

## Legal Protection of the Archeological Cultural Heritage in Mexico

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### **Abstract (Español; English)**

En México el estatus legal de áreas protegidas se define por las leyes nacionales y los compromisos operacionales de dependencias federales. A diferencia de EE.UU, México divide la responsabilidad de proteger recursos culturales a un departamento mientras los recursos naturales se quedan en las manos de otro departamento. También la responsabilidad de protección puede estar en manos federales mientras posesión de la tierra se queda al nivel de la comunidad. Esta fregmentación requiere un proceso constante de negociación al nivel local entre dependencias y también entre depedencias y comunidades, algo que no contempla la ley. Tomando el proceso actual de extender el estatus del área protegida a recursos culturales tanto como naturales en un solo valle, esta ponencia da énfasis a los dilemas de trabajar dentro del marco legal existente cuando el proceso de negociar requiere marcos diferentes.

In Mexico the legal status of protected areas is defined by national laws and the operational commitments of federal agencies. Unlike the United States, Mexico divides responsibility for protection of cultural resources to one department while natural resources are in the hands of another department. In addition protection responsibility may lie in federal hands but actual land ownership remains at the community level. This fragmentation requires continuing local-level negotiation among agencies and between agencies and communities, something the legal arrangements do not contemplate. Using current efforts to extend protected area status for both cultural and natural resources in a single valley as a case study, this presentation underscores the dilemmas of working within formal legal structures when negotiations require other frameworks.

### **Introduction**

The subject of this work is the legal protection of archeological heritage in Mexico, the objectives being to make known, roughly, the principal precepts of the legislation that in Mexico has been promulgated for the legal defense of this heritage, and how it is suitably applied.

The legal protection of archeological heritage is a subject that is not well studied in Mexico; attorneys specializing in this area are scarce, which is paradoxical, since Mexico is a country rich in historic and archeological monuments and monument zones. For example, Oaxaca is a state where tourism is the source of its economy, and therefore the conservation of cultural heritage is unavoidably influenced by the need for sufficient infrastructure to provide quality service to its visitors.

This paper will first focus on the historical background of the promulgation of the law that protects the nation's assets; on legal protection and its concept, which involves legal protection on the part of authorized institutions and bodies contributing to INAH (Instituto Nacional de Antropología e Historia/National Institute of Anthropology and History); the

importance of its precise application; the legal basis, and some current forms of protection; and the concepts of transmission of property rights. Of course, we will review the consequences of breaking the law, as sanctioned by the corresponding legislation.

This work is the result of experience gained over more than 25 years as a legal assessor for INAH in Oaxaca. We have encountered exceedingly interesting challenges that, in addition to enriching our knowledge, motivate us to continue this work in spite of the fact that on many occasions we are swimming upstream, institutionally.

## **Historical background**

Stemming from an appreciation of the historical value of cultural works of the pre-Hispanic era from 1827 to 1896, authority was established for the Federal Executive Power to regulate excavation and exportation of archeological assets, both transportable and real property.

The laws of 1930 and 1934, the jurisprudence that the Mexican Supreme Court established in this era, and an addition to Article 73 of the Political Constitution, created in 1966, clearly defined federal authority in matters of historical, artistic, and archeological monuments in a manner congruent with the legal tradition (Negret 2004).

The law's impact was important because since then, the possession, exploration, destination, use, etc., of archeological, artistic, and historical assets would be regulated; and the law would address national assets in the public domain. In this way, the nation's assets remain under state protection.

The term protection, in common language, means to safeguard, to care for a thing's integrity, be it material or immaterial. Legal protection consists of allotting cultural heritage, most beneficially as corollary elements together, best referred to as determined classes of assets, or, more effectively, as concrete assets, a special legal position with the aim of guaranteeing their integrity in any circumstance that could affect them, given the value and social function that they hold.

Protection shall be understood as the legal action initiated by one or more parties acting on behalf of the heritage, especially the administration, under the auspices of an institutional structure. From this perspective, the laws of the applied administrative procedure are the instruments of protection (Bermúdez, Juan, and Adelina 2004).

For Bolfo Cottom, cultural inheritance constitutes a cultural heritage, as a set of material or immaterial assets which, having relevant significance due to their historic or artistic value, must be protected by law in a precise manner and be the object of actions by the state, through suitable means (2004).

Fundamentally, assets—portable and non-portable, tangible or intangible—deserve legal protection, which from the moment the Mexican Political Constitution established the importance of these national assets, regulatory laws would be expanded to either directly or indirectly determine their protection by means of competent institutions.

For this reason, in Mexico, a series of legal norms (laws, agreements, decrees, etc.) are promulgated, that are to establish lineaments, conditions or restrictions on occupation or use of the nation's portable or non-portable assets, regulating what can or cannot be done with or to said assets, or in any case certain procedures, authorizations or requirements that shall be respected.

From there, are the legal norms with distinct hierarchy that are issued by the legislative power safeguard cultural property. Some laws refer in an indirect manner. Others are specialized because their objectives are related exactly to the protection of cultural heritage (Álvarez 1995).

### **Legal basis of protection by a hierarchy of laws**

**Political Constitution of the United Mexican States.** The access to and benefit of cultural assets and services has its legal basis in the Political Constitution of the United Mexican States of 1917, whose Article 3 in Section V indicates: “In addition to providing the pre-school, primary and secondary education indicated in the first paragraph, the State shall promote and fulfill all educational types and modalities—including early education and higher education—that are necessary for the development of the nation; shall support technological and scientific research; and shall encourage the strengthening and dissemination of our culture.”

The same fundamental legislation refers in its Article 73 of Section XXV, the Congressional faculty on other aspects of education: “and additional institutions concerned with the general culture of the nation’s inhabitants and to legislate all that relates to said institutions; to legislate over fossil remains and archeological, artistic and historical monuments, whose conservation may be of national interest. . . .”

From this regulatory text stem “regulatory laws,” which are elaborated by the Legislative Power, and should be executed and applied by the Judicial and Executive Powers.

**General law of national assets.** Addressing the nation’s assets, the General Law of National Assets was promulgated, which in its Article 1 points out that National Heritage is composed of the following: (I) Public domain assets of the Federation, and (II) private domain assets of the Federation.

Section I notes that public domain assets are, among others, (VI) Artistic and historical monuments, portable and non-portable, that are federal property; (VII) Archeological monuments, portable and non-portable. The same law subjects public domain assets exclusively to the jurisdiction of federal powers (Article 5), which means that federal public administration entities shall be authorized, and will have the responsibility, to apply legislation promoting their conservation and protection.

The bases of Federal, Centralized, and Parastate Public Administration Organization are found in the Law of Federal Public Administration, which notes that to carry out administrative business entrusted to the Executive Power, the Centralized Public Administration will be relied upon, such as the Secretary of Public Education, the body that will deal with affairs concerning the following: creation of the inventory registry of national historical heritage; creation of the inventory of national monuments; organization, maintenance and management of historical, archeological and artistic museums and galleries, in order to safeguard the integrity, maintenance and conservation of historical and artistic treasures of the country’s cultural heritage; conservation, protection and maintenance of archeological, historical and artistic monuments that make up the nation’s cultural heritage, in compliance with legal regulations (Article 38, Sections XVIII–XXI).

By including cultural heritage among public domain assets of the Federation, the Gen-

eral Law of National Assets prohibits any transmission of rights, be it through purchase, sale, possession resulting from statutes of limitations, or any other legal action regarding these assets, when it states quite clearly: “Article 13—The assets subject to the regulations regarding the public domain of the Federation are inalienable, imprescribable and unseizable and shall not be subject to claims nor provisional or definitive possession, nor any other action by third parties.”

**Federal Law for Archeological, Artistic and Historical Zones and Monuments.** After serious discussions in the Mexican Congress, on April 20, 1972, the Federal Law for Archeological, Artistic and Historical Zones and Monuments (FLAAHZM) was enacted, the importance of which was the legal regulation of movable archeological objects, omitting them from commerce, and of movable and immovable assets, making them no longer subject to claims or statutes of limitations. According to Article 1, the object of this law is the national and social interest, and its regulation and enforcement.

This legislation emphasizes the importance of registry of archeological pieces, and granting concessions to private parties for the possession—not ownership—of movable archeological pieces.

**Authorized institutions regarding cultural heritage matters.** By decree of President Carlos Salinas de Gortari, dated December 6, 1988, the National Council for Culture and the Arts (CONACULTA) was created as a body decentralized from the Secretary of Public Education and to which was specifically assigned the coordination of public institutions involved in the promotion and dissemination of culture and the arts.

INAH (a branch of CONACULTA) is concerned with preservation, conservation, and dissemination of the nation’s paleontological, archeological and historical heritage.

Conservation of archeological heritage is also the responsibility of the state and municipal authorities, as presented in Article 4 of the FLAAHZM. Upon establishing that the state and municipal authorities shall be entitled, in the application of this law, to intervene as the law indicates, the Federation, in close coordination with the state government, shall combine efforts to implement the mechanisms of protection, conservation, and dissemination of the state’s cultural heritage within the scope of their faculties.

**Supplementary legislation.** The application of supplemental legislation arises when the FLAAHZM does not have a regulation permitting effective legal defense of cultural heritage, and therefore international treaties and federal laws shall be applied, as well as civil and penal codes.

Outside of this legal framework, there is other applicable legislation, for example, decrees and resolutions. Decrees are a decision by a state body, created on a case-by-case basis, and require certain formalities (publicity) so that the decrees are known by those at whom they are directed. Resolutions, by contrast, are decisions of a higher body, authorized in these matters, which generally provides only written notice.

### **Means of protection of archeological heritage**

Article 5 of the FLAAHZM establishes two forms of protection: “those archeological, artistic and historical monuments and monument zones expressly determined in this law” which

leads us to Article 28, which says precisely: “archeological monuments are movable and immovable assets, product of cultures existing previous to establishment of the Hispanic culture in the national territory, as well as human remains, and flora and fauna remains pertaining to those cultures.”

Also, the law grants extensive protection of “fossil vestiges or remains of organic beings that inhabited the national territory in past eras and whose research, conservation, restoration, recuperation or utilization are of paleontological interest, a circumstance which shall be allocated in the respective declaration which the President of the Republic shall issue.”

By declaration, Article 5 states that archeological, artistic, and historical monuments and monument zones are those that are declared as such, either by official letter or petition, which means that the President of the Republic, or the Secretary of Public Education will issue or revoke the corresponding declaration, which will be published in the “Official Diary” of the Federation.

In this manner of protecting archeological heritage, the fact is that decrees issued by the Federal Executive are controversial, since they are finalized upon merely “declaring” the zone as one of archeological monuments. This brings with it conflict on the part of the landowners and possessors, who are then only able to use or enjoy their land within the limitations of said decree, subject FLAAHZM restrictions. Some communities, where an archeological site has been declared, have even filed appeals against the decrees, requiring work to fulfill additional requirements, including presenting proof in District Courts.

INAH must regulate land use in areas where the decree applies, coordinating with the local municipalities. This regulation involves issuing feasibility reports, work supervision, and, as necessary, suspension of any work not authorized by INAH.

## **Sanctions**

The sanctions chapter in the FLAAHZM indicates the penalties that judicial authorities can impose on anyone who damages either archeological monuments or monumental archeological zones, or both, in any of the following forms:

- For carrying out actual physical archeological exploration through excavation, removal or any other means, the prison sentence will be from one to ten years and the fine from one hundred to ten thousand pesos.
- For the use of a monument, be it for his own benefit or for that of another party, on the part of personnel from the INAH commissioned in the execution of archeological works if the fault is committed by a functionary in charge of the application of a norm he will then be sanctioned in accordance with the Law of Responsibilities of Public Functionaries and Employees. At present, there is an organism called the Body of Internal Control which recognizes the disorder or the not carrying out of functions that arise among the functionaries of the institution and the handing over of the matter to the Department of Public Function to then be turned over to the instance that takes care of the sanctions related to the case.
- For the transferring of dominion of a monument or trafficking with it, as well as its trans-

port, exhibition or reproduction without the permission and the correspondent inscription, the prison sentence will be from one to ten years and a fine of fifteen thousand pesos.

- For the illegal possession of an archeological monument or a movable historical monument.
- For the appropriation of a movable archeological, historical or artistic monument without the consent of the one who has the right to dispose of it according to the law, the prison sentence will be from two to ten years and a fine from three thousand to fifteen thousand pesos.
- For anyone who by means of fire, flood or explosion damages or destroys an archeological, artistic or historical monument they will impose a prison sentence of two to ten years and a fine of three thousand to fifteen thousand pesos.
- For those who through any means pretend to remove or remove an archeological, artistic or historical monument from the country without the permission of the authorized institution, the prison sentence will be from two to twelve years and the fine from one hundred to fifty thousand pesos.

To prosecute crimes against archeological heritage, INAH presents a formal complaint of heritage damages to the Federal Public Ministry Agency, relying upon the Attorney General of the Republic's Office. This organization is charged with investigating crimes and collecting all the evidence or elements that INAH provides to, when perfectly integrated, result in an order to apprehend; it falls to the District Court to follow the process until a sentence for the case is issued.

It is important to note that to date, no revisions have been made to the FLAAHZM's economic sanctions (i.e., fines).

Also important is the other part of archeologists' activity, who in penal processes become official INAH expert witnesses. They must appear before the Federal Public Ministry Agency to present technical reports and to ratify them, to inspect areas along with Public Ministry agents, or in the case of archeological pieces, to determine the authenticity of these pieces, and to contribute additional information that ends in a judge sentencing the accused.

Independent of sanctions of a penal nature, INAH, through the Legal Jurisdiction of Monte Albán, administratively sanctions offenders of the FLAAHZM and its regulations. These administrative sanctions are:

- Suspension of work (Articles 12 and 32);
- Demolition;
- Fine; and
- Revocation of authorizations.

The INAH can make use of the necessary legal means, including the help of public force, to execute sanctions.

Starting from this point, in some cases the conflict becomes litigious, due to the fact that the resolution given, in the majority of these instances, is motive for legal recourse in a second instance: recourse of revision, a trial of protection, or a contentious administrative trial

that will prolong the objective programmed for the plaintiff. Even so, the proper measures must be taken in anticipation of any other reaction on the part of the interested parties, especially if it deals with groups represented legally by leaders that will try to invade and block the activities in the archeological zones that are open to the public, put spots on the radio, block roads, etc.

In this manner the legal protection of the archeological sites and zones becomes a focus of attention. A careful watch over the developments should be kept so that proper and opportune measures may be taken.

### Conclusions

Legal protection is a decisive factor in the legal defense of archeological heritage. This work has gathered a series of legal instruments, which have been published for their exact application. However, in some instances it is not sufficient to have the intention to do it, but rather, it is necessary to carry out the process to its ultimate consequences, with the political decision and will of the exact application of the law.

Currently, INAH has a body of laws sufficient for effective and opportune legal defense of archeological heritage. It is important to fully employ the laws in the state and municipal scope that will expand the criterion of interpretation and opportune defense. Modifications become necessary in some cases, such as levying fines, which should be adjusted to the prevailing minimum wages. The same holds true for modifications with a previous, exhaustive review of the land's tenancy. In international documents to which Mexico is party, recommendations are found that countries should follow in order to safeguard their cultural wealth. Even when the application of the law brings as a consequence the interjection of other means of defense, it is essential to comply with the requirements, to provide greater proof for conviction, in order to obtain a sentence or resolution favorable to the interests of INAH.

With regard to the reaction of social groups on claims of their "property rights," particularly in areas that have been protected by law and decree due to their archeological evidence and characteristics, INAH makes dialogue and reconciliation a priority in an effort to avoid greater conflicts, and certainly, to consider the presentation of a justifiable legal means.

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