

## III. Legislations in Kazakhstan

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### 1. National Legislative System

Adopted on 15 December 2006, the Law of the Republic of Kazakhstan on Culture (hereinafter, 'the Law') regulates public relations in the sphere of creating, revitalising, protecting, safeguarding, developing, disseminating, and using culture and its values in the Republic of Kazakhstan and defines the legal, economic, social, and organisational foundations of public policy in the sphere of culture.

According to Article 1, paragraph 3 of the Law, 'Cultural heritage of the people of the Republic of Kazakhstan is a set of cultural values that have national significance, solely owned by the Republic of Kazakhstan without the right to transfer them to other states.'

And paragraph 14 of the same article gives the following definition of the concept of national cultural heritage: 'cultural values of particular importance for the history and culture of the country'

The Law establishes a special regime for the elements of the national cultural heritage—measures taken by the state to preserve, maintain, restore, protect, and use historic and cultural heritage. To preserve the existing cultural heritage, the elements referred to in the Article 32 of the Law are inscribed to the State Inventory List of National Cultural Heritage.

The cultural values are:

- 1) The archaeological excavations (including common and secret) archaeological discoveries;
- 2) Rare collections and specimens of flora and fauna, mineralogy, anatomy, and objects of palaeontological interest;
- 3) Property relating to history, including the history of science and technology and of war and society as well as the values related to

the heritage left by profound thinkers, scientists, and artists and the values related to events of national importance;

- 4) Rare manuscripts, ancient books, documents, and publications of special interest (historic, artistic, scientific, and literary), in single volume or in collections;
- 5) Postage, tax stamps, and similar items, as single pieces or in collections;
- 6) Coins, except for the coins representing the national currency of the Republic Kazakhstan, regardless of the metal alloy or their manufacture, including coins of other states made not later than hundred years ago, medals, seals, and other collectable materials;
- 7) Ancient and unique musical instruments;
- 8) Archives, archival funds, and collections, including sound, photographic, video, and movie archives as well as scientific and technical documentation;
- 9) Works of art bearing historic and cultural significance;
- 10) Ethnographic, anthropological, ethnological, and paleontological materials;
- 11) Antiquities older than one hundred years that have special historic and cultural value;
- 12) Objects associated with the Kazakh historic events, such as the development of society and the state, history, science, and technology; the objects associated with the lives and legacies of prominent figures in science, statehood, and culture; and museum objects and museum collections;
- 13) Value of art in the form of paintings, drawings, and handmade art on any basis and by means of any material (excluding industrial designs and manufactured articles decorated by hand);
- 14) Original work of statuary art and sculptures from any material;
- 15) Original engravings, prints, and lithographs;
- 16) The component parts of the dismantled artistic or historical monuments and archaeological sites.

As it is seen from the contents of the article, the legislation of Kazakhstan attributes both tangible and intangible cultural heritage to its cultural values.

Article 34 of the Law establishes the following special treatment of national cultural heritage:

- 1) Collection or compilation of objects representing special artistic or historical value can not be separated.

Destruction, displacement, modification, reproduction, or renovation of the national cultural heritage, included in the State Inventory List is not permitted without specific permission from an authorised organ, issued on the basis of recommendations provided by an expert commission and established on each particular item.

- 2) The use of national cultural heritage in a manner that is incompatible with its historic, artistic, and religious purpose. Items belonging to religious culture organisations and constituting the objects of national cultural heritage can be used in accordance with their religious purpose.
- 3) Particular treatment of national cultural heritage objects does not apply to objects of copyright and related rights.
- 4) Preemptive rights to use landmarks are owned by organisations in the sphere of culture.
- 5) Responsibilities for proper maintenance of the status and conservation of national cultural heritage are entrusted to users or owners. Failure to comply with this obligation entails a court-granted removal of the rights on a reimbursable basis. In cases when the owners' or users' financial or technical opportunities are limited, the responsibility to maintain national cultural heritage is borne by the state.

Implementing the rights of the owner of national cultural heritage objects in the manner prescribed is under the control of the Law of the Republic of Kazakhstan, with a priority rights to acquire objects of national cultural heritage of the Republic of Kazakhstan in the case of their sale.

- 6) State-owned objects of national cultural heritage are not subject to privatisation.
- 7) For the deliberate destruction, demolition, or damage of national cultural heritage objects, individuals and legal persons are liable in accordance with the laws of the Republic of Kazakhstan.

According to the Article 35 of the Law, exporting cultural property and national cultural heritage from the Republic of Kazakhstan is prohibited, except in cases of a temporary exhibition, tour activities, restoration work, scientific research, presentations, exhibitions, and international cultural events as well as other situations as provided by the Law.

Cultural values and objects of national cultural heritage illegally exported from the Republic of Kazakhstan and (or) illegally imported to its territory are

subject to mandatory return. In such cases, the return of illegally exported cultural objects as well as the objects confiscated by the court shall be deposited in state museums of national importance or relevant status.

The author, whether he/she travels outside the Republic of Kazakhstan, temporarily or permanently, has the right to export cultural values created by him/her. Regulation of exported and imported cultural values also applies to the objects created by foreigners and stateless persons within the territory of the Republic of Kazakhstan.

- 8) Cultural values, as well as the rights to own, use, and dispose of these values may not be transferred by its owners, as such a provision can contribute to the illegal export and import of cultural property.

The provisions of the paragraphs 3 and 5 of the Law 'On Culture' and articles 15 and 16 of the Law 'On Copyright and Related Rights' are mentioned later.

In regards to the execution of the order of the Head of State N.A. Nazarbayev and prior to the ratification of the Convention, the government of the Republic of Kazakhstan developed and adopted the concept of a strategic national programme 'Madeni Mura' (hereinafter, 'the Concept').

The focus of the Concept is to systematically improve the relationship and approach of the state to the values of historic and cultural heritage of the people of Kazakhstan.

Its text says: 'at the present time, when the reassessment of political and socio-economic processes of the past are becoming more widespread, it is essential to raise awareness of the necessity of the safeguarding mechanisms and the efficient use of cultural heritage in response to contemporary processes.' The Concept defines cultural heritage, as 'the spiritual, cultural, economic, and social capital of irreplaceable value.' It also states that heritage nourishes modern science, education, and culture. Along with natural resources, it represents the basis of national self-respect and recognition on the international arena.

The Concept became the basis for developing an action plan to further implement the state programme 'Madeni Mura', the strategic national project mentioned earlier in Chapter I.

The work conducted within the framework of the programme highlighted the synthesis of a centuries-old experience and knowledge of national culture and

literature, affirmation of the status of the state language, and composition of a comprehensive national fund for cultural heritage on the basis of world's most ambitious achievements in science, culture, and literature—which are all evidenced and reflected in the questionnaires filled out and submitted by target universities and institutes performing research in the sphere of tangible and intangible cultural heritage.

As indicated in the Concept, the state programme is not limited to purely utilitarian purposes of restoring historic and cultural heritage. Its main purpose is to achieve positive change in public consciousness, and in this context, it bears important ideological potential. The state programme also concludes that:

First, it is a question of strengthening and expanding the limits of historic memory of the nation, which is one of the most important spiritual foundations of statehood.

Second, the state programme was a response to inquiries concerning the formation and fortification of national identity.

Third, the realisation of the state programme led to the development of a new cultural and historic perception of the country.

Fourth, implementing the state programme helped increase the Kazakhstani people's interest in their native history and culture.

Fifth, the substantive potential of the state programme should be noted in terms of growth of the inter-ethnic understanding and harmonisation of intercultural relations domestically.

In general, the state programme led to significant results. However, it should be noted that its practical realisation also revealed certain difficulties in the development and implementation of the programme, particularly in identifying, collecting, systemising, processing, digitising, using, and disseminating in a relatively short period of time the spiritual, cultural, and humanistic potential that had accumulated over centuries.

If the state programme was previously characterised by identification, acquisition, accumulation, and study of general definitions of cultural heritage, including folklore, traditions, and customs of particular importance to national culture, the synthesis of centuries-old experience of Kazakh literature and writing, the codification, and the documentation of cultural heritage, then the subsequent stage of work should be in transforming the accumulated heritage

into the commonwealth of society and including the most valuable and historically significant elements on the UNESCO ICH Lists. This requires a logical conclusion of the processes already launched, which also includes the legitimisation of the elements. To move on to the next stage, the legal issues need to be resolved first.

In this regard, close attention should be paid to the conflicting norms contained in the Law of the Republic of Kazakhstan on 'On Culture' and the Law 'On the Copyright and Related Rights.' For example, paragraph 3 of Article 34 of the Law 'On Culture' says 'special treatment of the elements of national cultural heritage does not apply to the objects of copyright and neighboring rights.' In such case, what should be done regarding the rules in the Law 'On Copyright and Related Rights' that state, according to Article 15, 'moral rights of authors are inalienable.'

For example, we can mention *kyu*<sup>25</sup> compositions of Kurmangazy Dauletkeri, Tattimbet<sup>26</sup> and other renowned composers. Their *kyu* authorship is not in doubt, and their work has been transmitted for centuries. Thus, according to our opinion, they should also be placed under a special protection as a cultural heritage and should be included not only in the National ICH List, but also on the UNESCO ICH Lists. It seems that regarding the above-mentioned arguments, certain amendments relating to the individual, non-property rights of authors whose works have become public assets should be infused in the text of the Law of the Republic of Kazakhstan 'On Culture'.

Paragraph 5 of the same article reads: 'The transfer of legal powers on ownership, use, and disposal of cultural property by their owners is prohibited; as such actions may contribute to the illegal export and import of cultural property.' Then the Article 16 of the Law 'On Copyright and Related Rights' states that the author has exclusive property rights on his/her works, which means that he/she is entitled to use the element to its maximum extent and can transfer the rights on its use to the third person, including foreigners. Such standards should be implemented, according to the renowned Russian lawyer, E. Gavrilov<sup>27</sup>, and the rights on protecting objects that have

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<sup>25</sup>*Kyu*—traditional music composition performed on national instruments and lasting between one and three minutes.

<sup>26</sup> Profound Kazakh composers of the past.

<sup>27</sup>E. Gavrilov, O. Dobrynin, I. Bliznec 'Intellectual Property Law', 2001. Moscow.

Eduard Gavrilov, Ph.D in Law, Russian Economic Academy named after G. Plekhanov, UNESCO Chair on Intellectual Property Rights and Related Rights.

become public assets is quite legitimate according to the Berne Convention for the Protection of Literary and Artistic Works<sup>28</sup>.

## 2. Related Legislation

Another important issue, as indicated in the questionnaire (paragraph D, IP issues) by the representatives of the Kazakh National University of Arts, is the need of legal assistance in identifying works protected by copyright law as well as in answering questions of systematisation and registration of IP rights.

It should be noted that in dealing with legal issues, it is not enough to rely solely on the status of a copyright and related rights, but also to regard the standard rights on the intellectual property, such as patent law, trademark law, and appellations of origin.

Knowledge and correct application of current legislation on intellectual property is required in identifying the owner of the intellectual property rights and transferring elements from the communities and bearers of ICH to the universities that deal with collecting, processing, practicing, and distributing the ICH elements, particularly in matters relating to the recreation, commercial use, maintenance of secrecy, identification of the owners, and benefit-sharing.

With clear knowledge and correct application of current legislation of the Republic of Kazakhstan on intellectual property, many legal issues can be solved. Legislation of the Republic of Kazakhstan in the sphere of intellectual property consists of Kazakh Civil Law, the Law 'On Copyright and Related Rights' (hereinafter, 'Copyright Law'), Kazakh Patent Law, the Law 'On Trademarks, Service Marks and Appellations of Origin', the Law 'On Protection of New Varieties of Plants', the Law 'On Legal Protection of Topographies of Integrated Circuits', and other adopted normative legal acts.

The legislation sets all kinds of liability (criminal, civil, legal, and administrative) for violating intellectual property rights. Both the Law and the Civil Law of the Republic of Kazakhstan attribute literary, dramatic, music, and audiovisual works; paintings, sculptures, drawings, and other works of fine art and crafts; and other compositions to the objects of copyright. The objects of copyright also include collections, encyclopedias, anthologies, databases, and

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<sup>28</sup>The Berne Convention for the Protection of Literary and Artistic Works—an international agreement governing copyright, which was first accepted in Bern, Switzerland, in 1886.

other composite works representing the results of creative effort due to the selection and arrangement of their contents (Article 7 of the Copyright Law). All of them, according to the form and content, could relate to ICH elements in cases of obtaining the status of ICH. However, such works mainly include works of authors whose names are unknown and therefore considered works of folk art or works with the expired copyright terms.

Paragraph 3 of the Article 8 of the Copyright Law attributes works of folk art that make up the bulk of ICH to the works that are not subject to copyright. It seems that the legislator based the argument on the fact that it is impossible to identify the author of work, and secondly, the implication of a copyright's term equaling to seventy years after the death of an author.

Calculation of the period starts from 1 January of the year following the author's death. The duration of related rights for performers and producers of phonograms also equals to seventy years. Calculating this term is somewhat different from calculating the duration of a copyright for an individual author; it is counted from the date of the first execution of the work for performers and the date of the first publication of the phonogram to the rights of producers of phonograms.

As stated above, under the Article 2 of the Convention, ICH includes practices, representations, ways of expression, knowledge, and skills, including instruments, different kinds of inventory, artifacts and cultural spaces associated with communities, groups, etc. In form and content, they are similar to such objects of intellectual property as the performance, the work of fine art—namely, items of decorative art and industrial designs—and appellations of origin. However, current legislation on intellectual property can not fully protect the rights on ICH due to certain circumstances.

First of all, it is due to the fact that the subject of the copyright is an individual whose creative efforts have constituted a product. The author possesses an individual right on a name. In regard to ICH, it is impossible to identify a specific author since ICH might belong to the whole community and sometimes the entire nation.

For instance, no one questions the identity of the 'Manas'<sup>29</sup> epic or the 'KizZhibek'<sup>30</sup> lyric-epic belonging to Kazakh people. And in regard to

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<sup>29</sup> 'Manas'— national epos of Kyrgyz people on the heroic deeds of the warrior named Manas

<sup>30</sup> 'KyzZhibek'—Kazakh traditional lyric and epic poem depicting a love story between a girl named Zhibek and a boy named Tolegen;



traditional knowledge, as the process of manufacturing *yurts*<sup>31</sup>, traditional dairy products like *kumys*<sup>32</sup> and *shubat*<sup>33</sup>, it all represents common cultural heritage of many Oriental nations. Whoshould be given the preference then, since many Asian cultures assume this cultural heritage belongs to them? How can intellectual property rights be protected in such cases?

Referring to the Patent Law, subjects of industrial property rights have twenty-year term of protection, with possible extension for another fiveyears in respect to their invention, and industrial designs have a ten-year term that starts on the date of submitting the application. Again, the same question arises—who should be given preference? According to current legislation on industrial property rights, preference is given to the individual who has first applied for the document protecting property rights—the patent or certificate. Moreover, there is a condition of such property, as the novelty of an object. How fair is this application in regards to ICH?

As for the Law ‘On Trademarks, Service Marks and Appellations of Origin’, Article 7, paragraph 2, subparagraph 4 states: ‘they shall not be registered, without the permission of acompetent authority, as trademarks reproducing the surnames, names, and pseudonyms and their derivatives, portraits, and facsimile, violating individual non-property rights of these individuals, their heirs or assigns, and when such names are a part of the historic and cultural heritage of the Republic of Kazakhstan.’

There are different opinions on whether it is possible to ensure the protection of ICH by laws regulating intellectual property rights and more importantly Copyright Law.

In particular, the prominent Russian lawyer E.P. Gavrilov<sup>34</sup> states: ‘Even though the aforementioned standards provide sufficient legal basis to ensure the protection of the national folklore, they find no practical application. The norm contained in Article 15, paragraph 4 of the Bern Convention on the Protection of Literary and Artistic Works<sup>35</sup> also remains unrealised. This

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<sup>31</sup> *Yurt*—a portable, bent wood-framed dwelling structure traditionally used by Turkic nomads in the steppes of Central Asia;

<sup>32</sup> *Kumys/kumis/koumiss*—a fermented dairy product traditionally made from mare's milk. The drink remains important to the peoples of the Central Asian steppes, of Turkic and Mongol origin.

<sup>33</sup> *Shubat*—beverage of fermented camel milk, sparkling white with a sour flavor, popular in Central Asia—particularly in Kazakhstan and Turkmenistan.

<sup>34</sup> E.Gavrilov, O.Dobrynin, I.Bliznec ‘Intellectual Property Law’, 2001. Moscow.

<sup>35</sup> The Berne Convention for the Protection of Literary and Artistic Works—an international agreement governing copyright, which was first accepted in Bern, Switzerland, in 1886.

provision reads as follows: (4) (a) 'In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.'<sup>36</sup>

We certainly agree with the distinguished lawyer. Here, he implies the right of the primary creators of the intellectual property. The inalienability of moral, private, non-property rights was mentioned earlier concerning cases where the names of the creators are known, and as for the issues of exclusive property rights, it is clear that the term of their protection has generally expired.

But the focus is on the secondary rights—the rights of those individuals through whom ICH has reached us today. Their noble work is not worth just mere encouragement or a one-time fee. They could become the owners of ICH on condition that they would not just be engaged in the mechanical collection of information, but involved in a creative approach to compile collections, databases, albums, and recordings of traditional folk performances and other elements. This work could be recognised by the Law of Republic of Kazakhstan 'On Copyright and Related Rights' as subjects of copyright in accordance with Article 11, whereby the author of a collection or other composite work (compiler) is entitled to a copyright on the selection and (or) the arrangement of materials representing the result of creative effort (compilation). The compiler shall enjoy the copyright in respect for the rights of authors of each of the works included in the composite work. The focus is on the authors whose copyright term has not yet expired.

This article also entitles the publishers issuing encyclopedias, encyclopedic dictionaries, collections of scientific works, newspapers, magazines, and other periodicals with the exclusive right on the use of such media in general. The publisher may, with any use of such publications, mention his/her name or otherwise demand such reference.

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<sup>36</sup>The Berne Convention for the Protection of Literary and Artistic Works—an international agreement governing copyright, which was first accepted in Bern, Switzerland, in 1886.

In addition, Article 12 of the Copyright Law entitles interpreters and authors of other derivative works with the copyright on translation, correction, adaptation, and other kinds of alterations performed.

Translators and authors of other derivative work shall enjoy the copyright on the work created by them as long as they comply with the rights of the author's work that was subject to translation, adaptation, arrangement, or any other transformation. The focus is on the rights of those authors whose term of copyright has not expired. It is well known that many of the objects are subject to translation from ancient languages or obsolete scripts (runic inscriptions, Sanskrit, etc.) into modern interpretations. In such cases, copyright compliance is not required due to the expiration of a term, and the creative work of an interpreter is invaluable. Accordingly, the translator's entitlement to a copyright on the translation performed on unprotected works relating to ICH is clearly justified.

Moreover, Article 16 of the Copyright Law empowers the compilers of databases with the exclusive property right relevant to the work with the ICH elements. Articles 36, 37, 38, and 39, governing the rights of performers and phonogram producers, may also protect the rights of performers of ancient dances and rituals and other individuals who have recorded the sounds of a performance—singing, dancing, etc.—for the first time. After all, the collected materials are fixed via documentation or photography, and thus take the form of objects.

Accordingly, the right of the individuals engaged in collecting and documenting ICH elements—oral traditions, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, and traditional crafts—can also be protected by the National Copyright Law.

However, in all of these cases the focus is on the secondary law since the primary right has not yet been fixed, and even if it were fixed, then its validity would have expired. This does not imply that all the problems can be saved via the provisions of the Law. Anyway, the problems of legal regulation related to the field of ICH safeguarding and the development and enforcement of the existing mechanisms to protect ICH rights remain unimplemented to their fullest extent.

It is widely accepted that ICH represents a big part of common human heritage and a powerful means of bringing people and different social groups together, thus forming their cultural identity. However, there is a certain risk of

extinction, especially in relation to oral traditions. Therefore, within the next few years, all possible measures should be taken to ensure that humanity can use the results of centuries-old work, preserving these values and multiplying them.

There is a perspective for the Ministry of Education and Science of the Republic of Kazakhstan to introduce courses on ICH in the curriculum of the elementary, secondary, and university education programs, and for the government of Kazakhstan to provide financial and moral support to individuals and organisations studying and cultivating ICH, and thus, further encourage research in this area. For it is mentioned in the Concept that 'the effective solution of the problem of bringing fourth generations of professional staff workers is the guarantee of stable and progressive development of any society'.

Currently, there is an urgent need for highly qualified personnel. There is a serious shortage of professional translators able to perform high-quality translation of historic Kazakh heritage and folklore into different languages to provide meaningful translation of world science and social thought into the Kazakh language. Professionals trained on renovating and restoring are needed as well. Considering all the abovementioned arguments, the following work has to be done:

- Provide traineeship courses for interpreters, historians, and anthropologists
- Ensure the participation of young professionals in international educational programs
- Organise traineeship courses at the best cultural institutions domestically and internationally for the representatives in the cultural sector
- Exchange cultural experiences at the regional and international levels

Questions of international cooperation are regulated by the the Kazakh Law 'On culture'. According to Article 37, the Republic of Kazakhstan promotes international cultural cooperation, including the exchange of creative teams, professionals, cultural values, and the results of cultural activities as well as experience in organisational activities in various areas of culture. Obviously, such activities are a matter of time. But this rule should be fully implemented in ensuring the preservation, revitalisation, and augmentation of ICH. And, most importantly, the rulemaking process shall be mainstreamed towards effective implementation and proper functioning. To do so, we should take part in enhancing international law via the Intergovernmental Committee of

the World Intellectual Property Organization (hereinafter, 'WIPO') on intellectual property and genetic resources since the Republic of Kazakhstan is a member.

The Committee deals with:

- Preparing standard contract provisions on intellectual property rights relating to accessing genetic resources and benefit sharing with respect to traditional knowledge and folklore
- Identifying components that could be protected through intellectual property law, with respect to folklore
- Ensuring the protection of national laws on copyright and related rights, taking into account the recommendations of the WIPO Model Provisions and UNESCO that aimed at protecting ICH from the illegal use or activities.

It should be noted that the staff of the Committee on Intellectual Property Rights under the Ministry of Justice of the Republic of Kazakhstan participates in the annual meetings of the working group functioning under the Committee, for it could significantly contribute to the rulemaking process in this area. The outcomes of the Intergovernmental Committee are discussed at the WIPO Assemblies and sometimes at the diplomatic conferences targeting more concrete problems on protecting intellectual property, where the leaders of competent authorities in the field of intellectual property rights of WIPO Member States actively participate. If necessary, they initiate amendments and alterations in the text of existing international conventions and treaties to identify subjects and objects of the rights and the entitlement of such rights—all to effectively protect ICH.

To improve national legislation and to effectively safeguard the rights of ICH subjects, it is necessary to create an interdepartmental commission on changes and amendments to existing legislation in the field of intellectual property. At the same time, ICH should not be simply understood as the restoration of traditional ethnic forms of cultural life and the enrichment of modern culture with the national content, but as the creation of conditions and mechanisms for the formation of national culture as an integrated system, playing a dignified role within the universal culture, still representing its originality and uniqueness.

Therefore, the commission along with the lawyers should include the representatives of creative unions and other ICH-related public organisations. It is also necessary to solve the issue of permanent and mandatory financial encouragement of individuals performing technical work on collecting,

organising, and safeguarding ICH. An additional issue that needs to be resolved is paying compensation to the owners of ICH and other individuals involved in the study and restoration of ICH and promoting and encouraging other individuals, especially the so-called informants.

With regard to the abovementioned matters, public administration entities shall coordinate and monitor the work undertaken by various agencies, public organisations, and individuals, including enthusiasts, especially considering that the work is carried out on a state budget. It is a duty of public authorities to develop partnership relations with public and private sectors. Additionally, a multi-agency approach should be applied to conserve cultural heritage using all available resources and means. The task of preservation must be addressed not only by the central executive bodies, but also by local executive authorities.