granted with severe conditions. However, the Law of 1972 does not consider just any cultural object as being artistic; only a few which have been subject to a declaration issued by the federal government such as painters like Frida Khalo, Diego Rivera, David Alfaro Siqueiros, Saturnino Hernán and Orozco.

To encourage artistic creativity, the law explicitly states that works of living artists cannot be declared as monuments and cannot be subject to the Law of 1972.

B. Only privately owned historic cultural objects declared as such by the Law of 1972 or subject to a declaration issued by a federal government can be traded freely in Mexico; however special permission is required for permanent or temporary exportation for all historic monuments, again the likelihood of obtaining the permission is minimum and subject to severe conditions. In some cases, even privately owned objects, not mentioned by the Law of 1972 or subject to declaration, are unable to be exported.

C. Archaeological cultural objects, as ruled by the Law of 1972, are owned by the Mexican Nation and their trading and exportation is strictly forbidden; except for temporary exhibitions or to scientific institutes and only then with explicit permission from the federal Executive Branch and the fulfillment of certain agreements.

The problem arises with those archaeological cultural objects in ownership before the Law of 1972 came into effect, where the owner has the burden of proof. The trading of these types of archaeological cultural objects is not mentioned in the Law of 1972, but it can be assumed that they can only be traded within the borders of Mexico. It goes without saying that trading only occurs privately or on the black market.

Inalienability was added as a permanent feature to the concept determining archaeological monuments as heritage under public dominion. This was to prevent their illegal marketing, and purported a contractual sanction granting full voidance rights or public order in the case of someone acquiring the good.

vi. Register System

The Mexican legal system acknowledges three different Registers concerning cultural heritage:

A. The Public Federal Register ruled by the General Law of National Heritage (LBN), where all manner of federal assets are registered, including cultural heritage. Only federal agencies may request logging in this Register.

B. The Public Register of archeological and historical monuments and zones, ruled by the Law of 1972 and administered by INAH; governmental agencies, INAH officials (such as archeologists) and private individuals can request logging. As soon as a movable or immovable is discovered, it should be logged in this register. Under Mexican law, this Register does not confer any rights; its sole purpose is to record information. The presumption of ownership as ruled by previous laws, where the national State was considered as owner unless deemed otherwise by individuals, was disbanded. INAH is currently in the process of implementing an on-line program concerning "the methodology for the registration of archeological movables." and the actualization of the national catalogue of collections.

It should also be pointed out that archeologists are reluctant to register new findings due to the fact that pillagers would be aware of the location of the country's treasures by consulting the Register.

C. The Public Register of artistic monuments and zones ruled by the the Law of 1972 and administered by INBA. Anyone is entitled to log artistic monuments or zones provided that they match the administrative criteria.

The logging of cultural objects in these Registers does not bestow any authenticity.

The Law of 1972 overcame the notion of inventory with the Registers. One of the main problems of protecting cultural heritage had been the lack of inventory, as intended by the 1970 UNESCO Convention. Needless to say, compulsory inventorying defies common sense because most cultural heritage is as yet undiscovered and therefore the founding of the ex lege ownership declaration was an act of cultural sovereignty.

vii. Final Remarks

The Mexican legal system does not have a specific cultural landscapes definition, as considered by the 1972 UNESCO Convention, in secondary federal legislation. Nevertheless, Mexico has applied for several natural human heritage zones, the last being the Monarch Butterfly in the State of Michoacán and the State of Mexico in June 2008.

However, in some local legislation, definitions can be found regarding natural wonder landscapes and areas of natural beauty.

Under the Mexican Constitution the regulation of artistic and historic cultural heritage in certain areas is intended to be local. The local States, influenced to a certain degree by the 2003 and 2005 UNESCO Conventions, endeavor to rule over their own cultural heritage without encroaching on Federal jurisdiction. The State laws can be categorized in the following manner:

A. Specific laws: Those laws that foster traditional towns, natural wonders and natural beauty sites. Most of the States have enforced these specific laws.

B. Non specific laws: Mostly environmental laws.

C. Laws protecting the indigenous culture both tangible and intangible, such as language, culture, habits and customs. These are only present in the five States where the indigenous population is most dense.

To summarize, there are States that protect the traditional towns, natural wonders and natural beauty sites and hold a strong sentiment to decentralize the federal rights of control to the States and Counties.

The presumption introduced by the Mexican legislation was the tool to conciliate private ownership and national property where archeological immovables monuments were concerned. This was one of the great debates during the XX century. Needless to say, for obvious reasons the vexatious effect has been that all archeological monuments of less magnitude previously located in private ownership are now destined to remain silent and lost as heritage.

The hegemonistic nature of the federal governmental declaration subsists; the federal bureaucratic officials retain the determination and scope of Mexican cultural heritage as its own cultural sovereign act.

The national State has made herculean efforts in the region of the protection of archaeological Mexican heritage when declaring, in the first instance, a public control of movables located within archaeological immovable monuments and secondly that the movables were inalienable, not liable for seizure, not subject to statute of limitations and were now governed by the same legal system as archaeological immovable monuments. The national State achieved its goal and now recognizes a sole heritage regime which is under public dominion.

Moreover, in Mexico nobody questions the national ownership of both archaeological movable and immovable monuments. Over time, the public control has been consolidated and currently nobody would dare to claim possession of archaeological immovable monuments.

viii. Epilogue

Since 1897, an essential difference can be seen in the legal regimes of immovables and movables. From the outset, the purpose of the national State, where immovables pertains to the Mexican nation, is more than evident, but the assertion of legal movable heritage, inherent to the other side, remains, at the very least, a complex issue.

XIXth century legislation reflected a notion of ownership, in keeping with the times, and if archaeological immovables were considered under public dominion, destined for common use, belonging to the national State and subject to the res extra commercium principle: the legality of privately owned heritage and its legitimacy remained untouchable.

In the XXth century the national State[71] managed to consolidate the notion of cultural heritage and the archaeological zones became its fleuron.[72]

As the XXIst century commences, the nationalist movements promoted by the national State have proved fruitful. Mexican archaeological monuments are considered an integral part of the Mexican identity and are a subject of national pride.

[71] See the *Ley General de Bienes Nacionales* (*The General law on National Heritage*), herein after LBN, published in the *Diario Oficial de la Federación* (*Official Newspaper of the federal government*) on 20 May 2004.

[72] See articles 6 and 7 of the LBN.

It is possible to track the sequence of legislation developments regarding archaeological remains. First, a need to establish the foundation of the heritage of archaeological zones was considered. Next, the issues to be solved were the determination of the illegality of trade and the deterrence of the pillage of archaeological goods; by considering archaeological sites as being in federal ownership and depriving then from States or counties; these are the first symptoms of an assertion of the federal governmental authority on the subject and demonstrates how it was in charge of the custody and safeguarding of this heritage; finally the Law of 1972 strengthened the federal governmental authority with regards to the custody of pre-Columbian heritage.

C. *The Legislation on Urban Development – Between Scylla and Charybdis*

The post-war era brought a considerable increase in international tourism, largely attributed to the technological advances in air transportation. The increased tourism and the attention that the archaeological zones were attracting abroad, propelled them into a new dimension from which emerged a phenomena of cultural tourism with great economic impact; the work carried out in these zones felt the effects of this new perspective; their quality was articulated with predominantly tourist purposes. There was a change in values and priorities which occurred in an almost imperceptible fashion, creating controversy among archaeologists that continues to this day.

The protection and preservation of Cultural Tangible Heritage can not be fully understood, unless analyzed in situ. The Meso-American and the Central Highlands Andes regions are experiencing turbulent dynamisms of tourism and housing that have altered the cultural environment of archaeological, artistic and historic zones and monuments during recent times. These two phenomena belong to two different legal fields: one governed by cultural values where the preservation of human knowledge is privileged, and the other answers to free market principles and soil speculation. The philistine rhetoric of the free market does not seem to care at all about the preservation of human knowledge and cultural heritage. The crisis arises when they are juxtaposed, as seen in South East Mexico, where archaeological monuments, are endangered by the expansion of the housing and tourism industries.

The General Constitution established a legal basis for the legislation of urban development and soil use[73] that attempted to regulate the phenom-

[73] The urban development and soil use in Mexico correlates with the *ley General de Asentamientos Humanos*, (The General Law of Human Settlements) in the general field, whereas

ena of urban development, linked with the merging of several human settlements that tended to form geographic, economic and social units. This text drew up a conservation act for buildings, monuments, public plazas and parks, and in general all that integrated the historic and cultural heritage of such agglomerations.

The urban development ordinances of the Federal District (Mexico City) and the other States follow the same route; the federal ordinance determines that the purposes, uses and reserves of land, water and forest are inherent to public benefit and social interest that characterizes the legal nature of the property law in the terms of the Constitution and the Federal Code Civil.[74] In regards to the purposes, uses and reserves of land, water and forest, the property law has to be exercised according to limitations and methods maintained by law.

Currently, the Congress is discussing a change in cultural environments, especially because of the dynamic effects of tourist and housing development on the environments of archaeological zones. However, the legislation of urban development and soil uses already had rules in place for cultural preservation and has been recurrently ignored by the States, the Counties and the Federal District Government (Mexico City), overtly favoring tourism and housing developments. It goes without saying that economical transcendence has overshadowed cultural heritage protection. The statute project under discussion[75] foresees that, in the envisaging of urban development programs and soil uses, Mexican cultural heritage is protected and conserved. To ensure its effectiveness, it has been stated that Mexican cultural agencies are obliged to participate in the drafting of local and regional urban plans; and it is forecast that transgressions of cultural legislation may be challenged in Mexican jurisdictions. Through an extremely novel method in the Mexican legal system, procedural legitimacy is bestowed not just upon Mexican cultural institutions, both federal and local, but on the civil society as a whole. This guarantees the effectiveness of the struggle for the protection and preservation of Mexican cultural heritage, since cultural agencies of an official nature may easily be trapped by various interests, largely in the political order. This also means a break in the hegemony of the bureaucratic elite regarding the determination of the "culturality" and with this, a vertical imposition of a cultural model upon society. It is finally

each State and Mexico City, in accordance with this law, published their own legislation.

[74] See article 830 of the *Federal Code Civil* that states: "The owner of a good can enjoy it and keep hold of it under the limitations and methods that determine the laws."

[75] The law initiative is penned by the author of this report.

the dawning of a new era for cultural liberty, which is in fear of being ambushed by the economical field players, who run the risk of jeopardizing this initiative.

a. The Safeguarding of Mexican Cultural Heritage

The comprehension of the implementation of a safeguard policy on Mexican cultural heritage demands a detailed examination of the current trafficking of cultural heritage and their legal regulations, as well as an exposition of the protection over Mexican archaeological sites.

b. The Current Trafficking of Cultural Heritage and their Legal Regulations

Before determining the extent of a safeguard on Mexican cultural heritage, it is advisable to specify the fundamental notions of the Mexican contractual system, whose analysis is comprised of purchase and sale agreements concerning Mexican cultural heritage and the traditional protection of this heritage through public dominion, a notion that undoubtedly has a great influence on the contractual regime and therefore must form part of the analysis.

i. The Fundamental Notions of the Mexican Contractual Regime

The analysis referred to in the Federal Code Civil is the regulatory order applied throughout the Republic at a federal level. Its study is compulsory across the country and therefore is well- known nationwide.

In Mexican legislation, the contract theory displays evident influence from the French Code Civil.[76] The theme has been fully debated by the Mexican doctrine which encompassed the French notions as its own. In the development of the contract theory carried out by the Federal Code Civil, the contract brings about the effects of general law over other legal conventions.[77]

[76] It is clear that in the States there has been an enormous dispersion in this order in the latter part of the century, which has made its systemization incredibly complex. It is necessary to express that the drafting of these *Codes Civils* obeys fictional constructions that have very little relevance to Mexican contractual practices.

[77] See article 1859 of the *Federal Civil Code* that states "… legal regulations on contracts will be applicable to all kind of agreements and other legal conventions, unless it is against their nature or they are submitted to special regulations of the law on the same point …".

The contract has a considerable importance in the Federal Code Civil structure because it is based on this model that the general order of the contract is organized and constitutes the common denominator of other legal conventions.[78] According to the Federal Code Civil structure,[79] the reference to contracts are valid and are applicable to all manner of agreements and other legal conventions and acts, unless it is against their nature or they are submitted to specific legal provisions.

When the legal conditions are satisfied, the contract is refined. Formation and voidance are both points of reference in contract analysis. This is understood as a mechanism composed of several diverse elements, but, as a mechanism written by private parties within the legal order, it has to be in accordance with the demands of the law.

The core of our analysis into the purpose of the contract will be the purchase and sale agreement and its implications in the Law of 1972.

ii. The Purchase and Sale Agreement Concerning Mexican Cultural Heritage

The liberal doctrine of the XIXth century in the civil tradition countries, where Mexico is no exception, defined the right of ownership as an absolute, exclusive and perpetual right, whose characteristics were conceptualized both in the legal and philosophical fields.[80] However, modern ethics put forward the relativism and functionalism of the ownership right to this liberal notion, where it is conceived as a right-function in which power is subordinate to duty and the exercise of the ownership cannot go beyond social interest.

It is important to observe the manner in which the right of ownership regulates these characteristics in the purchase and sale agreement, especially when pertaining to cultural heritage.

The sale agreement constitutes the ad hoc mechanism of legal trade adopted by Mexican law. In the general context of legal acts, the purchase and sale agreement must satisfy the presupposed regulations of its category, particularly regarding its content; it is specifically in accordance with the content, and particularly the legal regime of the seller, that it is possible to analyze the Law of 1972.

78 See Carbonnier, Jean, *Droit civil 4. Les Obligations* (*Civil Law 4. Contract Law*), Eighteenth Edition, Paris, France, PUF, 1990, p. 35.

79 See article 1859 of the *Federal Code Civil*.

80 See Carbonnier, Jean, *Flexible law* (*Flexible Law*), First Edition, Paris, France PUF, 1971, p. 180.

The primary outline of the content of the agreement developed by Mexican Law is found in the Federal Code Civil. According to our legal tradition, which originated in the XIXth century, the Federal Code Civil grants the national State the power to expropriate goods belonging to individuals when it is deemed important and representative of the national culture. But, it simultaneously imposes serious control limitations upon the owners of these goods because they cannot sell them, attach them or alter them in any way that might result in a loss of their characteristics without the acquiescence of the federal government. Notwithstanding these serious limitations imposed by the law on private ownership, individuals still have the absolute option of alienating them and therefore these goods are not excluded from trade. Thus the Mexican cultural heritage in its general system also comprises part of individual ownership.

In order for a good to form part of the contractual content, it must first satisfy the following legal presuppositions: it is physically and legally possible. In regards to the physical possibility, the content must exist within its heritage or be susceptible to such existence. In reference to the legal possibility, it is advisable to analyze two elements: on the one hand, the content must be determined or determinable with respect to its genre and on the other hand, it must not be off the market, that is to say, it must not be considered as subject to the res extra commercium[81] regime. This last statement is fundamental in understanding the legal implications of the text in the the Law of 1972. In terms of the Mexican legal system, the content of a contract is off the market for two fundamental reasons; because of its nature or due to an order of the law.

Those contents declared by law as being unavailable for private ownership cannot be part of the contractual content. Consequently, a contract whose specified subject is goods that are off the market would be considered void due to its lack of a subject.

The main legal effects of a withdrawal from the market are that goods cannot be alienated nor can they receive the benefit of statute of limitation in favor of any individual. Only the goods that are on the market are susceptible to an acquisition by statute of limitation.

The contractual content must additionally be in agreement with the public order and good customs and it is specifically a challenge to public order that concludes the illegal character of the content.

[81] In this matter, the key articles of the *Federal Code Civil* are drafted as follows: "Article. 748. Goods that can be taken off the market due to their nature or by order of the law. Article 749. Goods that cannot be possessed by any individual exclusively are off the market due to their nature, and by order of the law, those declared by the same law as being unavailable for private ownership".

These analytical components are essential for the comprehension of the purchase and sale agreement, especially when its subject is cultural heritage.

The ownership right implies a commitment by the seller to transfer it and therefore: it must exist within its heritage; be susceptible to existence; pertain to a determined or determinable genre and lastly, it must be on the market. The ownership right depends on the legal regime to which the heritage of the seller is subject. The technique used by Mexican law in declaring the illegality of an ownership transfer of cultural heritage, among other archaeological monuments both immovable and movable, was to consider them inalienable and without statute of limitation; hence, it withdrew them from the market. This explains the specific contractual sanctions attributed to the Federal Code Civil consisting of the absolute or full voidance of the contract. The archaeological monuments, movable or immovable, cannot form part of the contractual content; their withdrawal from the market involves the legal impossibility of submitting them to the heritage regime for individuals or to be the content of a sale. The result of this being that any agreement having the transfer of ownership of archaeological monuments movable or immovable as its subject, is legally void as it lacks a subject in a technical sense, and the contractual voidance sanction will be then applied. According to the Federal Code Civil, this agreement would not cause any legal effect, nor could it be validated by confirmation or statute of limitation, and any interested party e.g. cultural institutions, may invoke its voidance. Notwithstanding this technical argument, the Mexican Courts have denied demands to date on the grounds that third parties (society in general) lack a procedural legitimacy to sue the contracting parties in order to void these contracts for breaching public order.

Combined with the above, the transfer of ownership is considered illegal if it contravenes a law of public order, as is the case foreseen by the Law of 1972.

The sanctions lie in the clarification of special offences regarding the resolution on archaeological movables. The Law of 1972 imposes a penalty of ten years imprisonment on any person found guilty of transferring the possession of any movable archaeological monument or trading with it. The same penalty applies to any person transporting, exhibiting or reproducing an archaeological monument without the mandatory authorization.

This brief analysis of the legal system regarding the current status quo of the Mexican trafficking of cultural heritage allows one to understand the protection of archaeological sites.

One of the most relevant issues is the limitation on the exercising of the possession of cultural heritage. The Supreme Court extended the limi-

tation of dominion and included the prohibiting of the demolition or destruction of buildings considered as national heritage. These regulations of a prohibition and public interest nature cannot be contravened by private individuals and the agreements that breach those regulations are illegal and consequently void.[82]

Another significant regulation is related to the determination of the amount of compensation that any cultural heritage owner is forced to reimburse when the competent authorities perform maintenance work on their heritage. It is an expense imposed upon the owner by virtue of the "culturality" of their heritage.

iii. The Mexican Notion of Public Dominion over Cultural Heritage

It would be difficult to appreciate all the aspects of the Mexican notion of public dominion without first reflecting on the function of the right of ownership in the Mexican legal system. This would enable a more accurate description of the res extra commercium notion and establish its importance as a cohesive element in the Mexican public dominion system. In order to conclude the analysis, a reference will be made to the effects of this notion on Mexican Law.

The Function of the Right of Ownership

The Code Civil is the legal ordinance regulating the transactions by which the economic purpose of individuals is carried out and the economic structure of the community is organized. It contains rules that govern the performance of attribution purposes, the exploitation of economic goods, their trafficking and the social cooperation that some individuals can carry out in favour of, or on behalf of other individuals.[83]

In an industrial and commercial economy, the trafficking of goods embodies the crux of the system. Every transmission implies previous situations and final results, it can consequently be observed as a status quo ante in this dynamic.

[82] See CD Rom, Octava época, Segundo Tribunal Colegiado en Materia Civil del Tercer Circuito, Eighth Edition, Second Collegiate Tribunal in Third Circuit in Private Matters, Parte II, Tesis 16 (Part II, Thesis 16), p. 608.

[83] See Diez Picazo, Luis, *Fundamentos de derecho civil patrimonial* (*Grounds of Civil Heritage Law*), Volumen II (Volume II), First Edition, Madrid, Tecnos, 1983, p. 31.

Every society, in accordance with its political and cultural system, has to resolve the problem of the determination or allocation of economic goods; in the same manner, all society must favour the determination of the right of ownership towards certain individuals to the detriment of others; to individuals, to organizations, to the community in general or to the national State, and define the means employed for its practice.

It is therefore necessary to establish the extent and limitations of this right regarding its quantative extension that counters the basic question: What is the amount of goods that one can own and exploit? Its qualitative length answers the question: What magnitude of powers can one exercise over the goods and what are the limitations of these powers? Finally, its temporary realm whose exposition is: What is the duration of the exercising of these powers?

In the field of the right of ownership, society must decide the purpose of the goods and whether the exercising of the right of ownership should be left to the will of its holder, or if it must be regulated. The right of ownership is tied to economic policy and is a fundamental character for all social organization.

The Federal Code Civil replicates the doctrine of the Mexican liberal economy that prevailed at the end of the XIXth century and conveys it in the following hypotheses: ownership is the right to enjoy and have the goods at ones disposal without further limitations than those determined by law; the owner has the claim right against the holder or possessor of the goods; nobody can be deprived of their ownership unless a decision is made by a competent authority for a reason of public benefit and through an indemnification. A conclusion is necessary: the Mexican economic system is based on free initiative and private ownership.

The right of ownership is part of the Federal Code Civil that regulates the distribution, use and enjoyment of economic goods in accordance with the legal principles of the established constitutional system. In Mexican Law there is a close relation between, on the one hand, the right of ownership and the economic and social structures and, on the other hand, between the right of ownership and the general principles of the political organization. The convergence point is property law, and it is its profile and meaning, as well as its scope and configuration, that are defining factors in the right of ownership.

There is no fixed type or temporary jus in rem. Instead there is a historic variability that correlates the typical jus in rem with the purposes of a social and economic order that it is expected to pursue. The jus in rem are determined according to the social configuration and legal policy.

The perception of a right as a jus in rem depends on practical experiences, which are in turn linked with the protection that such a right endeavors to bestow. The ownership is much more than just a jus in rem: it is the prototype or paradigm of the jus in rem. According to the classic formulation of the right of ownership, it is defined as a "right to enjoy and have the goods at ones disposal in the most absolute manner" The classic trilogy of the right of ownership in the codified countries is divided into these attributes: jus utendi, jus fruendi and jus abutendi, that is to say; usus, fructus and abusus.

According to leading legal literature, usus "specifies this type of employment as the drawing of personal profit (or pleasure), individually or for one's family, from an unproductive or unexploited good".[84] Fructus dubs the enjoyment as being: "the right to receive the revenues from the ownership ... whether through physical acts of enjoyment... or by legal acts".[85] Finally, abusus denotes the right of the owner to "dispose of the good, either by physical acts; consuming it... destroying it... or by legal acts, alienating it. In the strict sense of the term, the right of disposal is the right to alienatev".[86]

The analysis must now concentrate on one of the primary presumptions of ownership: the free disposition. Free disposition is the gravitational core in the individualist and liberal system of the heritage; it is, in this essential prerogative, that all the others are summarized. On the other hand, its impact depends on the status of the market.

The Mexican Constitution provides that the ownership of lands and waters stationed within the limits of the national territory originally is that of the national State, which did have, and still has, the right to transfer the ownership to individuals and to establish it in private ownership.

In Mexican Law, the right of ownership has been designed in affirmation with this principle. The Mexican Constitution also provides that the national State has, at all times, the right to impose the disciplines dictated by a public interest on private ownership. It is in this context that the Federal Code Civil develops the right of ownership and denotes how the owner of a good can have and enjoy it under the restrictions and disciplines dictated by law; that the good cannot be taken against the will of its owner, unless for the cause of public interest and in exchange for an in-

84 See Carbonnier, Jean, *Civil Law, Les Biens, op. cit.* p. 141.

85 Supra note 83.

86 Supra note 83.

demnity. Lastly, the ownership of a good extends the right of the owner to the products of the good and all that is embodied or incorporated therein.[87]

The Regime of the Legality of Treasures

One of the most important aspects in the analysis of property rights is the determination of the regime to which treasures are subject, especially where cultural heritage is concerned.

In the XXth century, and under the Code Civil terms, the treasure answers to the same definition and respects the same principles as those contained in the Mexican legal tradition of the XIXth century. The treasure is a hidden or buried good (money, jewelry or other valuable goods), whose legitimate source is disregarded; it is the ownership of whomever discovers it. If the goods discovered hold an interest for the sciences or the arts, they will be appropriated to the national State, who, in consideration, will pay a fair price for these cultural goods. However, if the discovery site belongs to public dominion or to a person who is not the prospector, he will receive half of the fair price and the owner of the discovery site will receive the other half.

Traditionally, treasure has been defined as res nullius and leading legal literature establishes that the word "treasure" addresses two extrinsic conditions: on the one hand, nobody can assert a right of ownership over a discovered good —it may have had an owner who hid or buried it, but lost it overtime— and on the other hand, the discovery has to be completely by chance.

According to the Roman law,[88] treasure is considered res nullius and of course it favors the interests of the State. The Mexican legislation, which is generally inclined towards individualism and to its most eminent expression, with respect for private ownership, has tried to conciliate the owner's interests with those of the State, binding the latter to a compulsory acquisition and the payment of a fair price. In this context, the immovable owner's consent is imperative: if a treasure is discovered through excavation work carried out without the owner's consent, the treasure belongs entirely to the immovable´s owner.

Under the Law of 1972, archeological excavations are strictly forbidden and penal sanctions are to be imposed, except in the case of INAH or scientific institutions that may carry out excavation work with special permis-

[87] See Ibarrola, Antonio de, *Bienes y Sucesiones* (Goods and inheritance), Mexico, Ed. Porrúa, 1972, p. 228.

[88] As defined by the Roman Emperor Hadrian.

sion from INAH. Everybody has the duty to inform INAH, within 24 hours, when an archeological monument is discovered.

In Mexican law, it is quite evident that the landowner cannot perform archaeological excavations on his own authority, but it is questionable if the federal government can carry out these types of excavations against the owner's will. If the federal government has a claim right against the heritage owner that has an archaeological interest, such a claim is based on an expropriation for public benefit. The legal regime for archaeological immovables and movables would prevail over private property by means of a federal governmental declaration in order to ensure public dominion. This declaration would have an expropriation effect, the vexatious effect of which has been a blanket silence from the owners and the terminal loss of cultural heritage.

The Res Extra Commercium Notion as a Cohesive Element of Mexican Public Dominion

In general, archaeological monuments, both immovable and movable, are submitted to the res extra commercium regime, unless they were acquired before the Law of 1972 came into effect. State owned historic and artistic cultural objects are submitted to the res extra commercium regime when they are specified as such by the Law of 1972 or subject to a declaration issued by the federal government.

The establishing of the concept and legal nature of the right of ownership that are subject to public control is based on two criteria: firstly, the nature of the good and, secondly, its affectation or purpose; the latter was prevalent in Mexican law: for some property e.g. rivers and mines, public control is tacit, but there are other goods whose explicit affectation or purpose is necessary; such as in the case of cultural heritage.

It is advisable to specify the idea of public control over the right of ownership. It refers to the attribution of a formal deed to the good, but implies a form of exploitation totally irreconcilable with the idea of private ownership. Public control presupposes a form of exploitation that is governed by general interest, belonging to the entire community, and left to bureaucratic controls which guarantee the priority of such interest.[89]

The res extra commercium notion represents the cohesive element in the system that is applicable to publicly controlled goods. The distinctive characteristics of this notion answer to a fundamental idea: the withdrawal

[89] See Diez Picazo, Luis, *op. cit.*, p. 130.

of goods from the market and the consideration of them as unattainable for possession. The goods subject to public control are taken off the legal private market because they enjoy a principle of protection that allows the prevalence of general interest over third parties, as well as over negligence or bad faith by the administrators themselves. The exclusion of publicly controlled goods from the legal private market is governed by the idea of affectation, which implies that, while they are subject to public control, they are not on the legal market; it is this affectation which determines the validity of the resolution acts regarding those goods.[90] In Mexican Law, the main characteristics of the legal regime of goods subject to public control are; inalienability, a non liability for seizure, a non statute of limitations and non-subjectability to any liens. The individuals and public institutions themselves may only acquire in use, enjoyment and exploitation of these goods, the rights regulated by the law and others dictated by the Legislative Branch.

The tendency to resort to public control to possibly obtain a better degree of protection is the one most generalized. There are two opposing radical conceptions: the first proclaims the regime of private ownership and consequently advocates a particular jus fruendi, and the second, the notion of public ownership, states that jus fruendi needs to have a social function.

These two principles, in keeping with the times, have alternately influenced the debate over the protection of cultural heritage and this largely explains the discrepancies seen in legislations on the subject. Currently, and on behalf of general interest, the national modern State eased the evident manner of the traditional prerogatives of the right of ownership and this decision reflects a wish to restrict the individualist aspect of the notion of ownership in the matter of cultural heritage. In the words of Lyndel V. Prott, we are assisting the emergence of the concept of "cultural property" as opposed to "cultural heritage".[91]

The Federal Code Civil was the first legal text to introduce regulation of publicly controlled goods into Mexican law. Furthermore, now in its federal version, it currently makes up the supplementary legal regime to which the heritage of the federal government is subject. In effect, the Federal Code Civil[92] states that, in the absence of special laws to this effect, ownership of

[90] Supra note 89.

[91] See Carducci, Guido, *La restitution internationale des biens culturels et des objets d'art. Droit comun* (*International restitution of cultural goods and objects of art*), Directive CEE, Paris, France, p. 51.

[92] See article 766 of the *Federal Code Civil* that states: "Goods in the domain of public control will be enforced by the regulations of this Code when it is not determined by national laws".

public dominion must be regulated by the applicable resolutions contained in that legal ordinance. According to the Federal Code Civil, the General National Goods Act (LBN) is a special law[93]and the outline proposed by the Federal Code Civil was described in further detail in the laws regarding the national heritage which were enacted afterwards. The Federal Code Civil distinguishes three types of goods that constitute public control: goods destined to common use, those destined to public service and the goods owned by the Mexican State.[94]

Regarding goods destined to common use, the primary concept is that they are inalienable and have no statute of limitation.[95] For purposes of inalienability, they are withdrawn from the legal market, which makes them unattainable for private ownership and therefore makes it impossible to integrate them into individual heritage.

The analysis brings about the decision that the nature of the statute of limitation on a good is a legal concept that has to be determined based on its inalienability.[96] This is fundamental in the clarification of ownership because only the goods that can be alienated, and are therefore on the market, can be subject to a statute of limitation. Under the Federal Code Civil terms the acquisition by a statute of limitation or illegal seizure is a mechanism that allows the acquiring of goods over the lapsing of a certain time period and under the conditions stated by law.

The LBN defines publicly controlled goods through numerous propositions but two fundamental ideas determine their principle: one refers to goods destined to common use and the other refers to goods assigned to public service.

Mexican law allows its inhabitants to use and enjoy common use goods under no further restrictions than those established by the laws and bureaucratic regulations.

[93] See article 5 of the LBN that states: "In the absence of express resolutions in this law or in other resolution from which they derive, it will be applied, in the conducive *Federal Code Civil*, the Federal Law of Administrative Procedures and the Federal Code of Civil Procedure".

[94] See article 767 of the *Federal Code Civil* that states: "Goods in the domain of public power are divided into goods for common use, goods destined for public service and the goods owned by the Mexican State".

[95] See article 768 of the Federal *Code Civil* that status: "Goods for common use are inalienable and have no statute of limitations. All inhabitants can take advantage of them under the restrictions laid down by the law, but for special advantages concession needs to be granted with the requirements prevented by the respective laws".

[96] See Fraga, Gabino, *Derecho administrativo* (*Administrative Law*) México, Ed. Porrúa, 1990, p. 181.

The LBN determines that only the goods that are subject to the system of public control are inalienable, have no statute of limitation and cannot be subject to liens.[97]

The LBN provides that common use goods, movables and immovables considered as archaeological, historic or artistic monuments according to the Law of 1972 and its federal governmental declarations, are subject to public control. In spite of these general principles, the LBN resorts to the principles, and in this manner, specifies that murals, sculptures and any artistic work incorporated in, or permanently fixed to, the building subject to the system of public control, are also subject to administrative control; movables which are not usually replaceable due to their nature, such as documents and office files, manuscripts, incunabula, editions, books, documents, periodic publications, maps, drawings, brochures and important or rare engravings, as well as collections of these goods; ethnological and paleontological pieces; type specimens of flora and fauna; scientific or technical collections of arms, numismatics and stamps; archives, sound recordings, films, photographic, magnetic or computer files, magnetic tapes and any other object containing images or sound and artistic or historic museum pieces.

The Law of 1972 prevents and penalizes the destruction of archaeological monuments and anyone committing this felony is obliged to repair any damage caused, which should be evaluated economically. The Supreme Court decided that the actuality of the goods being off the market did not in any way impede their accountability for an economic evaluation, since archaeology experts dedicated to such a task are able to assess them regardless of whether they are on the market or not.[98] Recently, an intense debate has begun in the General Congress over the criminalization of the desecration of cultural heritage.

The Supreme Court also considered that when the Law of 1972 came into effect it had, amongst others, the aim to conserve and restore archaeological monuments and treasures by virtue of the considerable importance that they hold for national cultural heritage. This law stated that, in certain cases, the Mexican Treasury must bear the cost of the work, and it wouldn't make sense to maintain that the value of this work is wasted, solely because it is embodied in a monument.

[97] See article 13 of the LBN.

[98] See CD Rom, Séptima época, Primera Sala (Seventh Edition, First Bench), *Semanario Judicial de la Federación* (*Weekly Judicial of the Federal government*), Tomo (Volume) 87, Segunda parte (Second Section), p. 60.

The Effects of the Res Extra Commercium Notion in Mexican Law

As a result of the Law of 1972, archaeological movable and immovable monuments are declared as being of national ownership, and therefore are inalienable, have no statute of limitation and cannot be subject to liens. Movables and immovables originating from civilizations prior to the establishment of the Hispanic culture in national territory, and also human remains, flora and fauna vestiges relating to these cultures are encompassed in this categorization.

Due to the conferred nature of inalienability and a non statute of limitation, archaeological movables and immovables belong to public dominion.[99]

By means of a declaration, the Executive Branch states that any territory containing several archaeological immovables monuments or where the existence of such monuments is surmised, can be declared as an archaeological zone; by consequence, the territory in question will be subject to federal jurisdiction.

The technical distinction between goods that are off the market and inalienable goods seems equally important. These terms are not synonymous in Mexican law. The inalienability of a good incorporates a withdrawal from the legal private market in all of its relations and its inability to form part of individual heritage; even when some legal considerations ensure the alienation of certain goods belonging to individual heritage.[100]

The effects of the res extra commercium notion are ordained by Mexican law as personal effects and real effects.[101] The personal effect of a good's inalienability is closely linked to the ownership of the good. If the good is subject to the system of public control, the inalienability is absolute; if the good belongs to a public organization, with the power of alienation, such an organization is obliged to request acquiescence from a public agency. In this way it attempts to assuage the traditional aim, which essentially consists of preventing the loss and at the same time guaranteeing the validity of the good in the public dominion.

On the other hand, the real effect is the non statute of limitation that substantially consists of preventing the loss of a good in favor of a good will third party. Finally, an attempt is made to extract the good from the appropriate claim under the Code Civil terms, and to preserve its affectation to public dominion.

[99] See article 6 of the LBN.

[100] See Borja Soriano, Manuel. *Teoría general de las obligaciones* (*General Theory of Contract Law*), Fifth Edition, México, Porrúa, 1996, p. 98.

[101] See Carducci, Guido, *op. cit.*, p. 61.

IV. The Mexican Institutions Charged with the Protection of Mexican Archaeological Sites

After the sun set on the Mexican revolution and during the pacification process that followed, one of the main functions of the national State, according to nationalistic principles, was to undertake the safeguarding of cultural heritage.

The initial task was to assess the total damage caused to archaeological heritage during the armed struggle and later in the legal field of the new constitutional legislation. It aimed to determine what conflicts might be generated by private ownership of land containing archaeological vestiges; legislation regarding the protection of archaeological sites pertaining to cultural heritage was determined by impending hazards.

Mexico in the post-revolutionary era created two fundamental institutions for the defense of cultural heritage: INAH and INBA. One would have to include the National Library, the National Newspaper Library and the General National Archive[102] assigned for historic reasons, the first two to the ‚National Autonomous University of Mexico' and the last to the Ministry of the Interior.

INAH was charged with carrying out these fundamental objectives. It must be noted that INAH does not deal exclusively with archaeology; it was founded with the concept of integrating archaeology with anthropology.

The rising acceptance of the new academic and political theories at the beginning of the XXth century would turn into the revolutionary ideological trend, exerting a decisive influence over the concept and implementation of official projects relating to the protection, conservation, research, administration and publicity of archaeological zones.

The INAH organization was sufficient and even revolutionary until the end of the Second World War. After this period, the transformations that the country underwent due to unusual industrial development, accelerated urbanization, electrification and irrigation work, meant that the institute was obligated to modernize its action.

One of the initial consequences of this movement towards change was the emergence of an archaeology referred to as "salvation", dedicated to

[102] The General National Archive is the successor of the Ministry of the Viceroyalty and it is the most important one due to its size and the contents of the documents. See Garcia Ayluarde, Clara, "Historia del papel: los Archivos de México (History of the paper: The Mexican Archives)", In the collective work *Patrimonio Cultural Mexicano* (*Mexican National Heritage*), Enrique Flores Cano (coord.), Consejo Nacional para la Cultura y las Artes (*National Agency of Culture and Arts*), México, Fondo de Cultura Económica, 1997, p. 257.

dams, streets, buildings, roads, new urban zones and work related to underground matters such as the metro and the sewage system in Mexico City. These issues were of an urgent nature for Mexican archaeology and demanded special techniques.

Very soon, the decentralization of this substantial effort in safeguarding and research was determined and assigned to specialized units in the various States; despite the fact that the demand had been subject to analysis and discussions throughout the preparation of the Law of 1972, it finally conferred all the authority on the subject to INAH; this situation continues even today, even though, in some States, there has been an emergence of groups dedicated to archaeology.

It was highly predictable that, confronted with new theories and archaeological techniques, Mexican archaeology would undergo extensive revision of its methods, projects and results. One should add at this point that INAH, as an official institution, directly depends on the Federal government, who imposes a public entity measure; and therefore a notable political guise. This could favor INAH regarding the allocation of resources, but on the contrary, its archaeological action was subservient to official objectives and methods, which did not always favor a conducive development.

An example that illustrates this best is the famous discussion regarding the authenticity of the alleged remains of Cuauhtemoc, the last Aztec Emperor, discovered in Ixcateopan or Ichcateopan in Guerrero, a Southern State where political interest clearly opposed scientific rigor. On two occasions the government applied pressure on archaeologists to validate the authenticity of the remains; the archaeologists defended their professional independence resolutely and, for the sake of the country, successfully.[103]

The initial purpose of INAH was to recover the expressions of several ethnic groups in order to propose a new society model with respect to regional and popular cultural traditions that had been set aside by the liberal

[103] In 1949, Dr. Eulalia Guzman announced that she had found the human remains of Cuauhtémoc, the last Aztec Emperor, as well as various tools belonging to him. A first commission was designated whose statement was adverse to the claims of Dr. Guzman. The controversy that was created is without precedents. It resorted to a new Commission made up of prestigious Mexican intellectuals like - Alfonso Caso, Pablo Martínez del Río and Julio Jímenez Rueda among others. The opinion was equally adverse; the national press stigmatized the commission members. In short, the members of this second commission categorically maintained that the found remains were that of at least five skeletons, including women and children. See Vázquez Zoraida, Josefina, *Nacionalismo y Educación en México* (Nationalism and education in Mexico), Second Edition, México, Centro de Estudios Históricos del Colegio de México, Nueva Serie, 2000, p. 247. See also Litvak, Jaime and Sandra L. López Varela, *op. cit.* p. 194.

cultural project. In 1948, anthropologists who carried out direct work within the indigenous communities, split from INAH and created the National Indigenous Institute, now extinct, and replaced it with the National Agency for the Development of Indigenous Populations.[104] On their part, with a few rare exceptions, the specialists of INAH became increasingly distant from the social problems affecting the communities during the industrial development period and dismissed the cultural project that had been the motivation for creating the Institute and transformed it into a government body dedicated to the administration of cultural heritage.

Nevertheless, and on account of the importance of the functions undertaken by INAH in the national cultural project, it is worth mentioning that throughout the institute's existence, its personnel accrued a considerable amount of technical knowledge. During its important field work, it carried out the essential task of inventorying cultural heritage and initiating federal governmental declarations of monuments and typical zones. It restored and consolidated numerous historic buildings in national territory and the abundance of documentation gathered during these tasks formed an invaluable collection for researchers.

INAH is in charge of scientific researches associated with anthropology and the history of the country's population, the conservation and restoration of archaeological, historic and paleontological cultural heritage. It is also in charge of identifying, searching, protecting and restoring monuments and archaeological zones as well as the movables associated with them. It is responsible for the ad hoc Public Register of Archaeological and Historic Zones and Monuments and paleontological remains.[105]

For its part, INBA has, amongst other functions, the nurturing and initiating of research into, and the creation of, fine arts, in the fields of music,

[104] See Decree published in the *Diario Oficial de la Federación* (*Official Newspaper of the Federal Government*) on 3 May 2003 that states: "... article. 2. The agency intends to orient, coordinate, promote, support, foment, pursue and evaluate the programs, projects, strategies and criminal actions for the integral and viable development of towns and indigenous communities in accordance with article 2 of the Political Constitution of the United States of Mexico, so it will have the following functions: ... To aid with the exercising of free determination and autonomy of towns and indigenous communities within the framework of constitutional resolutions....article 3.- The Agency will govern its actions by the following principles ... To observe the multi-ethnic and multi-cultural nature of the Nation … To promote the non-discrimination and social exclusion and the construction of a society which includes plural, tolerance and is respectful of the differences and intercultural talks; ... To include this approach in the policies, programs and actions of the Federal Public Administration in order to promote participation, respect, equality and opportunities for indigenous women...".

[105] See article 2 of the law of INAH published on 1 January 1947.

visual arts, drama and dance. It also participates in the artistic and literary education of establishments dedicated to pre-school, primary and secondary teaching. Finally, it is in charge of fostering, organizing and promoting the fine arts, including literature, using all means possible and guiding them towards the public in general and specifically towards the working class and the school population.[106]

The national State persists in its bureaucratic cultural development policy. In order to: foster the cultural expression of the various regions and all social sectors; promote a diasporas of the culture as wide as possible in all sectors of the Mexican population, and preserve and enrich national historical and cultural heritage; the federal government founded the National Council for Culture and the Arts, known as CONACULTA.[107] This Board is in charge of promoting and dispersing culture and arts as well as coordinating public institutions such as INAH and INBA who hold responsibilities in this area. It endeavors to deal with artistic education, public libraries, museums, art exhibitions and other representations of cultural interest, as well as developing relations of cultural and artistic order between Mexico and abroad. Needless to say, the aims of CONACULTA are as broad as the ambitions of its bureaucrats.

To sum up, in the crepuscule of the XXth century, the Mexican legislation successfully consolidated the notion of cultural heritage which gravitates around Pre-Columbian heritage. The XXth century thereby certified the legislative efforts that surpassed legal ambiguities, and attempted to reconcile the notion of cultural heritage with the constitutional order and the private property regime.

V. The Fatigue of the Nationalistic Cultural Heritage Model, The Emergence of the Multilateral Model

1. *Introduction*

At the dawn of the XXth century, Mexico transcended from monoculturalism into constitutional multiculturalism. In Mexico, as in the rest of Latin America, this multiculturalism has been specifically focused on the field of indigenous rights, which has generated a tremendous variety of amendments to constitutional rules. This transition was not in any way a

[106] Supra note 104.

[107] See the *Diario Oficial de la Federación* (*Official Newspaper of the Federal Government*) of 12 July 1988.

fortuitous occurrence; in fact, this debate has been an underlying feature throughout the entire Mexican XX[th] century[108] but it began to intensify in the latter part of the XX[th] century. This was attributed to the emergence of a series of anthropologists[109] who forcibly challenged the indigenous policies of the Mexican Government.[110]

Mexico ratified Agreement 169 of the International Labor Organization, and sealed its approval at the beginning of the last decade of the XX[th] century.[111] Over the same period, one can identify a movement towards constitutional transformation in the Latin American countries in recognition of the rights of the indigenous people.[112] In Mexico, this constitutional movement had a different cadence; the main catalyst undoubtedly being the indigenous movement supported by the Ejército Zapatista de Liberación National (EZLN) in South-East Mexico, ironically just as NAFTA was coming into force.[113]

[108] See Ordoñez Mazariegos, Carlos Salvador, "Tradición y Modernidad. Encuentros y Desencuentros de los Pueblos Indios frente al indigenismo y los procesos de globalización (Tradition and Modernity. Common and Uncommon Ground of Indian People in the face of indigenity and the globalization process)", In the collective work *Pueblos indígenas y derechos étnicos* (*Indigenous peoples and ethnic rights*), VII Jornadas Lascasianas, UNAM, Instituto de Investigaciones Jurídicas (Institute of Legal Research), 1999, p. 152.

[109] See Villoro, Luis, *Los grandes momentos del indigenismo en México* (The great moments of indigenity in Mexico), Aguirre Beltrán, Gonzalo, *El proceso de aculturación y el cambio sociocultural en México* (*The process of acculturation and the sociocultural change in Mexico*), México, Editorial Comunidad Instituto de Ciencias Sociales, Universidad Iberoamericana, 1970; Aguirre Beltrán, Gonzalo, *México profundo: una civilización negada* (*México in-depth: a denied civilization*), México, CONACULTA and Grijalbo, 1990. Stavenhagen, Rodolfo, "Los movimientos étnicos indígenas del Estado nacional en América Latina (The ethnic movements indigenous to the State in Latin America)", en *Civilización: configuraciones de la diversidad (Civilization: configurations of diversity*), México, UAM, 1984.

[110] Among others, it is possible to mention: Pablo González Casanova, Rodolfo Stavenhagen, Ricardo Pozas, Guillermo Bonfil Batalla, Arturo Warman, Margarita Nolasco, Enrique Valencia, Mercedes Olivera and Salomón Nahmad.

[111] Agreement 169 obtained its approval at the International Labor Organisation, session 76, 27 June, 1989. According to article 38 of the Agreement the rules of the Agreement fall into two categories: agreement and recommendations. The agreements are mandatory rules for the ratifying countries and it becomes national law after the ratification; the recommendations have no obligatory force and constitute guidance for the application of the agreements.

[112] See Valades, Diego, *Constitución y derechos indígenas* (Constitution and indigenous rights), México, UNAM, Instituto de Investigaciones Jurídicas (Institute of Legal Research), Mexico, 2002.

[113] *El Tratado de libre comercio de América del Norte* (*The North American Free Trade Agreement*) came into force on 1 January 1994.

This movement ended with the so called San Andrés Larrainzar Peace Treaties, signed in South East Mexico; indigenous groups and communities, who previously played a major role, seemed to have entered into in impasse.

2. *Antecedents*

Mexico is a heterogeneous country where several pre-Columbian cultures co-habited following the Spanish conquest, a syncretic culture flourished and resisted the Holy Inquisition Tribunal and the iron-fisted regime imposed by Spain. At the dawn of Independence, the formation of an incipient Mexican culture suffered many setbacks. Nevertheless, the enormous cultural diversity of the country was deliberately evaded and, from the onset, favored the creation of a unique and hegemonic "Mexican" culture, which suggested that no evaluation of its multicultural nature had ever taken place.[114] The Indigenous policy adopted by the national State only entertained one valid premise from the outset: the integration of Indigenous people into Mexican society. A unique "Mexican" identity was imposed upon all the population in a clear detriment to the individual identities of the different ethnic groups that cohabitated in our territory. National education was generally focused on the knowledge, values and conduct typical of all Mexicans with a disregard for their Indigenous cultures. In short, a unique national culture was imposed vertically from on high.[115]

Although national identity was constructed on biological interbreeding and cultural and legal syncretism, the heterogeneity of the territory, the various forms of occupation and appropriation of the land, regional and rural urban differences, the varied migration trends, the diverse influence of bordering lands in the North and South, contributed to a simultaneous shaping of the differentiation and hybridization processes all across national territory.[116] This ensures the existence of several cultural heritages in Mexico which are comprised of vast collections of tangible and intangible cultural objects which have value and coherence within an appropriate system

[114] See the difference between the notion of polyculturalism and multiculturalism in Fenet, Alain *et al.*, *Le droit et les minorités. Analices et textes* (*The law and the Minorities. Analysis and texts*), Brussels, Bruylant, 2000. p. 386.

[115] See Sánchez Cordero Dávila, Jorge, *op. cit*. p. 4.

[116] See Stavenhagen, Rodolfo and Carrasco, Tania, "La diversidad étnica y cultural (Ethnic and cultural diversity)" In the collective work *Patrimonio Cultural Mexicano* (*Mexican National Heritage*), Enrique Flores Cano (coord.), México, Consejo Nacional para la Cultura y las Artes (National Agency of Culture and Arts), Fondo de Cultura Económica, 1997, p. 277.

pertaining to the various social groups that constitute Mexican society and who possess a distinctive culture.[117]

3. *The Constitutional Transition. The Intangible Cultural Heritage as a Model*

In 1992 the first constitutional amendment that recognized Mexico's polycultural nature, initially sustained by its Indigenous peoples was approved.[118] However, in 2001 as we entered the new century, there was a complete amendment of the matter in the General Constitution.

In reference to the last constitutional amendments, one can identify three basic new principles with a plural vocation in the Constitution: The principle of legal pluralism, political pluralism and cultural pluralism; the latter, which is relevant to this analysis, maintains that the existing population in Mexican territory is culturally diverse; the principle outcome of an acceptance of this principle is an admission to an existence of several national identities in Mexican territory. There was therefore an abandonment of the hegemonic cultural model[119] which dominated throughout the majority of the Mexican XXth century and was rooted in a homogeneous cultural principle.

It is clearly apparent that, despite the last constitutional amendment, the Mexican debate is far from over. In the Latin American region, the problem is no less complex.[120] There are unresolved problems generating

[117] See Bonfil Batalla, Guillermo, "Nuestro patrimonio cultural: un laberinto de significados (Our cultural heritage: A labyrinth of meanings)", In the collective work *Patrimonio Cultural Mexicano* (*Mexican National Heritage*), Enrique Flores Cano (coord.), México, Consejo Nacional para la Cultura y las Artes (National Agency of Culture and Arts), Fondo de Cultura Económica, 1997, p 47.

[118] See Valades, Diego, *Los Derechos de los Indígenas y la Renovación Constitucional en México* (Indigenous Rights and Mexican Constitutional Amendments), en *Constitución y derechos indígenas* (*Constitution and indigenous rights*); González Galván, Jorge Alberto (coord.), Legal Doctrine Series, Núm. 92, UNAM, Instituto de Investigaciones Jurídicas (Institute of Legal Research), 2002, p 16.

[119] See González Galvan, Jorge Alberto, "Las decisiones políticas fundamentales en materia indígena: El Estado Pluricultural de Derecho en México (The fundamental political decision on indigenous issues: the multicultural "State of law" in México)", Legal Doctrine Series, Núm. 92, UNAM, Instituto de Investigaciones Jurídicas (Institute of Legal Research), 2002.

[120] See article 329 of the Constitution of Colombia; article 124 of the Venezuelan Constitution; article 123 of the Panamanian Constitution; Article 20 of the Brazilian Constitution and article 181 of the Nicaraguan Constitution. See Carbonell, Miguel, "La Constitucionalización de los derechos indígenas en América Latina: Una Aproximación teórica (The Constitutionalization of indigenous rights in Latin America: A Theoretical Approach)", In

regulatory and social tensions; one of which is the existing tension between the rights of the individual and the collective rights of the community; this conflict originated with a difficulty in establishing the subject or holder of the cultural rights, now recognized by the General Constitution. The jurisdiction, therefore, has the important function of interpretation, since it must determine if the subject or holder of the cultural rights is the individual, the community or the indigenous peoples. Along with this tension there are others of equal importance: the harmonization of national right and indigenous uses and customs and between the autonomy rights and the social rights recognized in the general constitutional regime.

It is necessary to clarify that the Mexican legal system has deviated in its attempt to reduce the identity of its indigenous groups and communities down to the characteristics of their uses, customs and genuine way of life;[121] with it, the Mexican lawmaker has intended to eliminate a false antinomy that had been upheld when two different cultures interacted. This antinomy assures that the only way to preserve the identity of an ethnic group or community is by conserving the characteristics that distinguish them as being "peculiar"; otherwise, and here lies the antinomy, the identity of the group or community would be jeopardized. This antinomy does no more than fatally sustain a false dilemma: either to conserve the minority cultures in a state of ethnographic curiosity or to attempt to promote their progress against their identity.[122] The respect of cultural identity does not reside in the preservation of their distinguishing points, rather in a strengthening of their capacity for decision and change. Finally, the Mexican legislation intends to clearly differentiate between a "culture" and the specific ways in which life and ideological systems develop within a culture.[123]

the *Boletín Mexicano de Derecho Comparado* (*Gazette of Mexican Comparative Law*), 108, New Series, Year XXXVI, Number 108 September-December 2003, p. 844; Valades, Diego, "Los Derecho Indígenas y la Renovación Constitucional en México (Indigenous Rights and Mexican Constitutional Amendment)", in *Constitución y derechos indígenas* (*Constitution and indigenous rights*), González Galván, Jorge Alberto (coord.), Legal Doctrine Series, Num. 92. UNAM, Instituto de Investigaciones Jurídicas, 2002, p. 16.

[121] See Villoro, Luis, "Sobre relativismo cultural y universalismo ético en torno a ideas de Ernesto Garzón Valdés (On cultural relativism and ethical universalism based around the ideas of Ernesto Garzón Valdés)", en *Derechos Sociales y derechos de minorías* (*Social Rights and Minorities*) in Carbonell, Miguel *et al*. (comps.), Serie Doctrina Jurídica (Legal Doctrine Serie), Núm. 28, UNAM, Instituto de Investigaciones Jurídicas (Institute of Legal Research), 2002, p. 179.

[122] See Villoro, Luis, *Ibidem*, p. 180.

[123] *Ibidem*, p. 178.

4. *Jurisdictional Activity*

The first indications of the interpretation of the new constitutional text by the Supreme Court can be identified in some recent resolutions.[124] The Supreme Court maintains that the State legislative bodies can extend indigenous cultural rights and their institutions which reflect their own characteristics in order to better convey the situations and aspirations of the indigenous people themselves who live in their territories. The General Constitution only provides minimum cultural rights.[125] The States are obliged to legally regulate the acknowledgment of indigenous populations and communities; they must nevertheless abide by the definitions and general criteria established on the subject in the General Constitution, which can be summarized as follows: the legal structure of the characteristics of free determination and autonomy best expresses the situations and aspirations of the indigenous people in each State; the basic principle of unity and national indivisibility and that autonomy is exercised within the constitutional framework. The Supreme Court adds that the cultural rights which are established, as much in favor of the indigenous populations and communities as they are for the indigenous individual, should be considered as minimum security by the States in the regulation and legal organization that fulfils the constitutions themselves and the respective laws.

One of the leading consequences that clearly results is; cultural rights in favor of indigenous people, which may be granted by the States prior to the enactment of constitutional reform[126] can not be considered to be limited by the new recognized cultural rights, unless the former were contrary to the basic constitutional principle of unity and national indivisibility.[127]

An epitome of the constitutional amendment coming into force has been that the indigenous people are now able to employ their native language in the court room, with the judge being obliged to communicate via a translator, rather then vice versa, as had been the case previously.

[124] It was to be expected that in electoral matters, resolutions of the jurisdiction were more abundant, especially with regards to uses and customs.

[125] See Novena época, Instancia: Segunda Sala, Fuente (Ninth Edition. Instance: Second Bench. Source), Semanario Judicial de la Federación y su Gaceta (Weekly Judicial Magazine of the Federal government and it's Newspaper), Tomo (Volume): XVI, November 2002 Tesis (Thesis): 2ª CXL/2002, p. 446, Materia: Constitucional, Tesis aislada. (Subject: Constitutional, Thesis isolated).

[126] The Constitutional amendment came into force on 15 August, 2001.

[127] Amparo en revisión 123/2002. Comunidad indígena de Zirahuén, Municipio de Salvador Escalante, Michoacán.'Amparo' in revision 123/2002. (Indigenous community of Zirahuén, Salvador Escalante county, Michoacán State).

Finally it is worth mentioning that in 2006 the first constitutional protection resolution "amparo" (habeas corpus injunction) to be promoted in an indigenous language, was granted.[128]

On the American continent, the Inter-American Civil Rights Court has issued several resolutions reaffirming indigenous cultural rights.[129] The Inter-American Civil Rights Court resolved[130] that the international instruments concerning the life, culture and indigenous rights, convey an explicit recognition of the indigenous legal institutions; each people in accordance with their culture, interests, aspirations, customs, characteristics and beliefs can establish a true version of the use and enjoyment of the goods. The relevance of this Court precedent is the recognition of community rights and the establishment of an "intimate and indissoluble" link between the rights of different natures, individual and collective, whose relevance depends on the positive guidance of individuals who form part of the indigenous ethnic groups.[131] The Inter-American Civil Rights Court upheld the existence of a convergence of civil, economic, social and cultural rights.

The Inter-American Civil Rights Court[132] also determined that the legitimacy of the possession of rights over traditionally occupied territory is totally independent from any class of evidentiary document that common legislation can provide; the Court recognized the sui generis nature of the link that the members of the community have with the territory that belongs to them and the intangibility of their community culture where it is recognized that members of a group are entitled to a cultural identity.[133]

5. *The Deficiencies*

Among many other deficiencies of the Mexican legislation on the cultural heritage, one can mention the following:

[128] Segundo Tribunal Unitario del XIII Circuito (Second United Court of the XIII Circuit), The ‚amparo' was written up in the chinanteca language.

[129] See García Ramírez, Sergio, "Los Indígenas en la Jurisprudencia de la Corte Interamericana de Derechos Humanos (The indigenous in the jurisprudence of the Inter-American Court of Human Rights)", en *Migración; pueblos indígenas y afro americanos* (*Migration; Indigenous peoples and African Americans*), XV Jornadas Lascasianas Internacionales, Ordoñez Cifuentes, José Emilio (coord.), Serie Doctrina Jurídica (Legal Doctrine Serie), Núm. 389, UNAM, Instituto de Investigaciones Jurídicas (Institute of Legal Research), 2007, p. 35.

[130] See Mayagama Community (Sumo) Awas Tingni Case.

[131] See García Ramírez, Sergio, *op. cit.*, p 37.

[132] See Moiwana community case; see also theYakye Axa community case and the Yatama case.

[133] See García Ramírez, Sergio. p 39.

There are currently 132 museums in the country of which the federal government takes charge, which do not include the Museums of Universities, States and Counties. Of these 132 museums, 17 museums are located in Mexico City and come under INBA. The remaining 105 museums are under the control of the INAH. Within these 105 museums, 5 museums are national (named after the legal instrument who created them, or due to their history; the importance of their collections and the theme of their heritage); 2 museums are metropolitan (located in Mexico City), 22 museums are regional (located in the States Capitals, covering archaeological, historic or artistic aspects of the State where they are located) 44 museums are local (centered around a theme or particular source), 29 museums are onsite (exhibiting collections of goods from the site) and 3 museums are community (where collections are exhibited of ecological, historic and artistic themes from the heritage that is protected by the communities themselves).[134]

Unfortunately there is no museum legislation regulating the intrinsic aspects such as policies of fund acquisitions, general methodology for cataloguing pieces, the need to train personnel working in museums, the adaptation of monumental buildings in museums, and many more. The Law of 1972 fails to make any reference; the only legislation currently in effect is dominated by a concept whose content is too general and far from satisfies the needs of Mexican museums.

The cultural bibliography, generated by humanities, anthropology and sociology over the last few decades almost exclusively concerned itself with identities, historical heritage and the national State. However, at the onset of the XXIst century, one would have to incorporate new elements: cultural processes are examined in relation to investments, art markets and consumption. The creativity of artists and writers, or la raison d'être of the museums, media and other institutions, are analyzed depending on international exchanges and globalization.[135] In Mexico, public policies are required to adequately protect the copyright, promotion and exchange of goods and messages and, of course, to control the oligopolistic trends in the radio and television industry apparent in the Mexican market. The Mexican society must reaffirm its inclusive nature and adopt governing frameworks and technical solutions that respond to the needs of our society, and try to seek a difficult balance which opposes simple lucrative marketing.

[134] See Becerril Miró, José Ernesto,.*El derecho del Patrimonio Histórico Artístico en México* (*The Law of Mexican Historical Artistic Heritage*), México, Porrúa, 2003, México, p. 238.

[135] See Garcia Canclini, Néstor and Piedras Feria, Ernesto, *Las industrias culturales y el desarrollo* (*Cultural industries and their development*)México, Siglo XXI Editores, 2006, p. 9.

The cultural industries must not be organized exclusively as business, but as a service. It is symptomatic that in Mexico they are starting to conduct primary studies on the economic value of cultural production.[136]

It is safe to say that the Mexican Museums foster the study and diffusion of the Mexican Cultural Heritage. However it should be pointed out that the great centralization of the cultural public policy mainly concerning archeological monuments, sustains a disrespect of communities as seen in the case of Tlaloc, a rain god, who played an animist role in a Mexican community. His monolith was forcibly taken by the federal government for adornment purposes at the entrance of the National Museum of Anthropology and History, in Mexico City.

VI. Conclusions

It has been confirmed[137] that there is a consistency in cultural clusters that originate from religion and its colonial past, with a marked relevance in the Latin America region. But it is essential to contrast them with other facts that exist in the international field in order to stress other cultural references. One of the features that tends to be overlooked is the consequence of the communist dominion that existed for a large portion of the XXth century and governed a third of the worldwide population. Cuba, on the American continent is still one of its remaining traces. Communism left a clear imprint of cultural values on those who lived under this system. One could mention, for instance, the People's Republic of China that, although located in the Confucian cultural zone, still holds strong elements from the Communist regime. In contrast to countries in our Latin American region, the most secular countries worldwide are Japan, China, Germany, Sweden and Norway. This secularization can be attributed to the relatively secular-bureaucratic Confucian tradition; the secularizing impact of communism or the secularizing impact of affluent post-industrial societies when accompanied by an advanced welfare national state.[138] This warrants accuracy in our region: although there is an actual abandonment of the churches, these values persist as part of the national cultural heritage in our region, and

[136] See Piedras, Ernesto, *¿Cuánto vale la cultura? Contribución económica de las industrias protegidas por el derecho de autor en México* (*What is culture worth? Economic contribution of industries protected by the author's right in Mexico*), México, CONACULTA, CANIEM. SOGEM y SACM, 2004.

[137] See Inglehart, Ronald *et al.*, *Human Beliefs and Values, a cross-cultural sourcebook based on the 1999-2002 values survey*, México, Siglo XXI Editores, 2004, p. 15.

[138] *Ibidem*, p. 16.

not through the direct influence of the religious institutions. The social economic infrastructure has undoubtedly had a great impact on human values, but today, the cultural factors undertake a paramount importance in shaping the societal level characteristics of our societies.

Mexico belongs to the Latin American environment, with a strong nationalist component and in the realm of the Catholic religion traditions. This rationalizes its history and cultural codes.

Cultural policy must be placed in a context where cultural heritage has as a fundamental objective, not only the rescuing of "authentic" heritage of a society, but also those that are culturally significant. Both the heritage and the processes involved in its rescue have the same relevance, since the latter represent a means of understanding and living in the world, and life, in our own social groups. The research, restoration and promotion of cultural heritage is not aimed at pursuing its authenticity or restoring it, but at reconstructing historic plausibility. The heritage policy must try to make a relation between goods, trades and the uses and customs which are understandable in order for them to clarify what they mean to those of us who today witness, remember and call them up.[139]

[139] See García Canclini, Néstor, "El patrimonio cultural de México y la construcción imaginaria de lo nacional (Mexican National Cultural Heritage and the imaginary construction of the national)", In the collective work *Patrimonio Cultural Mexicano* (*Mexican National Heritage*), in Enrique Flores Cano (coord.), México, Consejo Nacional para la Cultura y las Artes (National Agency of Culture and Arts), Fondo de Cultura Económica, 1997, p. 85.