

# The Legal Foundations of Religious Cultural Heritage Protection

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**Abstract:** It is common knowledge that the process of defining and protecting certain religious elements as invaluable heritage assets, is—more often than not—a complex one. In fact, it is exactly this, rather intricate, process that lends religious cultural heritage its powerful legal dimension, since the decision as to *what* and *how* is deemed worthy of protection and preservation is primarily made by Law. In this light, the present article will briefly examine the legal foundations for the protection of religious cultural heritage at the international level, in accordance with the principle of freedom of religion and the right to culture. Apart from the examination of various pertinent provisions, norms and regulations relating to the protection of religious heritage, crucial cultural themes will be also presented, utilizing a broader interdisciplinary approach of the subject matter. Within this framework, the model of *res mixtae* is introduced, in view of providing a better understanding of the numerous aspects of religious cultural heritage.

**Keywords:** religious cultural heritage; international law; legislative protection; freedom of religion; cultural rights

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## 1. Introduction

It is obvious that, before laying the legal foundations of the protection of *religious* cultural heritage (or any cultural heritage for that matter), one must first identify the very elements of this heritage, in order to define the scope of protection. At the same time, providing a coherent definition for such a multidisciplinary subject matter, and especially a definition claiming universal applicability, is in fact an arduous task; the range of possible elements—both tangible and intangible—that the notion of religious cultural heritage might encompass, is rather extensive: it might include complexes of buildings, sites of archaeological or historical significance, ancient works of art, ethnographic items, landscapes and topographical features, natural features endowed with special cultural significance, ritual items and ceremonial traditions. Thus, as it has been eloquently described by (Petkoff 2014, p. 58):

[...] developing a taxonomy of sacred places is virtually impossible in the same way that creating an exhaustive list of types of religion or beliefs or religious symbols is also impossible [...]

Besides, the identification of this heritage is always based on an active—and, at once, varying and changeable—choice as to which elements of this broader ‘religious culture’ are deemed worthy of preservation as an ‘inheritance’ for future generations. Therefore, the significance of religious cultural heritage as symbolic of the culture, and those aspects of it, which a society (or a certain religious group) views as valuable, are unquestionable. In fact, it is this very role of religious cultural heritage that lends it its powerful political dimension, since the decision as to what and how is deemed worthy of protection and preservation is generally made by State authorities at the national level and by intergovernmental organizations at a broader international level (Blake 2000). Likewise, one of the main problems associated with cultural heritage protection is the subjective definition adopted by states ‘particularly when influenced by political motivations’ (Hammer 2017, p. 86), on the basis of a

state-centric approach, also in accordance with national legislative (even constitutional) provisions, locally-driven administrative actions and regional fiscal projects (Fornerod 2015). Within this context, the regulation of religious cultural patrimony, along with its specific elements, remains *prima facie* an issue of the associated normative framework imposed and monitored, in each and every case, by the respective sovereign states.

The fact remains, however, that the legal protection of religious spaces and sites is subject to a number of inadequacies. The latter could be distinguished, in broad lines, between those that are *intrinsic* to the various protection regimes (such as the lack of a univocal definition and/or interpretation of religious heritage both at the national and international levels, the marginalization—or even exclusion—of various cultural aspects belonging to religious minorities, the corresponding lack of consensus about which religious spaces merit protection, the frequent struggle between state sovereignty and attention to fundamental human rights) and those defects that correlate to *practical* considerations in enforcement (relating, primarily, to complex diplomatic relations, political discourse over accumulated costs or the presence of other priorities that may override the protection of religious spaces). Besides, at the international level, the ineffectiveness of judicial bodies charged with protecting cultural property is evident in all these cases where “the effort is usually *ex post facto* and thus too late to actually preserve the destroyed cultural heritage” (Hammer 2017, p. 74).

Notwithstanding the above, and especially taking into consideration the fact that effective heritage conservation programs do exist in almost all countries, a substantial question is raised thereof: why—especially from a legal point of view—should the states (or any international political entity or institution that the latter form jointly) care about the protection of ‘sacred’ cultural elements, such as ‘religious spaces’? Is there a legal basis for such (national and international) political structures to be engaged with the protection of ‘sacred’ spaces and places, even in our age of ‘secular’ political institutions? Is there an obligation by law, for example, to restore and save a crumbling ancient chapel or a medieval synagogue, even though it is a religious edifice of the past? Before addressing these questions, it would be helpful to provide a brief overview of the various pertinent provisions, norms and regulations at the international level, and, subsequently, explore the existing typology of national legislative patterns relating to the protection of religious cultural heritage, particularly in relation to the religious character of its ‘spatial’ dimension.

## 2. The International Legal Framework

### 2.1. Binding Legal Instruments

To begin with, when we speak of ‘religious cultural heritage’, almost always, we express something wider than just mere ‘property’. Indeed, the concept of ‘cultural property’ (which was first introduced in 1954 within the context of the celebrated *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*) is construed as a more concrete legal term, so to speak; in other words, it refers, mainly, to movable or immovable things, such as sites, structures or objects, whereas the concept of ‘heritage’, is being brought up as a more abstract notion, in a way that it also encompasses non-material elements, such as oral traditions and rituals, or even sacred landscapes. In this light, it has been argued that the concept of heritage under international law, if compared to that of property, is broader in scope, as it expresses a more holistic form of, tangible and intangible, ‘inheritance to be kept in safekeeping and handed down to future generations’ (Blake 2000, p. 83). Nevertheless, at the international level, both notions are rather equivalent in the eyes of the law, not only because they have been both frequently used, under various criteria, in a great array of legal instruments and international agreements concerning culture, but also because they are both incomplete notions, in the sense that, in order to define, in each and every case, their true content, one must rely upon other non-legal disciplines, such as history, art, archaeology, ethnography, etc. (Frigo 2004, p. 376).

In any case, despite the fact that the international system has often failed to protect or preserve cultural heritage, particularly in times of warfare or civil strife,<sup>1</sup> the 20th century gave birth, amidst the

<sup>1</sup> See for example: (Munawar 2017).

natural and cultural ruins left by several devastative armed conflicts, to ecumenical agreements and international treaties intended to defend against human impulses to destroy or expropriate places of worship and religious artefacts (Schildgen 2008, p. 174). Particularly after the atrocities of the Second World War, the *Fourth Geneva Convention* (1949) reinforced the protection of ‘places of worship which constitute the cultural or spiritual heritage of peoples’,<sup>2</sup> while the great bulk of the subsequent statutes of the United Nations and the UNESCO, as well as the Council of Europe, such as the provisions of the *Hague Convention for the Protection of Cultural Property* (1954), the *World Heritage Convention* (1972), the *Convention for the Protection of the Architectural Heritage of Europe* (1985), the *European Convention on the Protection of the Archaeological Heritage* (1969; revised in 1992), the *European Landscape Convention* (2000) and the *European Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005), constitute major steps toward the international expansion of religious patrimony, as a revered common heritage that surpasses national borders.

Within this vast network of international legal instruments, the ‘spatial’ notion of religious cultural heritage, also following the broad definitions provided by the *World Heritage Convention* (1972), may refer primarily to: (i) ‘religious monuments’, i.e. architectural works, works of monumental sculpture and painting, sacred elements or structures of an archaeological nature, and combinations of such features, which are of outstanding universal value from the point of view of history, art or science, (ii) ‘groups of religious buildings’, i.e. groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the religious landscape, are of outstanding universal value from the point of view of history, art or science, as well as (iii) ‘religious sites’, i.e. works of man or the combined works of nature and of man, and sacred areas, including archaeological sites, which are of outstanding universal value from historical, aesthetic, ethnological or anthropological points of view.<sup>3</sup>

Of course, the aforementioned typology is by no means exclusive or complete, nor is the relevant *World Heritage List* of protected (religious) monuments and/or sites that the international community has designated as cultural properties of exceptional importance, after having fulfilled the requirements specified by the aforementioned *Convention*. Besides, a similar set of criteria relating to the protection of elements pertaining to the ‘spatial’ aspect of religious cultural heritage, can be also traced in various provisions of international cultural heritage law, such as the first Article of the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954); according to the latter, the term ‘cultural property’ shall cover, *inter alia*, irrespective of origin or ownership, immovable religious property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, as well as archaeological sites and groups of buildings which, as a whole, are of historical or artistic interest, whether *religious* or *secular*.<sup>4</sup> It should be noted, that, as it has been clarified by the *International Criminal Tribunal for the Former Yugoslavia*, despite the various differences in terminology,

[...] the basic idea is the same, that the cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.<sup>5</sup>

In the same vein, the *International Criminal Court*, following the definitions provided by the Constitution of the United Nations Educational, Scientific and Cultural Organization,<sup>6</sup> has emphasized, in the infamous case of *Ahmad Al Faqi Al Mahdi*,<sup>7</sup> that the designation of religious buildings not only

<sup>2</sup> (United Nations 1979, p. 27).

<sup>3</sup> (UNESCO 2007, p. 136).

<sup>4</sup> (UNESCO 2007, pp. 44–5).

<sup>5</sup> *ICTY Prosecutor v. Kordic & Cerkez*, Case No IT-95-14/2-T (Appeals Judgment of 17 December 2004) § 90. Available online: [http://www.icty.org/x/cases/kordic\\_cerkez/acjug/en/cer-aj041217e.pdf](http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf) (accessed on 24 March 2019).

<sup>6</sup> Full Text. Available online: [http://portal.unesco.org/en/ev.php-URL\\_ID=15244&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed on 24 March 2019).

<sup>7</sup> Ahmad Al Faqi Al Mahdi was found guilty (in 2016) by the ICC and sentenced to 9 years, as a co-perpetrator, of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to

reflects their special importance to international cultural heritage, but also corresponds to:

‘the wide diffusion of culture, and the education of humanity for justice and liberty and peace [which] are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern’.<sup>8</sup>

## 2.2. Quasi-Legal Instruments

It is true that, in spite of the current normative international framework and relevant case-law, there is an actual absence of enforcement mechanisms, capable of ensuring compliance with the relevant international rules regarding the protection of religious heritage, and especially religious monuments and sites (Hammer 2017). At the same time, as it has been rightly pointed out (Petkoff 2014, p. 71), it is even harder to develop ‘a universal taxonomy’ of legal status (and, therefore, a common legal protection network) regarding places of religious interest. Nevertheless, the existing international legal instruments, although often unsuccessful at safeguarding (or even preserving) important sacred places as cultural heritage assets, have contributed to the overall formation of the concept that the international community is entitled (and in many cases bears a corresponding responsibility) to establish legal canons for the protection of (religious) cultural property *in globo*. Moreover, the same rules have facilitated the enactment of various codes of behavior (therefore generating an important corpus of standard-setting documents, including charters and recommendations), as well as the creation of independent and highly specialized statutory organizations or significant initiatives (such as the *Initiative on Heritage of Religious Interest* under the aegis of UNESCO’s World Heritage Center), all of which are active in the protection of movable and immovable religious cultural property throughout the world.

In fact, at the international level, various working documents exist, providing guidance on the management of (cultural and natural) heritage of religious interest: for instance, a document (issued in 2016), which has been drafted under the auspices of the aforementioned UNESCO’s *Initiative on Heritage of Religious Interest*, seeks to indicate heritage assets of outstanding universal value, which ‘cannot be reduced to [their] material expressions, without reference to [their] particular ontology and associated sacred value’;<sup>9</sup> the same issues have been recently discussed within the ICOMOS *Scientific Committee for Places of Religion and Ritual* (PRERICO), which has been formally established to research, and provide specialized interest in Monuments and Sites of Religions and Ritual, including places of world religions and local traditions and beliefs, religious heritage and sacred places including their intangible significance. Moreover, similar wording can be also found in other soft-law documents, such as the *Principles and Guidelines for the Management of Sacred Natural Sites Located in Legally Recognised Protected Areas*, issued in 2008 by the International Union for Conservation of Nature, or the *Universal Code on Holy Sites*,<sup>10</sup> which, since its issuance in 2009, has been endorsed by various interfaith networks and religious communities. According to the provisions of the said *Code*:

Where necessary to ensure the preservation of a holy site, the relevant authorities should consider establishing a protective zone around it, prohibiting or restricting construction or development, without prejudice to property rights. If a holy site is subjected to certain restrictions due to its designation as a national heritage site, these should not be such as to unduly limit its continued *functioning* as a holy site under these restrictions.<sup>11</sup>

It should be born in mind, that the aforementioned provisions correspond to a well-established

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religion, including nine mausoleums and one mosque in Timbuktu, Mali, in June and July 2012.

<sup>8</sup> ICC. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15 (Trial Chamber VIII, Judgment of 27 September 2016) § 46 (available online: <https://www.icc-cpi.int/mali/al-mahdi> (accessed on 24 March 2019)).

<sup>9</sup> *Final document of conclusions and recommendations: Thematic Expert Consultation meeting on sustainable management of the World Heritage properties of religious interest, focused on Mediterranean and South-Eastern Europe* (2016), UNESCO Headquarters, 16–18 February 2016, p. 4.

<sup>10</sup> See the Full Text. Available online: <https://www.sfcg.org/wp-content/uploads/2014/06/ucchs.pdf> (accessed on 24 March 2019).

<sup>11</sup> *Universal Code on Holy Sites*, Article 2.

perspective of the German jurisprudence, that acknowledges an approach of ‘holistic protection’, which combines the potential liturgical function (*liturgische Funktion*) of a certain religious space, with its parallel public function (*öffentliche Funktion*) as a protected cultural asset (Heckel 1968, p. 242–3). According to this rationale, the authorities efficiently protect these distinct elements of national heritage, insofar as they respect the religious autonomy and collective freedom of the involved faith communities.

In fact, the emerging plethora of soft-law guidelines highlights exactly the above consensus ‘regarding the importance of listening to religious groups and their needs concerning sacred space’ (Hammer 2017, p. 96). In this way, the involved actors and responsible stakeholders preserve the true nature of religious heritage, by protecting its spiritual significance and unique value, and, thus, efficiently safeguarding its overall authenticity and integrity. It is self-evident that the states’ commitment to maintaining the element of functionality is crucial, especially in cases where the respective heritage assets retain an active liturgical function; the latter corresponds also to one of the basic parameters of cultural heritage protection at the international level, which is the (widest possible) promotion of this heritage to the public, on a case-by-case basis (Fornerod 2015).

Besides, even in the case of ancient sacred sites that have been stripped of their original function and are now being adapted to new—whether religious or secular—uses (cf. (Davies 1968) (Coomans 2012)), there are already several quasi-legal sources available at the international level, setting important guidelines, such as the ones established by the *Venice Charter for the Conservation and Restoration of Monuments and Sites* (that was adopted in 1965 by ICOMOS),<sup>12</sup> or the *Verona Charter on the Use of Ancient Places of Performance* (as adopted at the International Colloquy of Verona in August 1997). It is noteworthy that one of the *Verona Charter’s* main objectives is ‘to infuse ancient sites, where circumstances permit, once more with their full role of places of artistic creation, shared enjoyment and emotion’ (Ballester 2001, p. 331).

### 3. Patterns of National Protection

It should be stressed, that pursuant to the aforementioned *World Heritage Convention*, ‘it is for each State Party to this Convention to identify and delineate the different properties situated on its territory’ (Art. 3) and to ensure that ‘effective and active measures are taken for the protection, conservation and presentation’ of the religious cultural elements situated on its territory (Art. 5). As it is self-evident, the cultural and linguistic diversity existing across the globe, the individual variations of the national legal systems, the contrasting status of church-state relations,<sup>13</sup> as well as the ephemeral nature of legislation, make it extremely difficult to provide a definitive account of the pertinent legislative patterns. Nevertheless, after surveying the plethora of national legislations on cultural heritage, it could be argued that, worldwide, there are three main legislative patterns of religious cultural heritage protection, especially in relation to the ‘religious character’ (Tsivolas 2014, p. 39 f.) of its spatial dimension:

- (i) the religious character may be acknowledged as an additional, yet unique, attribute of specific places or objects, that fall within the ambit of general legal provisions (*lex generalis*).<sup>14</sup> In this rationale, sacred places constitute, in essence, the subject of general civil law protection, as elements of cultural importance. For example, according to the provisions of the *National Heritage Resources Act* of South Africa (issued in 1999), a certain place may be considered part of the national patrimony, if it has cultural significance or other special values because of ‘its strong or special association with a

<sup>12</sup> The above notion of ‘church’ refers to any form of institutional church or organized religion.

<sup>13</sup> See the Text of the *Charter*. Available online: [http://www.international.icomos.org/charters/venice\\_e.pdf](http://www.international.icomos.org/charters/venice_e.pdf) (accessed on 24 March 2019).

<sup>14</sup> Of course, at the same time, there is an abundance of national statutes regarding the protection of cultural heritage that do not even mention the *religious* attribute as a separate or unique characteristic of the protected patrimony; see for example the relevant provisions of the *Law of the People’s Republic of China on Protection of Cultural Relics* (revised several times since its initial issuance in 1982) in relation to the protection of ancient tombs or temples on the sole basis of their ‘historical, artistic or scientific value’ (Article 2 § 1), or the *Law on Cultural Heritage* adopted by the National Assembly of the Socialist Republic of Vietnam (in 2001).

particular community or cultural group for [...] spiritual reasons' (Art. 3 § 3).<sup>15</sup> Similar provisions may be found in Swaziland (*The National Trust Commission Act*, Parts IV-V), in Togo (*Loi No 90-24 relative à la protection du patrimoine culturel national*, Art. 2), in Madagascar (*Ordonnance n°82-029 relative à la protection, la sauvegarde et la conservation du patrimoine national*, Art. 1) or in Nigeria (*Loi n° 97-002 du 30 juin 1997 relative à la protection, la conservation et la mise en valeur du patrimoine culturel national*, Art. 3 § 2). In Europe, the same legislative pattern may be found, for instance, in Portugal (Act No. 107/2001, Art. 4), in Poland (Act of July 23, 2003, Art. 6 § 3), in the Netherlands (*Monumentenwet*, Art. 1 e), or in Sweden (Heritage Conservation Act, Chapter 4). Similar provisions have been incorporated across the individual German States (*Länder*), in which the legal protection of sacred heritage entails the respect of both the spiritual and the social function of its various cultural aspects (Tsivolas 2014, pp. 142–48). In Austria, the protection of religious heritage assets balances on the principle of 'including neutrality' (Kalb et al. 2003, pp. 42–43), and the need for co-operation between the State and the legally recognized owners of major cultural monuments, namely the recognized churches and religious societies (Wieshaider 2002, p. 135). In Greece, in view of the relevant provisions of Act No. 3028/2002 'on the protection of antiquities and cultural heritage in general', any intervention in the vicinity of a religious monument must be compatible with its unique sacred character. This is, at its best, exemplified by the relevant case-law, according to which the Court has protected the 'sacred character' and 'aesthetic value' of the Metropolitan Cathedral of Athens against the perilous expansion of subway construction works,<sup>16</sup> as well as the historical significance of the Patmian Monastery of Saint John the Theologian against incompatible private constructions on the 'sacred island' of Patmos.<sup>17</sup>

- (ii) the religious character of certain elements may justify the application of special rules of protection, particularly in cases of sites or places marked with an exceptional religious gravity and unique historical importance (*lex specialis*). For instance, according to the *Protection of Holy Places Law* (passed in 1967), Jerusalem's landmarks and monuments: 'shall be protected from desecration and any other violation and from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places'.<sup>18</sup> Similarly in Greece, the Meteora monastic complex (where a network of cliff-top Byzantine monasteries has existed for centuries) has been protected since 1995 as an integrated 'sacred area', pursuant to a special legislative framework,<sup>19</sup> also in light of the Constitutional provisions of Art. 13 (religious freedom) and Art. 24 (protection of the cultural environment). Likewise, the peninsula of Mount Athos, which is, in accordance with its ancient privileged status, 'a self-governed part of the Greek State'<sup>20</sup> and specifically protected according to its own Constitutional Charter (Konidaris 2012, p. 192 f.; Tsivolas 2013, p. 176 f.). Similar special attention has been paid also to other religious sites, such as the sacred mountain of Croagh Patrick (St Patrick) in Ireland,<sup>21</sup> and the Isle of Iona on the western coast of Scotland, or other major pilgrimage sites, including Lourdes in the Pyrenees and Fatima in Portugal (Tsivolas 2014, p. 75). Moreover, in the same scheme of *lex specialis*, one could also add the various *Concordats* that have been signed, over the years, between the various States and the Catholic Church, regarding the maintenance and preservation of specific historical places of worship. For instance, according to the Agreement of

<sup>15</sup> Full Text. Available online: [https://en.unesco.org/sites/default/files/senghor1\\_droit%26patr2002\\_eorof\\_freorof\\_fretno.pdf](https://en.unesco.org/sites/default/files/senghor1_droit%26patr2002_eorof_freorof_fretno.pdf) (accessed on 13 April 2019).

<sup>16</sup> Council of State, decision n° 2073/1997.

<sup>17</sup> Council of State, decision n° 457/2010; see also Act No. 1155/1981 'Recognition of Patmos as a Sacred Island and other ecclesiastical issues'.

<sup>18</sup> *Protection of the Holy Places Law*, 21 L.S.I. 76 (1966–67). Available online: <https://mfa.gov.il/mfa/mfa-archive/1960-1969/pages/protection%20of%20holy%20places%20law-%201967-.aspx> (accessed on 11 April 2019).

<sup>19</sup> Act No. 2351/1995, 'Recognition of the Meteora area as a sacred site'.

<sup>20</sup> Greek Constitution, Art. 105 §1.

<sup>21</sup> See *Tara Prospecting Ltd v. Minister for Energy* [1993] *Irish Law Reports Monthly*, p. 771.

1984 between the Italian Republic and the Holy See (*Accordo di Villa Madama*),<sup>22</sup> it has been acknowledged that ‘The Holy See shall retain the power to dispose of the Christian catacombs that exist underground at Rome and other parts of the Italian territory and [...] subject to the laws of the State [...] shall be at liberty to proceed with any necessary excavation and removal of sacred relics’.<sup>23</sup> Similar individual agreements between the religious and the local public authorities have been also established in Spain (Tsivolas 2014, pp. 159–63). It is self-evident that in many cases the special protection (and, at the same time, the corresponding subsidies) afforded to certain sites or places is interwoven with their intangible values and traditions: see, for example, the provisions of Law 891/2004 regarding the Holy Week processions and the Popayan Religious Musical Festival in Colombia<sup>24</sup> or the provisions of Law 1812/2016 ‘by means of which the celebration of Holy Week of the Parroquia Santa Gertrudis La Magna de Envigado, Antioquia is declared as Intangible Cultural Heritage of the Nation’.<sup>25</sup>

- (iii) the religious character may justify an exclusion from the general application of the pertinent legal provisions (without prejudice, of course, to mandatory provisions of national laws or *jus cogens*, e.g., the legislation on cultural heritage or environmental protection), because of its uniqueness, and, primarily, its direct relation to worship (*privilegium*). In Great Britain, for example, as far as listed buildings are concerned, official exemptions from State control and relevant restrictions are being provided (under specific conditions) for edifices in current use for worship (Mynors 2006). Whereas, in France, by virtue of the relevant provisions of the Act of 1905,<sup>26</sup> as well as of the Act of 1907 concerning the public exercise of religion,<sup>27</sup> the allocation (*affectation légale*) of the religious edifices that belong to the public domain (i.e., pre-1905 structures), guarantees their prime destination and perpetual function as places of worship. This legal ‘affectation’, which is ‘gratuite, exclusive et perpétuelle’ (Benelbaz 2011, p. 475), offers, through the allocation of the edifices to the public sphere, a solid legal basis for the effective protection against the possibility of insufficient maintenance or improper use and correlates, in practice, with both the cultural and the religious allocation (*affectation culturelle et cultuelle*) of the same religious structures (Fornerod 2013, p. 39 f., 155 f.). Within this framework, any organized visit to a legally assigned place of worship depends upon the prior authorization of the competent religious authority; this privilege functions, in essence, as a right of veto indented, primarily, to protect the sacred dimension of such listed edifices.<sup>28</sup> Similarly, in Quebec, the *Historic Sites and Monuments Act* has been adopted since 1922 (as it has been revised several times since), which is closer to the French legislative pattern, than to the Common Law and the listing system that governs the heritage in the United States, as well as in the other Canadian provinces (Noppen and Morisset 2012).

<sup>22</sup> The agreement was ratified by *Legge n. 121 del 25 marzo 1985*.

<sup>23</sup> 1985. *International Legal Materials*, 24: 1589.

<sup>24</sup> Ley 891 de 2004, ‘Por la cual se declara Patrimonio Cultural Nacional las Procesiones de Semana Santa y el Festival de Música Religiosa de Popayán, departamento del Cauca, se declara monumento Nacional un inmueble urbano, se hace un reconocimiento y se dictan otras disposiciones’; see also Decision No C-567/16 issued by the Constitutional Court of Colombia. Available online: <http://www.corteconstitucional.gov.co/RELATORIA/2016/C-567-16.htm> (accessed on 11 April 2019).

<sup>25</sup> Ley 1812 de 2016 ‘Por medio de la cual se declara Patrimonio Cultural Inmaterial de la Nación la celebración de la Semana Santa de la Parroquia Santa Gertrudis La Magna de Envigado, Antioquia, y se dictan otras disposiciones’; see also the recent Decision No C-034/19 issued by the Constitutional Court of Colombia. Available online: [http://www.corteconstitucional.gov.co/relatoria/2019/C-034-19.htm#\\_ftn66](http://www.corteconstitucional.gov.co/relatoria/2019/C-034-19.htm#_ftn66) (accessed on 11 April 2019).

<sup>26</sup> Loi du 9 décembre 1905 concernant la séparation des Églises et de l’État, Art. 13.

<sup>27</sup> Loi du 2 janvier 1907 concernant l’exercice public des cultes, Art. 5.

<sup>28</sup> See Council of State, *Abbé Chalumey*, 4 November 1994, No 135842; cf. Council of State, *Commune de Massat*, 25 August 2005, No 284307, where the relevant privilege was extended also to non-religious uses of listed places of worship. Specifically, in relation to non-religious uses of places of worship in France, see Art. 2124–31 of the *General Code of Public Property*.

#### 4. The Human Rights—Based Protection

Having discussed all the above, it should be noted that the right of each faith community to shape, regulate and administer its cultural property *sui iuris* (i.e., pursuant to its very own customs, beliefs and canonical traditions), may be limited by the secular (national and/or international) laws governing the maintenance and upkeep of the same property, as an integral part of a broader cultural patrimony. Indeed, the same religious objects and places of worship (that are being freely created and utilized under the human right to freedom of religion) may be subject to an organized system of State control, under the scheme of one of the aforementioned legislative patterns, and, at the same time, identified as elements of a wider cultural network that merit legal protection. Within this framework, the enjoyment of religious heritage corresponds also to a certain right of access, that includes the right to know, understand, enter, visit, as well as to participate in the identification, interpretation and development of this heritage irrespective of its denominational origin or affiliation. For instance, according to the *Principles Respecting the Holy Sites* (issued by the International Human Rights Law Institute):<sup>29</sup>

[...] The custodial faith communities, in addition to serving the needs of their community, shall take all necessary and reasonable steps to protect and preserve the physical and living spiritual integrity of the holy sites in the interests of humankind, and for the benefit of future generations [...] The custodial faith communities shall provide and grant access to “public” spaces within the holy sites not only to believers within their own traditions, but to all people of faith and others seeking enlightenment.<sup>30</sup>

Similarly, as the *European Court of Human Rights* has expressed in an *obiter dictum*:

[...] au vu des instruments internationaux et des dénominateurs communs des normes de droit international, fussent-elles non contraignantes [...], la Cour est prête à considérer qu’il existe une communauté de vue européenne et internationale sur la nécessité de protéger le droit d’accès à l’héritage culturel. Cependant, force est de constater que cette protection vise généralement les situations et des réglementations portant sur le droit des minorités de jouir librement de leur propre culture ainsi que sur le droit des peuples autochtones de conserver, contrôler et protéger leur héritage culturel.<sup>31</sup>

Of course, particularly in the case of *religious* cultural heritage assets, varying degrees of access and enjoyment should be recognized, taking into consideration the diverse interests of individual believers and the involved faith communities, depending on their relationship to their specific spiritual heritage, as well as the need to preserve spiritual integrity. In essence, there is always an overlay between the (national and international) interests regarding the protection of religious cultural heritage, the freedom of religion or belief, as well as the profound human need for artistic expression and creativity. The latter, which is being also protected under international law as a fundamental human right,<sup>32</sup> is, more than often,

<sup>29</sup> Full text available at: (Guinn 2006, pp. 191–95).

<sup>30</sup> (Guinn 2006, p. 194).

<sup>31</sup> ECHR *Zeynep Ahunbay et autres v. la Turquie* (Application No 6080/06, Decision issued in January 29, 2019) [the above excerpt could be freely translated as follows: [...] in view of the relevant international instruments and the common ground contained in the norms of international law, even if these were not binding [...], the Court is prepared to consider that there exists a shared European and international perception of the need to protect the *right of access to the cultural heritage*. However, that protection generally focussed on situations and regulations pertaining to the right of minorities to enjoy their own culture freely and the right of indigenous peoples to maintain, control and protect their cultural heritage]; cf. ECHR *Zeynep Ahunbay et autres v. la Turquie, l’Autriche et l’Allemagne* (Application No 6080/06 declared inadmissible against Austria and Germany).

<sup>32</sup> See, for example, Art. 27 of the *Universal Declaration of Human Rights*: ‘everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.’ Cultural rights are, therefore, inseparable from human rights, as recognized in Article 5 of the 2001 UNESCO



interwoven with the right to religious freedom, both in its individual and collective capacity. Indeed, the freedom of religious communities to designate sacred objects and sacred sites, such as religious buildings and places of worship, should be considered, first and foremost, as one of the basic aspects of religious liberty, stipulated specifically in (or, at least inferred from) almost all of the major constitutional texts throughout the world (e.g., for those within the European continent, see (Doe 2011)), in conjunction, of course, with the relevant provisions of international law concerning freedom of thought, conscience and religion, such as the *Universal Declaration on Human Rights* (1948), the *European Convention on Human Rights* (1953), or the *International Covenant on Civil and Political Rights* (1966). According to this perspective, religious pluralism may become a key aspect of autonomous communal orientation within cultural space (cf. (Donders 2002, p. 278)). However, as it has been noted by (Hammer 2017, p. 100):

While human rights might temper the realization of a group's assertion of cultural identity, reliance on the freedom of religion or belief as grounds for protecting a group's sacred space can enhance the desired protection to be accorded to cultural property and heritage of such groups [...]<sup>33</sup>

Collective freedom of religion, in particular, which could be construed as the freedom of each religious community to act autonomously within the public sphere, serves as the necessary foundation upon which any such community may construct its own cultural space. In fact, one of the positive aspects of religious freedom is the right of a religious group to establish and maintain places of worship (Kalb et al. 2003, p. 193 f.). More specifically, it has been argued (Villaroman 2012) that the normative content of this right entails the right to construct a place of worship and to make all necessary repairs, subject only to local planning regulations (cf. (Gabielli 1998, p. 44 f.)), the right to solicit and receive voluntary financial and other contributions for the purpose of building a place of worship (cf. (Lupu and Tuttle 2002)), the right of protection to places of worship against interference by the State or non-State stakeholders and the right against discrimination in applications to construct and/or maintain places of worship.<sup>34</sup> As the *Human Rights Committee* has commented:

The freedom to manifest religion or belief in worship [...] encompasses a broad range of acts [...] including the building of places of worship, the use of ritual formulae and objects, the display of symbols [...]<sup>35</sup>

The above collective right of religious communities to establish and access the infrastructure that is vital for their enjoyment of religious freedom, correlates, in many cases, to the State's commitment to protect the same monumental places or sites (e.g., temples, mosques, synagogues and churches) as landmarks of cultural and/or historical significance. In these cases, the heritage-sensitive approach should respect the dual nature of these sacred structures (Tsivolas 2017), in so far as the latter become spatial mediums for expressing religious beliefs and, at the same time, integral components of the historical and cultural identity of a certain community. In other words, the same structures perform a critical twofold cultural function: on the one hand, they constitute physical locations (*loci sacri*) where members of a faith community assemble in accordance with their core rites and rituals, anchored on specific religious tenets and doctrines, and, on the other hand, they serve as outstanding and expressive symbols within the public sphere. Indeed, as it has been observed by (Evans 2010, p. 291–92):

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*Declaration on Cultural Diversity*, and can be defined as the right of access to, participation in and enjoyment of culture. This includes *inter alia* the right of individuals and communities to know, understand, visit, make use of, maintain, exchange and develop cultural heritage, as well as to benefit from the cultural heritage of others.

<sup>33</sup> (UNESCO 2007, p. 708).

<sup>34</sup> See, for example, the case of *Manoussakis v. Greece*, Reports of Judgments and Decisions 1996-IV; cf. (Konidaris 2005).

<sup>35</sup> Human Rights Committee. CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), July 30, 1993 (CCPR/C/21/Rev.1/Add. 4 § 4).

One of the clearest manifestations of religion within a community is the presence of religious structures. Religious buildings are a symbolic presence in and of themselves and their distinctive architecture and adornment, as well as the activities which take place in and around them, again take on a symbolic meaning which is both ‘conceptual’ and ‘tangible’: the presence of a minaret or church tower dominating the skyline in a town or village is more than the mere display of a symbol but is a statement of a physical presence within the community, with the size and location of such buildings being similarly significant.

It should be noted that a similar set of versatile issues, also in view of the necessary balance that must be struck between the demands of the public interest and the necessary protection of fundamental religious and cultural rights, was thoroughly discussed in 2010, within the framework of an historic meeting that took place in Kiev (Ukraine) under the aegis of the *United Nations General Assembly*, involving the active participation of several religious authorities; there, for the first time in the history of the *World Heritage Convention*, a joint *Statement* was unanimously adopted, reaffirming that the sustainable management of religious heritage ‘should be the responsibility of all stakeholders concerned’, on the basis of a:

mutual understanding and acceptance of the World Heritage significance and specificity of each heritage place, and its associated spiritual and religious values.<sup>36</sup>

## 5. The Legal Status of *res mixtae*

As it has been already emphasized by (Eliade 1959, p. 12) in his seminal work on the nature of religion:

By manifesting the sacred, any object becomes something else, yet it continues to remain itself, for it continues to participate in its surrounding cosmic milieu. A sacred stone remains a stone [...] but for those to whom a stone reveals itself as sacred, its immediate reality is transmuted into a supernatural reality.

The aforementioned dichotomy (between the sacred and the profane),<sup>37</sup> which evokes an analogous bipolar distinction in relation to spatiality between the private and the public (Fornerod 2012), is an idea originally posited by Émile Durkheim, also in conjunction with his classical theory on ‘sacred things’, that is, things (or even whole structures) set apart and forbidden, whose function is to be radically different from the norm.<sup>38</sup> In the same vein, (Smith 1992, p. 106 f.) has clarified that things and spaces become ‘sacred’ because they are identified with the places where ritual is enacted. Indeed, the role of ritual (as an act of sacralisation) is crucial in creating meaningful places, as well as in marking out a sphere of difference and thus producing an ecosystem of religious topography (Knott 2015, p. 102 f.). Particularly in the case of religious monuments, as has been eloquently expressed by (Lefebvre 1991, p. 222):

A monumental work, like a musical one [...] has a *horizon of meaning*: a specific or indefinite multiplicity of meanings, a shifting hierarchy in which now one, now another meaning comes momentarily to the fore, by means of—and for the sake of—a particular action. The social and political operation of a monumental work traverses the various ‘systems’ and ‘subsystems’, or

<sup>36</sup> See the full text of the ‘*Kyiv Statement on the Protection of Religious Properties within the Framework of the World Heritage Convention*’ in: <http://whc.unesco.org/en/religious-sacred-heritage/>. Accessed on March 24, 2019; cf. *Quebec Declaration on the Preservation of the Spirit of Place*, adopted at the 16th General Assembly of ICOMOS in 2008, as well as the *Resolution 17GA 2011/35’Protection and enhancement of sacred heritage sites, buildings and landscapes’* adopted at the 17th General Assembly of ICOMOS (available online at: [whc.unesco.org](http://whc.unesco.org). Accessed on March 24, 2019).

<sup>37</sup> According to the Roman—and later Byzantine—law, things sacred, religious, and holy, were exempted from commerce, and held to be the property of no one: ‘Temples, churches, altarpieces, communion cups, and whatever was consecrated according to the forms prescribed by law, were held sacred, and could not be applied to profane uses’. (Mackenzie 1862, p. 163).

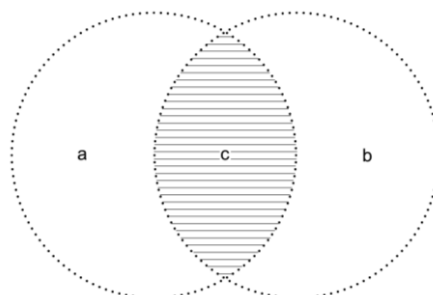
<sup>38</sup> (Durkheim 2001).

codes and subcodes, which constitute and found the society concerned. But it also surpasses such codes and subcodes, and implies a 'supercoding', in that it tends towards the all-embracing presence of the totality.

From a legal point of view, it seems that the best possible approach to the 'totality' of religious cultural elements, would be that of defining them as *res mixtae*, a term that stems from the German approach on Constitutional Law of State-church relations (*Staatskirchenrecht*), and corresponds to the status of 'gemeinsame Angelegenheiten' (that is, issues of common interest), where the public responsibility of the State is coordinated with the autonomous activity of the respective religious communities (Tsivolas 2014, p. 103 f.). This term also reflects the complexity and importance of these elements and, at the same time, signifies the need for co-operation between the States and the faith communities, as well as the right of the latter to retain their religious identity, tradition and values. For example, in Europe, as it has been expressed by a 2015 Report adopted by the European Parliament:

[R]eligious heritage constitutes an intangible part of European cultural heritage; [...] historical religious heritage, including architecture and music, must be preserved for its cultural value, regardless of its religious origin [...] <sup>39</sup>

The aforementioned consensus model could be depicted as the common area (*vesica piscis*), which is molded by the overlapping spheres of religious autonomy *per se* (mainly those norms concerning the safekeeping of the religious character of its own property) on the one hand, and public responsibility (in preserving the same property as a common cultural asset) on the other hand. In essence, this model could be depicted as the outcome of the equation  $a \cap b = c$ , where *a* is the internal normative system of a religious community, *b* is the legal system of a State relating to the protection and maintenance of its overall cultural heritage and *c* is the intersection of the two systems (see Figure 1):



**Figure 1.** The model of *res mixtae*.

Following the above perspective of conjoined legal spheres, the protection of religious properties, as significant components of a wider cultural patrimony, is delimited by the religious autonomy and collective freedom of the custodial faith communities. Thus, a common 'horizon of meaning' emerges (to reiterate Lefebvre), creating a holistic approach of religious places (i.e., a variety of ecosystems made up of sacred spaces and objects), as protected cultural assets. This holistic approach, as was quite recently attested by the *Gran Canaria Recommendation on Astronomical Heritage and Sacred Places* (issued in 2018 under the aegis of UNESCO), may even refer to the skyline of specific sites of religious interest; in fact, as it has been recognized by the aforementioned *Recommendation*, the involved parties should:

[...] protect properties of astronomical and sacred interest through use of the precautionary principle and appropriate legal and practical measures, preserve astronomical alignments and skylines by appropriate spatial planning measures such as the creation of buffer zones. <sup>40</sup>

<sup>39</sup> Full Text. Available online: [http://www.europarl.europa.eu/doceo/document/A-8-2015-0207\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/A-8-2015-0207_EN.html?redirect) (accessed on 24 March 2019).

<sup>40</sup> Full text of the *Gran Canaria Recommendation* (following the International Expert Meeting on Astronomical

Hence, the proposed model of *res mixtae* provides the necessary legal framework for the proper understanding and regulating of the numerous aspects of religious cultural heritage, ranging from any form of property with religious associations (such as churches, monasteries, shrines, sanctuaries, mosques, synagogues, temples, sacred landscapes and groves, or other landscape features) to any natural site associated with certain spiritual traditions and rites (Burton 2002). In essence, this model also provides a better understanding, as well as a more thorough response, to the initial question posed regarding the justification of ‘interference’ by secular political structures with the protection of religious spaces and places of the past in our modern age of secularity (Taylor 2007).

Indeed, as far as the same cultural products are construed, from a legal point of view, as *res mixtae* belonging to a shared area of common interest, where the autonomy of the respective stakeholders co-exists with the responsibility and awareness of the State vis-à-vis its overall cultural patrimony, the protection afforded to these elements corresponds to the obligations and duties set forth by the relevant (national and international) cultural heritage law provisions, and, at the same time, respects the *interna corporis* of the various religious communities, also on the basis of the established (national and international) laws pertaining to the protection of the (collective) right to religious freedom. Following this rationale, the state acknowledges both the worldviews of the respective faith communities as well as the shared values existing at the public domain regarding the protection of religious cultural heritage *in globo*, as a common heritage of mankind; a heritage that, in the end, unfolds like a *horizon of meaning*.

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