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Foreword

Archives have rights. They must comply with the law, protect the law and make laws understandable. The relationship between an archive and the law is multifaceted and often contradictory. In the day-to-day business of archives, the problems arise, for instance, with the storage or use of certain documents as both the public demand for transparency and the right of the individuals in question to protection of their personality have to be taken into account.

In the course of its existence, the Committee on Archival Legal Matters has dealt in-depth with these and other basic issues concerning archive-related legislation. When it was dissolved in 2004, it decided to make the work it had performed in recent years available to the public. This volume thus contains the most important contributions on the topic, which have already been published elsewhere and which have been revised and updated for this publication.

This publication is also an important contribution towards furthering the dialogue within the archival community and with other stakeholders. Many of the questions raised here will concern us for some considerable time to come. Legal and technological developments exert a reciprocal influence on each other and are often equally fast-paced. This means that archivists have to keep up with these trends. They must not only accept legislation as a framework within which to operate but must also help to shape it. Ultimately, archival work involves carrying out basic laws. The code of ethics acts as a guide in terms of interpreting these basic laws.

As the person responsible for the International Council on Archives for the "Advocacy and Promotion" priority area, it is my wish that legal issues should remain at the top of the agenda of our professional association, even if there is no corresponding working group in place. I hope that this volume will contribute to a broad-based discussion. Finally, I would like to thank my colleagues for their dedication and their outstanding work as members of the legal committee.

Andreas Kellerhals, Director Swiss Federal Archives
ICA-Responsible for Advocacy and Promotion

Introduction

Claes Gränström

GENERAL

The Committee on Archival Legal Matters (CLM) was established by the International Council on Archives (ICA) in 1992 at the Congress in Montreal. The reasons for this step were clear as archival and records management were more and more influenced by the development in the society and therefore legislative matters became more and more important. The committee started working in 1993 with Principles for Archives and Current Records Legislation in 1993. The Principles were presented to the International Council on Archives at the 1996 Congress in Beijing and were published in Janus 1997:1.

During the sequent years the Committee worked, according to a plan decided at its meeting in Spoleto in 1997, with several of the most important items regarding archival work, such as copyright, authenticity, access, data protection and privacy, legal grounds for settlement of international archival claims. The results of this work have been presented and discussed at various occasions during the last eight year period, 1997 to 2004. The papers have been adjusted to these discussions and to the development in these areas.

The Committee was abolished at the ICA Congress in Vienna in 2004. It has been considered important to publish the results of the Committee's work. These products are in no way the final words of the themes as the development in these areas is very rapid. It is therefore of great value to discuss these matters and to develop these publications. I sincerely hope that there will exist ways to collect this criticism and to follow up these publications and themes. It is of utmost importance that the archival society and professional bodies engage in the legislative work and not only limit themselves to the direct archival legislation but also the so called related legislation, which in many cases can influence archives and records management (that is records/documents and archival holdings) very much, regarding electronic documents perhaps even more than the direct archival legislation. In my view, the archival profession has to engage themselves in proactive work today and in the future in order to be able to fulfil the goals embraced by the society and thereby by archivists.

CHANGES IN THE SOCIETY

The tasks of archivists are governed by the goals set up for them. Of course, it differs between various countries depending of history, tradition and legal system. In some countries, archivists are very much engaged also in the records creation. Access to records/documents, kept both at the creating agencies and at the archival institutions, are here often set up in Freedom of Information legislation. In other countries, archivists are more occupied in taking care of transfers of archival material from creating agencies or other bodies and making this material in their custody available to their customers.

It is generally accepted that one goal for archivists is that archival material shall be kept and be accessible for cultural purposes and for the scientific society. This material shall be authentic, which means that it has not been manipulated in any way (for example through migrations). It shall be representative, which means that it should give the whole and correct picture of what has happened in all parts of the society, even after necessary appraisal/deletion. It must be structured and inventoried/catalogued in such a way that it is possible to find the adequate information. In the society of yesterday which was dominated by the use of paper records/documents, it was difficult for practical reasons to change the structure, because of the vast masses of papers. Here destruction was the great danger, that is that too much was destroyed, so that the picture was distorted.

Today the situation has changed dramatically for archivists. The society is today dominated by the use of Information technology (IT) and will be so even more in the future. The development in recent years has been very rapid and there is no sign that this condition will change. There are according to my belief four factors in the society which are of outstanding importance for archival work. They are as follows:

- the technological development which has led to an enormous production of complex records/documents/archives and to fast growing communication of data through various networks,
- the democratic process which has led to a growing demand on public access to official documents (transparency) in order to inspire confidence towards the Government on various levels and also to the legitimate wish to know how it really was now and in the past,
- the internationalisation, where it has become evident that many issues can no longer be dealt on the purely national level,
- changing structures in the society, partly made possible by the IT revolution.

These four factors have resulted in growing need for establishing firm rules, usually in legislation. Through legislation, society sets the norms and standards for different activities. Legislation is normally decided by the highest body in the society, that is the Parliament. You can call this some kind of judicialisation of the society. For us archivists, this means that we have to engage in this kind of work, that is to be aware of what is going on in the various legal fields which affect archival work. We have to be proactive and see to that laws are drawn up in a way which is in conformity with the goals set up for archival work and also to speak up when other laws are in conflict with the goals in archival. We must adjust our ways of working and methods accordingly. One illuminating example is when data protection laws were introduced in the seventies and where in most cases destruction of personal data was the main solution to protect personal privacy, thereby destroying much material of immense value for the cultural and scientific needs. After much work, a balance between the need to protect personal privacy and the need to preserve archival material for cultural and scientific needs has been found.

IMPACT ON THE OBJECTIVES

Has this development affected the objectives of archival work? Of course, archival objectives are dependent of the constitutional structure of each state. Is the more traditional way of looking at archival management as motivated by only working for the researchers still valid today? What are the objectives today and tomorrow? This must be established preferably in law but it must be said the organisation to fulfil certain objectives can differ from country to country, depending on tradition and legal structure.

The objectives for the administration of documents/records management set by the society in a broad sense can be said to be the following:

- access to documents as a right, regardless of location and age of the document,
- to preserve the documents/archives regardless of age and location as a part of the national cultural heritage,
- to satisfy the needs of public administration and administration of justice,
- to satisfy the needs of research and science.

Of course in a given country, there can be fewer or more objectives. If you do not have a Freedom of Information legislation, the first objective is perhaps not valid for you. I believe that the democratic trend towards more openness and thereby emphasizing the right of access to documents is becoming more and more important all over the world. This has brought about new legislation, which is more demanding to implement in a society, dominated by the enormous growth of IT documents.

To sum up, it is of utmost importance to establish the objectives which have been set up for the management of documents/archives administration. Consequently, it is of the same importance to

establish the role and mandate of the National Archives/archival service in the work of achieving these objectives. Both these matters, objectives and role/mandate, should be decided in law.

METHODS AND MEANS

What parts are there in archival management today and will be tomorrow? Of course, that depend on the objectives, mandates and tasks given to the National Archives.

Firstly, a question can be asked if the principle of provenance is still valid today regarding the partly new situation, caused by the introduction of electronic documents. It has been said that today the information flows freely without any creator and that the principle of provenance is not valid any more. Personally, I am convinced that this principle is more important today and tomorrow in a society dominated by IT with enormous flows of complex information. This view is strengthened by the fact that Sweden in 2002 was changing its Freedom of information Act, a part of the Swedish constitution, it was considered to put in a clause that guaranteed the principle of provenance. But then it was said that this is so obvious and you do not mention obvious facts in the Constitution. The principle of provenance is founded on the complex nature of documents/records. They are both text and context, which must be kept in its original form and structure (even after migrations). If this is lost, you do not have a trustworthy, authentic document any longer, there will be an irreparable loss for the citizens and society, especially in the long run.

It must be decided what parts archival management consists of and what kind of strategy to adopt. If archival management only embraces work within the archival institution and the only contact with the administration is by receiving transfers of archives, it is my belief that the objectives will not be achieved, as the situation with electronic documents demand a proactive strategy thereby guaranteeing the authenticity of the electronic documents. From this follows that archivists from archival institutions must engage in the work within the administration even before the document is created. In the electronic world with the short life perspective of the physical document in contrast to the long life perspective of the intellectual content, it is necessary to decide from the beginning about structure, migration etc regarding electronic documents.

In this proactive work, it is necessary that these objectives and the ways, means and methods in order to achieve the objectives are embraced not only by archivists but also by other professions such as legal councillors, IT specialists, administrators. Also the management of the agencies must be aware and consider this line of work. One necessary condition for this is that the legislation is consistent, this means not only the specific archival but perhaps more important the related legislation. Archivists must therefore engage among other things also in various legislative matters to see to that laws are drawn up in a way which is compatible to their objectives and give them support in their work.

TO SUM UP

The products elaborated in the committee are the following:

- Principles for Archives and Records legislation
- Access to Archives and Data Protection
- New technology and copyright: The impact on the archives
- Some Problems of Authenticity in an electronic environment
- Authenticity: Electronic Signatures or trusted Custodian
- Controversies around legal grounds for the settlement of international archival claims
- Palestine Archive: Dispersal, Destruction and Reconstruction

These products have been discussed during our meetings, been presented at various conferences and seminars some have been printed before. One product, however, is not printed in this volume and it is

the paper on how privatisation of state affects the legal position of the official documents/state records. This paper was printed in *Janus* during the late nineties.

The discussions and engagement has been very lively and constructive. We have learnt from each other and learnt about that the conditions differ from country to country. The terminology has been a problem as we do not mean the same thing with the same term. We also use different terminology. But as we always had a positive attitude, we always finally understood each other. The time in CLM has been one of the most gratifying in my life.

The development has been very rapid in the past decades and this development will continue, as said above regarding the four factors affecting archival work/records management. All areas of the society is affected. A tendency is therefore that more legislation is introduced both on the national level as well as on the supranational level. These both levels will be more and more harmonized; one excellent example of this is the copyright issue. We need to take part in the legislative work and above all we must cooperate on an international level in order to be strengthen our case and to share experiences. The work within this committee has proved to be of great value in these aspects.

To be more personal, I have met many colleagues from various countries and traditions from all over the world and I have made many friends I have learnt a lot not only on the archival side but also on the more human side. I have avoided to mention names and meetings in this introduction, otherwise it could have been a catalogue of names and places. It has been a fantastic period in my life and I am very glad to have been able to work for the ICA in various capacities since 1975. As said above, I sincerely hope that these issues will discussed and continued. It is not an easy future ahead of us but what is the choice?

Principles for Archives and Records Legislation

Sarah Choy¹

INTRODUCTION

Legislation is a set of binding principles and rules stipulated through formal mechanisms to grant power, confer rights and specify limits that regulate the conduct and behaviour of a society. Archives and records legislation establishes the legal and administrative base that allocates functions, power and responsibilities among accountable bodies within the country, and expresses the rights and expectations of citizens with respect to recorded information and documentary heritage.

Archives and records legislation establish preconditions [framework] for management and maintenance of archives and records, provides the mandate of the archival authority, sets out the rules for its operation, defines what part of the collective memory of the country should be retained and preserved, and for whom and under what conditions the preserved records could be made available. Although some may argue that legislation does not necessarily ensure compliance, without the elements of an archival authority being clearly established by law, the identification, preservation and access to archival heritage will not be certain.

The varied history, legal tradition and experience in different countries have no doubt created differences in the content, interpretations and applications of archives legislation. However, we all have the same need for clear, updated and workable legislation to protect and provide access to archives, and to cater for new development and changes such as technological innovations, new social or business orientations and new records related laws that have competing priorities and emphasis.

This paper is an update of a document which bears a similar title prepared by CLM/ICA in 1996. It is written as a response to the rapid growth of electronic records and information, the heightened demand for government transparency and ready access to recorded information, and the enactment of various new records related legislation in many parts of the world. Despite the changes taken place, we assume that it is the shared mission of every National Archives to ensure the creation, identification and preservation of authentic, reliable and usable records of enduring value, and make them accessible to the largest possible extent according to the interests of the country and its citizens. The archival principles to be discussed in the following paragraphs aim to give effect to this shared mission.

We do not intend to offer a model of a perfect Archives Act. Our intention is just to point out on what aspects attention should be drawn when drafting archives and records legislation.

Although the focus of the article is succinct archives and records legislation addressing the fundamental issues essential for establishing and maintaining a national archival authority, many of the archival principles outlined are of general application to Archives at provincial level. Each country, having regard to its own history, legal tradition, administrative culture and social and political reality, may have its own ways to achieve the entirety or part of these archival principles. Whether in reviewing existing archives legislation or drafting a new law, it is recommended that only the most essential principles and practices should be firmly stated in law. The more flexible and easily amended regulations and policies may be used to facilitate interpretation and application of the law.

In this paper unless the context otherwise refers –

access includes the meaning of access and use;

archives includes records and documents appraised to have enduring value for permanent preservation.

Archives mean the organization responsible for managing archives and/or records.

¹ With the collaboration of Viktoras Domarkas (Lithuania), Claes Grånström (Sweden), Gary Peterson (United States).

documents and *records* carry the same meaning as recorded information generated in business activities that are kept as evidence of the activities.

National Archives refers to a national organization with the authority to take care of archives and /or records

public records, *state records* and *official documents* have the same meaning indicating those records created, received and maintained by government agencies or other institutions within the public domain as opposed to private records from non-government agencies, institutions, families or individuals.

state is equivalent to a country as a political entity

ARCHIVES LEGISLATION OR RECORDS ACTS

A country may choose to tackle issues relating to records and archives in a single piece of legislation or in several laws but the statutory provisions and definitions should always be clear and consistent.

Archives and records legislation is closely associated with the management of current records and decisions about their creation, maintenance, access and disposal. This is especially true in dealing with electronic records whose authenticity, reliability, usability and durability hinge upon proper system planning even before the records are created and sound management throughout their life cycle. A country may choose to tackle issues relating to records and archives in a single piece of legislation or in several laws. Some may extend the mandate of the National Archives to include certain management aspects of records in their active stage. Others may prefer an integrated approach by establishing a National Records Administration with jurisdiction over the management of records in continuum. Regardless how the legislation is shaped, the factors to be addressed demand clarity and consistency. To ensure that the archives legislation is accurately interpreted, it should also include clear definitions of all the technical terms used, as well be compatible with related national legislation such as on freedom of information, data protection, legal procedures, evidential value of record, public administration etc.

DEFINITION OF RECORDS AND ARCHIVES

There is no single definition for records and archives. These terms must be defined and used without ambiguity in the archives legislation, and they must also be compatible with other related law.

Depending on national legal and administrative tradition, legislation may make a distinction between records and archives or may cover entire life cycle of records. Records may sometimes be synonymous with documents. In some countries, records are defined as recorded information regardless of its form or medium created, received and maintained by an agency, institution, organization or individual in pursuance of its legal obligation or in the transaction of business that they take part or provide evidence. Archives may refer to records under the control of the authority designated by the archives legislation or as records selected for permanent preservation because of their continuing value. A generic term may sometimes be used for both records and archives with a distinction made between current and historical records.

Examples

Whenever records and documentary material are mentioned in this Act, it refers to any kind of records, written as well as in any other form, which contain information and have their origin in the functions performed by an institution or an individual, whether written records, maps, plans, photographs, films, slides, sound recordings, machine-readable material, tapes or any parallel material. (Iceland, Section 3)

Les archives sont l'ensemble des documents, quels que soient leur date, leur forme et leur support matériel, produits ou reçus par toute personne physique ou morale, et par tout service ou organisme public ou privé, dans l'exercice de leur activité. La conservation de ces documents est organisée dans l'intérêt public tant pour les besoins de la gestion et de la justification des droits des personnes physiques ou morales, publiques ou privées, que pour la documentation historique de la recherche. (France, Section 1)

Public records, state records and sometimes, *official documents* are used interchangeably in archives legislation indicating those records created, received and maintained by government agencies or other institutions within the public domain as opposed to private records from non-government agencies, institutions, families or individuals. As the right and ways of access to records and archives often depend upon how these terms are defined in the legislation, consistent and clear definitions are essential, and as far as possible, they should also be compatible with the terms used in related laws.

The definition of a public or state record under an archives legislation should meet the essential criteria of provenance, purpose and value. It should cover recorded information created, received, and maintained by a government organization or any organization performing public functions and services on behalf of the government as evidence of such functions and services. It should preferably include any aids and supplementary data necessary to understand and use such information. An enumeration of different kinds of documents that are considered to be records/archives may illustrate, but not replace a proper legal definition. The definition needs to remain valid regardless of the form or medium of the record. An enumeration of possible forms of a record tends to become obsolete when technology develops a new media.

Example

“Records” included all books, paper, maps, photographs, machine readable materials, or other documentary materials, regardless of physical forms or characteristics, made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legislative successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government because of the informational value of the data in them.” (US Federal Legislation)

Document in the meaning of this Act shall be recorded information, regardless of medium, received or produced in the performance of the public duties of the Confederation, and all aids and supplementary data necessary to the understanding and use of such data. Archives shall mean documents taken into safekeeping by the Federal Archive or independently archived by other bodies according to the principles of this Act. (Swiss Federal Act, Section 1)

It is my personal opinion that today especially in Europe, with existing trend on transparency in administration, it is better to use the definition of records in continuum, without separation on *records* and *archives* in order to avoid a danger of inconsistency of legal acts.

SCOPE

Archives legislation must define the scope and extent it applies. Apart from government bodies, considerations should be given to include organizations that perform public functions.

Legislation must define the scope of the bodies to which it applies. Legislation for records or archives should make clear whether it covers the head of government and all the bodies, with or without exceptions, that discharge the legislative, judicial and administrative functions of the country, and if it also extends to include public corporations, quasi-government agencies and others that perform public functions. For the latter, a further elaboration of the scope of the public bodies and quasi government agencies should be included. Further, provisions regarding dissolved public institutions and the extension of statutory control to new public bodies should also be considered.

Depending on tradition of the country, in the scope of the Act could be included and private legal entities with intention to protect cultural heritage, public interest and human rights.

Example

Records in any form whatsoever received or created by an administrative authority...or by an institution or person whose rights or duties have passed to an administrative authority...(and an) administrative authority is an organ of a legal person established under public law, or, any other person or body in whom or in which some public authority is vested. (Netherlands, Section 1)

In the legislation of the United Kingdom, public bodies included, "their staff, together with public services, enterprises and institutions and their respective staff" and "public bodies before or after the entry into force of this Act". The specific inclusions provide clarifications of the definition of public record and the breadth of the law. Sometimes there may be a need to exclude from the legislation certain bodies or certain records. These should be clearly specified in the legislation. Another important consideration is how easy it should be to extend the coverage and exclusion under the legislation, and how it should be carried out. If it is the intention to alter ambit in the future without resorting to amending the legislation or enacting new laws, the legislation should provide a mechanism to include or exclude bodies and records that it intends to cover.

Examples

A Commonwealth institution, or a person having to act on behalf of a Commonwealth institution, may, with the concurrence of the Director-General, determine that a Commonwealth record, or each record in a class of Commonwealth records, being a record or class of records in the possession of the Commonwealth institution or relating to the functions of the Commonwealth institution is

- (a) a record that is not required to be transferred to the custody of the Archives under section 27; or
- (b) a record to which the Archives is not to be entitled to have access under section 28 or is not to be entitled to have access under that section otherwise than on specified conditions to be observed by the Archives... (Australia, Section 29)

Without prejudice to the Lord Chancellor's power of making orders under paragraph 4 of this Schedule, Her Majesty may by Order in Council direct that any description of records not falling within the foregoing provisions of this Schedule (not being Welsh public records) as defined in the Government of Wales Act 1998) shall be treated as public records for the purpose of this Act but no recommendation shall be made to Her Majesty in Council to make an Order under this sub-paragraph unless a draft of the Order has been laid before Parliament and approved by resolution of each House of Parliament. (United Kingdom First Schedule Section 7(1))

INALIENABILITY AND IMPRESCRIPTIBILITY OF PUBLIC RECORDS AND ARCHIVES

The National Archives should have the right to inspect, replevin, recover and instruct protection of public records which are or believed to be estrays through an established mechanism.

Public records and archives of a country should be taken as public property in the public domain through a process governed by law. Records and archives relinquished from official custody without lawful authority or if the authority is subsequently revoked should not lose their quality as public property. The National Archives should have the right to inspect, replevin, recover and instruct protection of public records which are or believed to be estrays. It may be useful to include provisions for reproduction of estrays where return of records is not feasible.

Given the world-wide trend of privatization, corporatization and outsourcing of government functions and services, archives and records legislation may require explicit records disposal before such administrative or organizational changes happen to ensure that records created before such changes retain their public nature unless provided otherwise in law. Some legislation incorporate provisions that prohibit or impose controls on the export of records which are considered to be or once have been considered archives in the legislative framework concerning cultural property. In short, it is important for the National Archivist to be given the right and a mechanism to "declare" or "schedule" records he or she considers to be or have been public archives with retrospective effect and take appropriate recovering or protection measures.

Example

Les archives publiques sont insaisissables, inalienables et imprescriptibles. Lorsqu'il est établi que des archives sont d'origine publique et détenues par les personnes physiques ou morales, l'Etat les revendique sans limitation de temps. (Algeria, Section 6)

RECORDS FROM THE PRIVATE SECTOR

The National Archives should be given responsibility and flexibility to acquire archives from private sources for proper preservation or to enrich its collection through legal means.

Archives and records legislation should identify the responsibility of the National Archives for the acquisition and care of private records that warrant permanent preservation. While the responsibilities may or may not be extensive, the National Archives should be given the flexibility to acquire archives from private sources for proper preservation or to enrich its collection through legal means. The degree to which the National Archives acquires private records partly hinges on the division of collecting responsibilities among cultural institutions in each country. The manner in which the enabling legislation is exercised will also be determined by the kind and extent of intervention in the private economy chosen by each government. Regardless, the archives legislation should encourage communication and cooperation to preserve private records of national, regional and local significance.

Archives legislation in some countries imposes explicit controls on private archives, which are of main public interests. While the controls may not affect ownership, the idea is to ensure proper preservation and thus the owner may not be allowed to destroy, change or export the archives without approval of the National Archives. Sometimes, the National Archives may have the right or the priority to either copy or buy the archives at a price fixed by the owner if the latter has the intention to export the archives.

Example

"Private archives or records (...) may, by agreement made with the owner, be accepted for preservation and maintenance with the National Archives. (Finland, Section 20)

ESTABLISHMENT, RESPONSIBILITIES AND STRUCTURE OF THE ARCHIVES INSTITUTION

Archives and records legislation should provide for the establishment of a National Archives with clear mission and broad functions that enable it to play a key part in making policies for and management of records throughout their entire life cycle.

Legislation should provide for the establishment of a National Archives and state its mission and major functions in acquiring and preserving the society's documentary heritage and making it available for public access and use. Regardless of how the National Archives is structured, it must be designated [entitled] to play a key part in the overall management of records and information of the public administration. Its statement of mission in legislation should be comprehensive and broad with the major functions listed to illustrate a mission but not to limit the mandate. A too detailed enumeration of specific functions and responsibilities may restrict the evolution of the Archives as the environment changes.

To ensure that adequate, reliable and authentic records are created, maintained and preserved, and to avoid duplication in management efforts, National Archives should participate, at the front end, in planning, policy-making and developing the infrastructure of electronic records and information systems, and implementing appropriate recordkeeping rules and practices. With the increasing reliance on electronic records in documenting decisions and conducting business transactions, the need for establishing a close link between the National Archives and records creators, managers and users is becoming more imminent than ever. The collaboration or integration of records management and archival activities is sometimes effected through restructuring or extending the role of the National Archives to become a National Records Administration with jurisdiction over records throughout their entire life cycle.

The formal authority to take action on professional issues about records should be vested with the senior professional, usually the National Archivist, acting under the overall constitutional responsibility of the government represented by a Minister or higher. The mandate of the National Archivist should include not only areas of acquisition, preservation, access and use of archival records but also the creation and maintenance of adequate, accurate and usable records in agencies covered by the legislation.

Although it is not the task of legislation to define internal organization or detailed administrative arrangements, it is essential that the legislation authorizes the appointment of the head of the National Archives and defines the statutory duties and responsibilities. If it allows national legal framework, in order to ensure quality management of archives and records, the recruitment, training, promotion and the professional qualifications of middle and senior archivists, and the classification of records staff both in the National Archives and working in government agencies should be addressed in specified regulations or staffing standards.

Examples

The objects and functions of the National Archives of Canada are to conserve private and public records of national significance and facilitate access thereto, to be the permanent repository of records of government institutions and of ministerial records, to facilitate the management of records of government institutions and of ministerial records, and to encourage archival activities and the archival community. (Canada, Subsection 4.1)

The Authority (State Records Authority) has the following functions:

- (a) to develop and promote efficient and effective methods, procedures and systems for the creation, management, storage, disposal, preservation and use of state records,
- (b) to provide for the storage, preservation, management and provision of access to any records in the Authority's possession under this Act,
- (c) to advise on and foster the preservation of the archival resources of the State, whether public or private,
- (d) to document and describe State archives in their functional and administrative context,
- (e) such other functions as are conferred or imposed on the Authority by or under this Act or other law.

(New South Wales, Section 66)

REPORTING RESPONSIBILITY

The National Archives should be established within the main stream of public administration under an influential minister or above to lead and control records and information management in departments and agencies.

As modern National Archives are accountable for the selection and preservation of relatively recent records of the country and they also have a central role to play in managing current records, legislation should place the National Archives within the main stream of departments and agencies. The National Archives should be under the jurisdiction of an influential minister or above with suitable authority to lead and control records and information management in departments and agencies. The legislation should provide the level of responsibility within the state structure that enables the National Archivist to intervene directly with the heads of other departments and agencies. Placement of the Archives outside of government or as a purely cultural institution may not be desirable as it will not involve the Archives adequately in the ongoing programs and decision making of government.

Examples

The Archivist of the United States shall be appointed by the President by and with the advice and consent of the Senate. (US Federal Legislation, Section 2103)

The Lord Chancellor may appoint a Keeper of Public Records to take charge under his direction of the Public Record Office and of the records therein and may, with the concurrence of the Treasury as to numbers and conditions of service, appoint such other persons to serve in the Public Record Office as he may think fit. (United Kingdom, Subsection 2.1)

The National Archivist of Canada shall be appointed by the Government in Council and shall have the rank and salary and all the powers of a deputy head of a department. (Canada, R.S., c.1(3rd Supp). 3(2))

ADVISORY BODY

An advisory body may be created to strengthen relationships with the government and private groups to ensure that the National Archives remains responsible to public needs

Enabling legislation should permit the archival institution to create an advisory body that is useful in strengthening relationships with public and private groups that have an ongoing interest in the evolution of the institution. Responsibilities of the advisory body should not extend beyond the provision of advice as the direct responsibility and accountability of the archival institution is to the state of which it is a part. The role of the advisory body is to ensure that the institution remains responsive to its communities.

NATIONAL ARCHIVAL COORDINATION

National Archives should be given a leadership role within the community of archival institutions, both inside and outside governments (public and private sector) to facilitate the development of a national archival system or network.

Legislation regulating a National Archives system should take into account the structure of the country and the degree of autonomy enjoyed by authorities within the country. In some circumstances, there may be the need to have a coordinated national system, in which, public archives services are linked to different levels of government, provincial or municipal, etc. Provisions should also be considered in legislation for any responsibilities assigned to the National Archives for management of the archival operations of other authorities such as those enabling the National Archives to play a leadership role within the community of archival institutions, both inside and outside governments (public and private sector). These will facilitate the development of a national archival system or network. Under this umbrella, policies can then evolve to strengthen the national archival system.

Example

Au cadre de l'activité du Directeur General des Archives de l'État appartient la coordination de l'activité archivistique sur le territoire de l'État. (Poland, Section 21)

RECORDS MANAGEMENT

Archives and records legislation should direct the National Archives to develop, approve and review advisory and mandatory standards and regulations for adequate and accurate recordkeeping in departments and agencies, and audit their management of records from creation to ultimate disposition against mandatory requirements to ensure authenticity, integrity and usability.

The quality of a record, regardless of its physical form, depends to a large extent on how it was generated and maintained by the records creating agency. Legislation should direct the National Archives to develop, approve and review advisory and mandatory standards and regulations for adequate and accurate recordkeeping and other management functions of records from creation to ultimate disposition to ensure their authenticity and integrity and usability.

The prominence of electronic records with their inherent physical attributes is an important factor favouring legislated authorization for the above. To ensure the ongoing preservation and accessibility of electronic records through time, the requirements of archival functions must align with the recordkeeping requirements even before such records are created. Without proper management and control of records at the front end of their life cycle, their authenticity, reliability, usability and durability cannot be assured, and those of archival value will not be readily identified and safeguarded.

The delivery of advice and instructions from the National Archives may be through other central agencies of the government, but the role of the National Archives in establishing standards and regulations for records held by public administration should be granted in law. Further, the archives legislation should establish the authority and role of the National Archives to inspect, instruct, and report on the creation, maintenance and use, retention, and disposal of records held by the public administration to ensure compliance with the mandatory records standards and regulations. It is useful to clarify the role and responsibilities of other government agencies or bodies covered by the act in respect of records management.

Examples

The Director shall conduct research and studies, develop and establish standards and procedures, for record making and record keeping, selective retention of records, scheduling of records for disposal, storage, security and preservation of records and their retirement to records centre or the National Archives. (Nigeria, Subsection 8.3)

The Federal Archives shall advise Federal agencies designated in paragraph 1 on the management of their records. (Germany, Subsection 2.10)

Each public office must make and keep full and accurate records of the activities of the office. Each public office must establish and maintain a records management program for the public office in conformity with standards and codes of the best practices from time to time approved... (New South Wales, Section 12 (1) and (2))

APPRAISAL AND DISPOSAL

Archives and record legislation should stipulate that no public records should be transferred, migrated, altered, deleted or destroyed without the consent of the National Archives. The respective roles of the National Archives and government departments in appraisal and appropriate disposal of records should be defined and the ultimate authority specified.

All archives legislation should define the respective roles of the National Archives and the various government departments for continuous appraisal and appropriate disposal of records. The latter should involve not only destruction of records but also their transfer (custody and/or ownership) within and outside government jurisdiction, migration, alteration and deletion. The legislation should specify the objectives and formal responsibilities for records appraisal and disposal, and define the ultimate authority for these functions, which preferably should rest with the National Archives or the authority responsible for the National Archives. Archives legislation should unequivocally oblige all bodies creating state records not to dispose of such records without the consent of the National Archives.

Examples

No record under the control of a government institution and no ministerial record shall be destroyed or disposed of without the consent of the Archivist. (Canada, Subsection 5.1)

The Federal Archives, after consultation with the offering agency, shall decide on the permanent value of the documents for the research in or the comprehension of German history, the protection of the rightful concerns of citizens or the provision of information for legislation, administration or jurisdiction. (Germany, Section 3)

The law may also specify particular types of records which are not to be eliminated, for example records dating from or before a certain date.

TRANSFER OF ARCHIVES

Legislation should require government agencies and public organizations to timely and systematically transfer archival records to the National Archives or relevant institutions as the National Archives directs. The National Archives may assume the role for the proper management, control and preservation of archival records regardless of their custody.

Legislation should require that government agencies and public organizations covered, in due course, transfer archival records to the National Archives or relevant institutions as directed by the Archives. Exemption for certain departments or certain types of records from the normal transfer arrangement may be included as necessary for reasons of costs, technology, statutory provisions or long-term operational needs, etc. with mandatory consent of the National Archives.

Systematic transfer of records of permanent value to the National Archives or organizations it designates should be accomplished according to agreed retention periods and transfer dates, and methods and rules prescribed by the archives. Transfer according to a fixed period of years after records creation defined in legislation may not be practical because of the rapidly evolving environment surrounding records creation and use. The timely transfer and preservation of electronic records has become particularly important because of the fragile nature of the medium on which such records are maintained and the necessity of acquiring related information that permits use of the records.

Examples

Upon the conclusion of a President's term of office, the Archivist of the United State shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. (US Federal Legislation, Section 2203 f.1)

Documents shall be deemed no longer constantly required and hence must be offered to the Federal Archive... no later than ten years after the last addition to the records. Special categories of documents shall be... transferred immediately after drafting or signature... The Federal Archives' instruction shall govern the details. (Swiss Federal Act, Section 2)

Le Conseil supérieur des archives décide souverainement du transfert aux Archives historiques nationales de tous les documents qu'il juge avoir une valeur historique, qu'il s'agisse d'un ministère ou d'une autre administration publique. (Egypt, Section 5)

Further, if an agency is defunct and the functions have not been transferred to an ongoing institution, the records of a defunct agency should also be transferred to the National Archives. The legislation may also provide for the proper management, control and preservation of records appraised to have permanent value by the National Archives whether or not they are to be transferred to the National Archives or its designated places.

Example

The Archivist shall be entitled from time to time to inspect any public records that are for the time being in the possession or under the control of any Government office and give such instructions as to their safe preservation and such advice as to their efficient and economical administration and management as he considers necessary. (Fiji Islands, Section 9)

ARRANGEMENT AND DESCRIPTION

The National Archives should be given the leadership in developing and promulgating archival arrangement and description standards.

The National Archives should be assigned a leadership role in developing and promulgating arrangement and description standards for the management of archives regardless of physical medium to facilitate their access and use. Detailed provisions are often left to regulations, instructions or internal manual.

Example

The National Archives may issue regulations concerning...archives descriptions and archives inventory... (Sweden, Section 11)

ACCESS

Access to public records, subject to prescribed conditions and exemptions for the protection of privacy, copyright and official secrets should be granted as a right preferably in a single legislation. Restrictions to record access should not be forever. A specified authority may grant exceptional access to closed records or change the closure period.

The freedom and liberty of access to records, subject to prescribed conditions, should be provided in legislation as a right of every citizen and foreigners may have equal access right. It will be desirable to have a single legislation or a single set of regulations that governs access to all official records including archives throughout a country. If such harmonization cannot be achieved, the archives legislation should take into account existing legislation on access to information, protection of privacy, data protection, and copyright with the aim to establish clarity and certainty, and ensure no erosion of access rights already exist. If the archives and records legislation does not override conflicting provisions in other laws, it will help to specify that the archives legislation prevails unless there is express repeal or specific action taken to avoid that result.

Access considerations should not determine the institutional location of the record or the transfer date of the record to the archives. The same access conditions should preferably apply to records whether they are archives under the control of the National Archives or whether they are current records under the control of other departments and agencies of the administration.

While access may be refused in circumstances where archival records are in bad material condition, for protection of national security, public interests and privacy or in respect of individual donor agreements, such restrictions, however, should not last forever. Legislation should permit access to records at the earliest possible date, based on the impact of release, the application of fixed time periods for specific categories of records or certain attached conditions on the use of the information contained. The access date may vary for different categories of archives.

Legislation should also specify an authority which may grant exceptional access to closed records or decide upon extending closure for an exceptional longer period. The authority may be vested with the minister responsible for the records and archives and/or delegated to the National Archivist. This power should be exercised within a process that provides a further opportunity for citizens to appeal the decision. Legislation should specify the authority that can remove restrictions in accordance with law. Legislation on access must be developed and implemented with a balance that ensures that records continue to be created, preserved and available for use.

The archives legislation should establish provisions in respect of copyright in records in the National Archives if no equivalent provisions exist in the copyright law. The provision should permit the Archives

to make records available for inspection and to provide copies for research and study without breaching private copyrights that may subsist in them.

Examples

In order to encourage the free interchange of opinion and the enlightenment of the public, every Swedish subject shall have free access to official documents. The right of access to official documents may be restricted only if restriction is necessary having regard to (exceptions)... (Sweden, Sections 1 & 2)

Tout fonctionnaire ou agent charge de la collecte ou de la conservation d'archives en application des dispositions de la presente loi est tenu au secret professionnel en ce qui concerne tout document qui ne peut etre legalement mis a la disposition du public. (France, Section 2)

Documents which already in the public domain before transfer to the Federal Archive shall remain in the public domain. (Swiss Federal Act, Section 3)

PRESERVATION

Legislation should recognize the role of the National Archives in proper preservation and conservation of records and archives by providing it with appropriate resources, equipment and facilities, and allowing it to prescribe necessary standards and instructions to government or public offices.

Preservation should be defined as one of the most basic functions of the National Archives in storing and protecting archives to ensure their authenticity, reliability, usability and durability. Proliferation of electronic records and their susceptibility to easy modification and erasure make the task more complicated than ever. Legislation should recognize the role of the National Archives in proper preservation and conservation of records and archives by providing appropriate resources, equipment and facilities, and prescribing necessary standards and instructions to government or public offices to protect physical and intellectual security of records in their custody.

As the right to data rectification by the data subject is granted by most data protection laws, archives legislation may include provisions to guard against erasure or blocking of personal data in archival records, whose authenticity should be preserved whether or not the information contained therein is verifiable.

Example

If an affected person becomes aware that the archived documents contain information about him or her which he or she considers incorrect, he or she may have this noted but shall not correct the data...The note of objection shall be added to the documents at the appropriate point. (Swiss Federal Act, Section 5)

In addition, if the copyright law does not provide for the National Archives to make copies of copyrighted material for preservation purpose, an equivalent provision should be included in the archives legislation.

SANCTIONS

Sanctions to enforce the fundamental principles of archives protection and preservation should be provided by law.

Archives legislation or other related laws should provide for sanctions to enforce the fundamental principles of archives protection and preservation. Most archives legislation contains a general clause

prohibiting the damage, mutilation, destruction, removal from custody, etc. of public archives. Sometimes, it is left to the responsible authority to provide any regulation for penalties.

Example

Celui qui, ayant une obligation particuliere de proteger les documents d'archives, procede a leur endommagement ou destruction, est soumis a une peine d'emprisonnement jusqu'a trois ans. (Poland, Section 52)

Access to Archives and Data Protection

Rolande Depoortere ¹

INTRODUCTION

Historical background

As other international bodies², the International Council of Archives has been active for more than ten years in archival legislation matters, with emphasis on archival access and data protection issues. These issues were discussed during CITRA Conferences (Mexico 1993, Edinburgh 1997, Stockholm 1998, Cape Town 2003) where different points of view were presented. *The Principles for Archives and Current Records Legislation* was issued for the international archival community in 1996, which set forth principles for access to archives and current records.

Taking into account the specific importance of archival access issues in Europe, ICA took part in the preparation of Recommendation No. R (2000)13 adopted in July 2000 by the Committee of Ministers of the Council of Europe discussing European policy on access to archives³. ICA was also involved in preparing the second recommendation to the Council of Europe related to our profession – the recommendation on access to official documents adopted in February 2002⁴.

The Committee on Archival Legal Matters wrote the report entitled *Personal Data: Access and Protection* for discussion at the ICA Congress in Sevilla. The author of the report, Poul Olsen (Denmark), commented that "this sketchy outlining of the issues in connection with personal data and access has left the majority of the questions unanswered" and identified areas for further work by the ICA: the most important task was to conduct research to identify the various national data protection and archival laws. Comparative studies needed to be done in the following areas: (1) secondary use of personal data; (2) the role archival agencies should play in the transfer of digitized personal data; (3) limitations and access to personal data in various national laws; (4) case studies of practices dealing with access to personal data (administrative and court decisions, ombudsmen's reports, etc.); and (5) the co-operation between administrative agencies in granting or denying access. During the meeting in Basel in April 2001, the CLM adopted a work plan for the 2001-2004 period that included this project. In this same meeting a work group was established to begin the project with Rolande Depoortere as reporter, and including Peter Kartous, Jean Le Pottier, Eljas Ormann, Fouad Soufi, Piotr Stegni, and Maria Spankova. The group started its work in Basel.

Objectives of the report

The CLM work group decided to analyse three main topics

- (1) Access to archives in general: i.e. legislation, access rights, special permissions, partial access, responsibility of users, refusals, appeals, and access to private archives;
- (2) Access to official documents: i.e. legislation, the impact of freedom of information acts with regard to archival access legislation, co-operation of public archives with public authorities;

¹ With the collaboration of Maria Spankova (Ministry of the Interior of the Slovak Republic), Eljas Ormann (National Archives of Finland), Jean Le Pottier (Archives départementales de la Haute-Garonne) and Jay Butler, (lawyer U.S.A.)

² Like UNESCO which published RAMP studies on access to archives: M. DUCHEIN, *Obstacles to the Access. Use and Transfer of Information from Archives*, Paris, 1983; G. BLAIS, *Access to Archival Records: a Review of Current Issues*, Paris, 1995.

³ Council of Europe, *Recommendation R (2000) 13 of the Committee of Ministers to member states on a European policy on access to archives*, 13 July 2000.

⁴ Council of Europe, *Recommendation R (2002) 2 of the Committee of Ministers to member states on access to official documents*, 21 February 2002.

- (3) Protection of personal data: i.e. definitions of basic terms relating to personal data protection, access to personal data and its limitation in the legislation of particular countries, relevance to archives access rules, role of the archivists in deciding access.

The following issues were not incorporated in the inquiry: copyright, access to archive records created by former leading political parties, and archives/records of security services for former repressive regimes. Copyright issues are the subject of a separate CLM project, as are access rules for archives/records of former leading political parties. A report prepared by Antonio Gonzalez Quintana for UNESCO on behalf of the ICA and published in 1997 addresses access to archives/records of the security services from 1974 to 1994⁵.

The report is in two main parts. The first is an analysis of the general problem of access and limitations on access to information in the archives. The second studies the protection of individual rights of privacy as a major constraint on dissemination of information.

The report is orientated to help active archivists to be more engaged in working together with legislators. But the intended audience is not limited to professional archivists or students in archives and records management. Administrative supervisors and managers, political authorities and decision makers, members of legislative and political bodies, consultants, lawyers, researchers, are also expected to be interested in the matters covered.

Methodology

Basic information has been collected on access and data protection legislation in as many countries as possible because of our understanding that archives and related records legislation are closely linked to the legal tradition and experience of each country. Mr Ormann was entrusted with drafting a report on the situation in the Nordic countries (this report is now published⁶) and Mr Soufi with collecting documentation on African countries. Jay Butler gathered information regarding both federal and state access and privacy legislation in America. Due to fundamental political changes made in the countries of Central and Eastern Europe during the last decade, Peter Kartous and Maria Spankova were asked to create a questionnaire and summary of the data relating to these parts of Europe. The questionnaire was sent to 19 countries, and by the end of November 2001, 15 recipients had responded.

In some cases, where information was lacking, an attempt was made to find substitute information by using other sources, such as texts of certain archival acts for the respective countries, the CITRA reports of L. L. Lundquist and Nina V. Kystruska (Edinburgh 1997), and reports prepared by participants of the Open Society Archives summer school (Budapest 2000). Information presented at the 6th European Conference (Florence 2001) by Mrs Darja Nalecz (Poland) was also used, and recent publications as the proceedings of the EU-Conference on access to official documents and archives organized in Lund in April 2001, the proceedings of a conference on archives in the information society organized in Poland in 2002, the proceedings of the CITRA in Cape Town on October 2003, the proceedings of the pre-congress meeting of the ICA in Elblag in May 2003, and the last issues of *Comma* on archives in Russia⁷. Web sites of the National Archives of numerous countries were systematically consulted and provided an overview in French, English or Spanish of the legislation on access to archives, and the regulation of the reading rooms as well, which is an important source throwing light on access to archives in practice.

⁵ A. GONZALEZ QUINTANA, *Archives of the Security Services of Former Repressive Regimes. Report prepared for UNESCO on behalf of the ICA*, Paris, 1997.

⁶ Cf. E. ORRMANN, *Legislation concerning Access to and Secrecy of Official Records, Archives and personal Data in the Nordic Countries*, *Comma*, Paris, 2004, n° 1 p. 113-128.

⁷ See *Access to Official Documents and Archives. Report from an EU-Conference on Access to Official Documents and Archives in Lund*, Sweden, 5-6 April 2001, Sweden, 2001; *Archives in the Information Society. Papers of the International Conference Popowo*, May 31-June 1, 2002, Warshau, 2002; *Proceedings of the XXXVIIth International Conference of the Round Table on Archives (CITRA)*, Cape Town, South Africa, 21-25 October 2003, *Comma*, ICA, Paris, 2004, nr 2; *Archives in the Society. ICA pre-congress meeting. Papers of the International Conference Elblag May, 22-24, 2003*, Warshau, 2003; *Archives and Archival Issues of Russia*, *Comma*, ICA, Paris, 2004, nr 3-4.

Some definitions

In order to clarify the following report, the authors would like to make it clear that their enquiry covers access to documents at every stage of their life cycle. As some national archival laws and systems make a distinction between current records, semi-current records and non-current records or "historical" archives, it is necessary to remind readers that in the present text, the word "archives" designates documents and data at every stage of their life cycle, from their creation to their placing in the custody of an Archives repository. The definitions used are those produced by the ICA⁸.

Access

Right, opportunity, or means of finding, using, or approaching documents and/or information. In data processing, the process of entering data into and retrieving data from memory.

Archives

Documents, whatever their date, their form and their material support, created or received by any person or entity, and by any service of public or private statute, in the exercise of their activity. *This is the translation in English of the French definition of the concept of archives.* The concept covers thus the Anglo-Saxon concepts of current records, semi-current records and archives.

The words "Archive" and "Archives" (with capital letter) designate the institution or the building in which archives are preserved and made available for consultation; also referred to as an archival repository or archival agency.

Record

A document created or received and maintained by an agency, organization, or individual in pursuance of legal obligations or in the transaction of business.

Document

Recorded information regardless of medium or characteristics. A single item.

Data

Information represented in a formalised manner, suitable for transmission, interpretation or processing manually or automatically. Loosely used for *information*, especially in large quantities.

ACCESS IN GENERAL

The legal framework for defining the rules for access to archives varies widely according to country. The committee distinguished groups of countries according to general tendencies. For instance, the legislation and the practices appropriate for member states of the European Union tend to become standardized at the instigation of the directives issued by the council, which have a supranational reach. However, different approaches are still sharply perceptible when one compares Scandinavian countries with other member states; and countries with Anglo-Saxon culture also have a specific tradition. The case of formerly authoritarian states that are, at present, in the process of democratic transition or have finished the transition toward a democratic regime cannot be discussed here. In the field of access to information and archives, the countries of Central and Eastern Europe that are new members of the European Union, are equipped with a dozen years of legislative experience compatible with that of other member states within the Union.

The reader of this report must keep in mind that practices can diverge from written policies or legal texts. The liberal appearance of certain national laws can sometimes hide ambiguous realities. It is also

⁸ See *Dictionary of archival terminology. Dictionnaire de terminologie archivistique*, ICA, 3rd edition prepared by the ICA/DAT group (<http://staff-www.uni-marburg.de>); see also the 2nd edition of this dictionary in: ICA Handbooks Series, vol. 7, München, New York, London, Paris, 1988.

the case that the execution of the normative texts arouses insuperable material or logistic difficulties that hinder their practical application.

Fundamental texts and principles

Numerous international texts assert the right of citizens to obtain access to information, including the Universal Declaration of Human Rights (art. 19), the International Covenant on Civilian and Political Rights (art. 17), the UNECE Aarhus Convention on Access to Information, public participation in decision-making and access to justice in environmental matters, the European Convention on Human Rights and Fundamental Freedoms (art. 6, 8, 10), the recommendations of the Council of Europe and, in particular, the recommendations (2000) 13 adopted in July 2000 and (2002) 2, adopted in February 2002.

At the national level, access to archives in most states is governed by a combination of texts, based on the national Constitution for statutory measures or circulars, laws and decrees. If the laws on archives contain provisions in this domain, the other texts on the subject do not relate specifically to archives in the sense collectively admitted by the profession and the ICA. These texts may deal with access to "Information", or to "data", in "records", in "files" and in "documents". Moreover, interpretation of the language is not clarified in all texts. Terms such as "publication", "opening", "access", "consultation", "classification", "secrecy" and "personal data" do not have an identical meaning from one country to another. The legal and cultural contexts play a significant role in understanding the terms. This is particularly evident in cases concerning the protection of private life, as will be described in the second section of this report. It would nevertheless appear that, in spite of problems inherent in translation from one language to another, the global reach of the legislative provisions current in a country remains understandable to foreign users.

The Constitution of a particular state is the main official text governing access to archives, so far as it establishes the right of every citizen to freedom of information, and/or his right to privacy. Other main official texts are the laws or decrees on: (1) freedom of the media; (2) publication of administrative documents; (3) classification of sensitive administrative documents; (4) archives; (5) protection of private life or of personal data; (6) telecommunications; and (7) copyright protection. In several countries, specific laws or decrees address particular categories of documents, for example, archives of the judiciary, legislature, ministerial departments, archives of the registry office (family status), notaries, official statistics, private economic information (such as data relating to patents) or data on electronic carrier. With reference to statutory texts, ministerial circulars play a significant role in defining the regime of access to documents, in that they address the functioning of the public reading rooms, clarify document reproduction rights, list the procedure for obtaining certified true copies, and fix charges for services.

Certain texts enforce or insist on freedom of access or, to the contrary, on limitations on access. The countries of northern Europe, namely Sweden, Norway, Denmark, Finland, and Iceland emphasise most clearly open access to information. Sweden and Finland, quite particularly, provide a general principle of freedom of access to information, and the only limits to this principle must be exceptional and specified in the law. This is the approach taken, as well, by the American Congress in the Freedom of Information Act, 5 U.S.C. §552, as amended by Public Law No. 99-570, §§1801-1804 (1986). However, most national legislation addresses in principle the limits to access, clarifying closure periods during which documents remain inaccessible, and providing exceptions to these closure periods. In numerous countries, the management of access to information remains marked by a tradition of secrets, an inheritance from the time when information control was a kingly right. In practice, between states all ranges of modulations are possible, from the most expansive freedom of access to the most binding limitations on access.

It happens that, within national legislation, the number of texts that settle questions of access to archives, along with their complexity, engender contradictions or ambiguities between their provisions. Therefore, the definition of certain terms can vary from law to law, delays in communication are not compatible and even certain fundamental principles are mutually excluded. Archivists and users have to face the consequences of these discrepancies on the daily functioning of the Archives services and the reading rooms.

Variations to the right of access

Access to archives is defined according to criteria that can be classified into broad categories, including the status of public or private documents; the nature and content of these documents; the stage of the administrative process to which they refer; the nature of the data carriers, especially in the case of electronic records; the interests of producers and/or owners of these documents; the profile of users; the purpose of use; the levels of access; the physical condition of the data carriers; the facilities to get copy of original documents; the cost of access; and the available description of documents.

Public archives

The status of the originating body of the archives determines their public accessibility. This is doubtless the main element that most strictly determines access to documents. Legal texts frequently make distinctions between public documents and private documents. The reason is that laws regarding publication of information generally limit themselves to information produced and kept by public bodies and the law usually applies only to administrative or official documents. This principle is explicit in laws of some countries, and implicit in most other countries. Public organizations, corporations and private bodies that fill missions of public utility are, as a general rule, included in public bodies. The regime of access to archives for services belonging to various levels of territorial administration (central, federal, regional, and municipal) is related to or in the same text when the State is centralized. When the State has a federal or confederate structure, the access regime is usually set out in separate texts, promulgated by legislative authority in the different federal entities. Rules and manners applying in federal or confederate States bodies can diverge significantly from one another.

It is generally only public, official, or administrative documents that benefit from freedom of access laws on transparency of administrations that exist in the great majority of democratic States. It is, however, necessary to mention an abnormality concerning the opening of documents possessed by public bodies. In several countries, documents given or bequeathed by private owners to public Archives services are subject to the conditions of access fixed in the agreement of donation. Although considered to be in the public ownership by transfer of property, these documents may escape the freedom of information laws or the laws on archives until the end of the term of inaccessibility determined in acts establishing the transfer of property.

In a number of countries, documents emanating from the legislature and the judiciary are subject to particular measures in the name of separation of power. It is quite common that the conditions of consultation that apply to documents of these institutions are more restrictive than those applying to documents relating to services of the executive. The files of judicial order court cases are often protected, given the personal and delicate character of the data they contain.

In some countries there are executive institutions whose documents are subject to special regimes that generally restrict consultation. These institutions usually manage their own archives, and documents are either not transferred to the National Archives, or are transferred only after a significant lapse of time. This is often the case for Ministries of Defence, Foreign affairs, Justice, State Security, police, the secretariat of the Prime Minister (or sovereign), and the cabinet; in short, archives of departments that contain classified materials. This point will be discussed in further detail in section 2.3. While in certain countries, rules of access to these documents are published or at least communicated to the public, this is the exception and not standard practice for most countries.

In several countries, access to the official archives largely depends on the authority that produced or held the documents and the stage of decision-making or administrative process to which they relate. In some countries, documents relating to the preparation of files and decisions at both national and local levels can, or in certain cases must, be kept secret. This may be the case for files and for correspondence exchanged by services within the framework of study of the files that they handle, including drafts of texts and preparatory notes. In its recommendation (2002) 2, the Council of Europe acknowledges the right to protect the confidentiality of deliberations within or between public authorities during the internal preparation of a matter. However, information pertaining to this distinction does not appear in the most legal texts and it is unknown how it relates to numerous States.

Private archives

Even in States where the political tradition is marked by liberalism, legislation intervenes to regulate conditions of communication for private archives. Generally, protecting the privacy of individuals motivates this intervention. Laws that deal with the protection of private life have been promulgated for the last thirty years in a number of countries and are applicable to both public and private archives, with the exception of the United States where the federal Privacy Act, 5 U.S.C. §552A, as amended, applies only to records and information held by the executive agencies of the federal government. Legislation was originally targeted at the management and the use of computerized databases created in administrations and bodies of the private sector such as banks, insurance companies, and hospitals.

At another level, the State intervenes indirectly when it exercises a right of pre-emption on private archives to integrate them into the national patrimonial collections for use by citizens. As mentioned above, access to documents of private origin kept by public Archives and the terms of procedure of donation, legacy, or deposit, are likely to be regulated by formal agreements signed by the State and by the donors or owners of the documents. Clauses that determine the regime of communication vary from case to case, even if most countries try to standardize practices at the national level.

As a rule, the State does not interfere in the management or organization of services for private Archives repositories. Private Archives set conditions of access to their collections; such as free consultation, the cost of supplementary services returned to the public (duplication of documents, etc.), opening hours of their reading rooms, internal regulation of communication, and categories of persons authorized to consult their documents. The State can, however, participate directly in management of certain centres of private Archives, notably when the Archives request subsidies or the State recognizes a cultural mission of the Archives and grants them a label of patrimonial institution. As demonstrated in some countries, authorities can also legally place obligations on the private Archives in order to guarantee access to information to citizens and administrations.

Nature and contents of documents/Nature of interests to be protected

The nature of documents is taken into account when authorizing their communication to protect contents that could hurt collective or individual interests. The normative texts define rules of consultation by the function or type of document (judicial and parliamentary archives are often distinguished from other categories of archives), the information they contain (personal data is a perfect example), or the interests to be protected. These interests are either those of the State, of individuals, or pertain to bodies of private law.

States systematically protect sensitive information concerning national security, national defence and economic interests, including the army, international relations, the safety of their citizens abroad, public order, the functioning of decision-making bodies within the State, the power of inspection, control, and supervision exercised by public authorities, the search and the pursuit of facts liable to penalty, the economy, the currency and monetary policy, and the national scientific potential. Some countries add to this list of national interests the preservation of nature, and restrict access to information relating to the protection of natural environments and endangered animal and plant species. Under the designation of protecting State interests, confidentiality of considerations between authorities is assured during the preparation of cases. The recommendation (2002) 2 of the Council of Europe assumes a significant part of this designation. Several States were equipped with legislation fixing rules and procedures for classification and declassification of sensitive documents. Some examples of rules that are determined are, the degrees of confidentiality of the data, the time allowed before declassification must be done, responsible agents, the penalties for cases of neglect or malpractice, and the manner of appeal.

Interests of the State are taken into account as well as those of private persons or institutions. Patents of invention and manufacture that are registered by a public authority are prohibited from communication during a specified time period, which varies from country to country. Finally, personal medical data is more or less strictly protected in many countries.

Electronic archives

The CLM has wondered about the status of electronic archives. Do they benefit from a special legal system? Is there a practical plan of access to them? The legislation for most States does not really make the distinction between the right of access between electronic data/archives and data/archives in traditional formats. The laws regarding transparency of administration and classification of sensitive data apply generally to any document, whatever the format. European legislation regarding protection of personal data addresses files and processes whether automated or not. Nevertheless, certain countries consider it necessary to promulgate specific capacities for management of electronic data. In regard to communication, Scandinavian countries oblige authorities to provide users with easy access to the data, requiring them to organize data processing in a way that provides public access to computers and all facilities for use. In Norway, the Ministry of Justice and police ensure that public bodies technically assist persons authorized to consult electronic data. These precautions are indispensable to avoid the problem of isolated or technologically deprived citizens who have no access to sophisticated computer equipment being unable to have access to information to which they have a legitimate right of access.

The specific nature and support of electronic documents facilitate access to information but conceal the important risk of loss of data if conservation is not guaranteed beyond current technology. On the one hand, the requirements of legislation for the protection of privacy can be more easily met with computer technology. It is relatively simple to copy partial electronic data, thus making the data anonymous, or to encode it. Electronic treatment of this data is less difficult than with non-digital support. On the other hand, a significant concern is that the lack of budgeting, computer resources, and specialized staff chronically affecting many archival services removes them from being producers of electronic archives and prevents them from exercising their role within the chain of data processing. Authorities must put great effort and expenditure into long-term conservation of electronic data if they want to ensure conservation of collective memory and equality of access for citizens. The chosen solution, whether collaboration between archival services and outside bodies (public bodies specializing in data processing, universities, or private companies) or delegation to third parties belonging to the public or private sector (subcontracting), will require rules that are made in perfect correspondence to laws that guarantee access to information, and require an effective communication of these rules to the users.

We intend to renew the recommendations of the International Council on Archives that encourage archivists to intervene with producers of archives in the conceptual design of information systems, before the creation of software and data; in short to participate actively in implementing systems of e-governance. This can only be done with solid training for archivists and an evolution of the profession, particularly for the staff of historical archives services.

Purpose of consultation/ Status of applicants (researchers)

The communication of archival documents can be modulated according to the users and the purposes for consultation. When laws exist regulating administrative transparency, every individual enjoys the right to inspect files concerning him or her, as well as information that is not classified, or does not fall under the law on the protection of privacy. In the exercise of their functions, categories of professionals may have access to files even of a personal nature, such as judicial files, state registers, or medical files. Lawyers, notaries, or deputies of the individuals to whom the files relate can consult and obtain copies of documents, when it is necessary within the framework of a current administrative or judicial procedure. Researchers belonging to a recognized scientific establishment or independent researchers proving the scientific reach of their research, may be able to receive wider access than that of "simple" users or amateur researchers. This is recognized in legal texts, such as the European directive of 1995 on protection of privacy and national laws of the member countries of the European Union and several candidate countries. But mostly, the privilege granted to the scholarly researchers stems from custom.

Other qualities of the user can determine his or her freedom of access to information, such as the user's age, nationality, or place of residence. In many public and private archives services, consultation of documents is reserved for adults, or for minors registered in establishments of higher education. The nationality or place of residence (abroad) is sometimes taken into account to refuse access to sensitive data. This discrimination tends to disappear in the archives services for Ministries of Defense or Foreign

affairs of the European States, but it strengthens in the field of protection of private life. Indeed, the European directive of 1995 addressing this subject and, consequently, the national laws of member states of the European Union transposing it forbid the communication of personal data to countries outside the Union that do not guarantee an adequate protection of privacy or do not have agreed safeguards, without preliminary consent of the persons concerned.

Levels of access

Legislation can distinguish several levels of access to documents, including simple consultation, reproduction (delivery or non-delivery of copies certified as authentic), and license to publish the collected information. Researchers are not always put in direct contact with finding aids, and are thus not allowed control over whether they receive access to all available information (see section 2.9).

Partial access to information is foreseen in certain cases, notably for personal and classified documents. Archivists, the holders of the information, communicate to researchers documents whose sensitive information has been erased or masked. This requires complex, long, and expensive manipulation. Original documents on paper are not communicated, partial copies are supplied, in which incommunicable elements are absent or hidden. With electronic documents, it is possible to code sensitive data or make them anonymous, as is recommended by the European directive of 1995 relating to the protection of privacy. However, these operations rely heavily on material and technical expertise, and are expensive. That is why many public bodies refuse to do so. Some archivists, moreover, have concerns about the propriety of spreading truncated information, by removing some of it, especially if national laws do not require researchers to be informed that the communicated information is only partial.

Destruction/appraisal of documents

Destruction of documents and data inevitably limits access to information. This destruction is sometimes planned or authorized in laws, like, to a certain extent, laws on personal data protection. Legally supervised, the elimination of information is supposed to avoid improper use of information to the detriment of persons or entities. But destruction is irreversible, and may, if it is not carefully thought-out, have disastrous consequences for those whose interests are being protected because people lose the opportunity to prove their rights and allegations. Furthermore, decisions on destruction should take account of the increased longevity of people and the consequent need to allow a longer period for their legal rights to be provable.

Physical condition of the data carriers/documents

Other factors are taken into account by legislators that justify limitation of the right of access to archives. We note here factors connected to the physical condition of documents. First of all, access to damaged or deteriorating documents is generally limited to authorized persons to prevent further damage to the documents. To remedy this problem, the holders of documents proceed with the necessary restoration or offer to researchers surrogates in the form of photocopies, microfilm, micro-index cards, traditional or digital photography, etc. In certain countries, Archives services are obliged to supply copies or make the technical manipulations or restoration within a time period fixed by regulations, so that documents can be removed from use only for a limited period.

Communication delays (or closure periods)

The combination of different laws that apply in a State becomes the reality for archivists and users because they mean variable delays in communication (or closure periods) according to the type of document and the nature of the interests to be protected (interests of the State, communities, or individuals). Fixed, as a rule, by the normative texts, the closure periods run from the document creation date or from a date relating to the subject matter, for example, the birth or death date of the person to whom the data relates.

Often there is a general delay in opening records transferred to a public Archives, as determined by national law on archives. While certain States do not impose a general closure period and open documents to the public as soon as they arrive at the National Archives, the majority of countries

continue to apply a general closure period of between 15 and 150 years. The European and North American practice aims at a period of 30 years (although in the United Kingdom standard closure periods ceased to apply in January 2005), but there are still States that apply a stricter standard.

Long official closure periods may be softened by the fact of a more liberal custom that shortens this period depending on the archive. In fact, in a number of countries a different regime is applied to official documents which are still current and thus, as a rule, still kept by the original producers, and to historical archives when they enter public archives. The first are subjected to laws on administrative transparency, freedom of the media and information, telecommunications, and classification, whereas the second are subjected also to the law on archives. Now, as has just been explained, the laws on archives often determine the closure periods for communication of sensitive documents. Paradoxically, historical archives can be less accessible than current records. States often try to surmount this contradiction by applying the rule that documents opened to the public by producers stay open after the transfer to archives services.

In addition to general closure periods, certain documents may be closed for longer periods. For example, documents originating from the national defence, foreign affairs, police and some other administrative bodies may be closed for between 40 and 150 years depending on the country, judicial procedures and notary offices documents from between 40 and 100 years, or family status, generally closed for 100 years. Personal data is withheld for periods of 50 to 100 years; the delay for information of a medical nature is usually longer and is calculated according to the date of birth or death of the individuals concerned. There is one completely exceptional case, which deserves to be mentioned here. It is the secrecy of origins that is recognized by French law. By virtue of this arrangement, children born to a mother who refused to allow her identity to be registered, cannot have access to the file of their birth and such a document would be forever incommunicable.

Limits to limits: special arrangements

Almost all laws make provision for exceptions to these fixed closure periods and an organized system is usually in place allowing users to request from authorities access to otherwise closed documents. These special provisions are similar in each country and two types are usually found. This first is a general authorization of free communication to every user before the end of the statutory closure period. The second is individual authorization involving specific time limits and sometimes a ban on reproduction or on publication of the information.

Archivists sometimes require the researcher to sign a written undertaking promising not to communicate or publish anything that might undermine the security of the State or the private life or reputation of the people concerned.

In cases of a refusal of a special authorization of access, authorities are generally obliged to explain the reason for their refusal.

Who decides on access?

From one country to another, the laws divide the power to give or refuse access to sensitive documents between archivists, the bodies that originated the archives and independent commissions. As long as the originating body retains the documents, the power to refuse access rests with the direction of the producing service or its archive management. Items are classified and declassified by agents of the originating body, and this takes place generally before transfer of documents to the historical Archives.

If declassification is not done before the transfer, Archive services agree with originating bodies the closure period and conditions for opening the documents to the public. After transfer to the historical Archives the decision, as a rule, belongs to the director of the Archives service. But the originating bodies may still be able to give their opinion on requests for access to closed documents (requests for special authorization of access).

However, in a number of countries, data containing personal information relating to a living person, even if preserved in the Archives services, is only communicated in accordance with the views of an independent body or civil servant, known as a Commission for Protection of the Private Life, a Privacy Commissioner or some similar name. These bodies, however, often prefer to focus their actions on

current records and recent documents, and pass to archivists the responsibility for determining when sensitive historical archives should be available to the general public.

Responsibilities of archivists and users

A question of concern to archivists is the civil and criminal liability with regard to the communication and use of information contained in archives. Several laws, in particular those which protect personal data, stipulate civil or criminal penalties against those responsible for data processing which results in injury to the person or community affected by release of the information. Now, who would be considered responsible in the event a researcher obtained sensitive data, having undertaken in writing not to reveal the information, and then revealed it? Is the written undertaking enough to exempt from liability the archivist who communicated the data? Generally speaking, can archivists, as providers of information, be considered responsible for the unfair use of information made by the recipient?

It seems necessary for the legislature to fix clearly the responsibilities of each party and for archivists to be aware of their position. If archivists are not satisfied by the provisions already in force, the legislators should be made aware of the reasons for their concern.

Penalties

In many countries, laws on archives do not include penalties for non-compliance such as neglect or malpractice. Nor do they refer to laws and regulations of general application repressing such malpractices (i.e. penal code or disciplinary regulation of public service). On the other hand, laws regarding protection of private life/personal data, freedom of information and press, transparency of administration, or classification of sensitive official documents, very often define the penalties for those guilty of neglect or malpractice. Punishments can be disciplinary for civil servants, or penal, and can include fines or several years of detention.

Procedures for appeal

Most countries provide a means of appeal either explicitly or implicitly in the legislation. As a general rule, laws on freedom of information, administrative transparency or classification provide for an appeal and indicate clearly which jurisdictional authority must be used in a contested case. Most European States establish independent committees to rule on appeals regarding access to administrative documents, or for protection of personal data. In some countries the appeal authorities are obliged to make their decision within prescribed time limitations.

When appeals are not explicitly provided in the legislation, we can assume that general principles of public law apply, and that the classic procedures for appeal against an administrative decision can be followed: namely, appeal in front of a superior authority, either before an administrative jurisdiction, ombudsman, or a mediator when one is available. Let us note that the European directive on protection of personal data recommends the possibility of a double appeal, an administrative appeal before the supervisory authority, and a jurisdictional appeal, without clarifying whether the latter is an administrative or judicial jurisdiction.

Practical and financial limitations to access

Charges for access

The expenditure that the users have to incur in order to consult archives represents a considerable factor limiting access. The expenses are of various types: admission fee in the reading rooms, copying charges and fee to make a secondary use of specified documents (for instance, to reproduce documents in a commercial publication). The tariff in force in the public Archives is seldom fixed in the law on archives, but generally in decrees or circulars. The private archives institutions are free to fix their own tariffs, even in countries that adopt a policy of free access to public Archives. The State sometimes imposes exemptions from payment for access to private Archives which are supported by public subsidies.

With regard to simple direct consultation of documents in the public Archives, States fall into two categories: those where payment for a right of access to the reading rooms (admission fee) is required, for example in the form of paying for a reader card for a given period; and those which adopt a policy of free

access. The Council of Europe recommends to its members that there be no charge for simple consultation of official documents (i.e. all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function, with the already quoted exception of documents under preparation).

The European directive of 2003 on access to environmental information prohibits charging for access to environmental information in a reading room, and an admission fee is not therefore permitted when information falling within its scope is concerned.

Beyond the simple consultation by the users, there can be charging for additional services facilitating access, such as reproduction of documents, extraction of data from data bases, research by staff for the public, provision of copies, whether certified or not, provision of certificates, transcription of old documents and translation. These are considered commercial facilities or value added services, for which the cost of provision (including materials and staff time) can be recovered. The payment of a fee is justified as price delivery of a commercial transaction or as public royalty⁹. There exist, to our knowledge, few studies concretely evaluating the cost to users of engaging in research using archives¹⁰.

In certain public Archives, in addition to charging for copies, a fee is required for published reproductions, not to confuse with the copyright. Those supporting a fee for a licence justify it as royalty due on the profits that the private individuals or companies will make from the publication of copies (such as book editors or paying Web sites editors).

Increasingly users can make their own copies, with their own equipment or equipment provided by the Archives, for example digital cameras. In this case, the majority of Archives require precautions such as prohibition of flash use, in order not to damage the documents. Specific rooms are sometimes placed at the disposal of the public to this end.

Description of documents, inventories

Archivists play an important part as intermediaries between the documents and the users insofar as they write the finding aids, i.e. they describe documents and index information. Identification of archives, and thus their accessibility, depend on the precision and the exactitude of their description, and also on the intelligibility of the description to the user. This aspect of the mediator role of archivists is seldom specified in legislation. Legislation does not require an Archives service to provide a precise description of documents, so making it possible for the user to identify for himself relevant items. Rare are the laws on archives which *oblige* the public Archives services to give to the readers the inventories for direct consultation, even if the *habit* is largely in favour of direct access to the inventories. Rare are the laws which prohibit the archivist from calling upon the state of unarranged or undescribed archives to refuse their communication.

Practical regulations of the reading rooms

Access to information is directly conditioned by the functioning and the rules of the reading rooms. According to the size of their staff and their equipment, the Archives services can ensure or not a continuous distribution of documents. Often, distribution is limited to certain hours, a certain number of items per reader and per day. These rules are in principle described in the reading room regulations that are communicated to the public.

Lastly, no law will govern the human quality of the reception given to the users, in particular to those who consult eminently sensitive data, concerning delicate matters and their close relatives, sometimes in situation of great moral distress. But it should be remembered that professional ethics require the

⁹ See J. LE POTTIER, *La recherche est-elle une prestation ? Dispositions réglementaires et déontologie professionnelle*, La Gazette des Archives, Paris, 2001, 192, p. 93-104 ; B. FAU, *La facturation des recherches est-elle légale ?*, La Gazette des Archives, Paris, 2001, 192, p. 105-111.

¹⁰ See for instance a short study on the cost of genealogical research in Belgium by J. ROELSTRAETE, *Wat kost het aan de genealoog om zijn stamboom op te zoeken?*, De archivaris, de wet en de rechtbank. Verslagboek van de studiedag Archief tussen openbaarheid van bestuur en bescherming van de privacy, Rechtsfaculteit van de Universiteit Gent 13 mei 2002, Brugge, 2004, p. 57-61.

archivist to provide the public with assistance, in particular those less able to deal with complex administrative procedures¹¹.

ACCESS AND PERSONAL DATA PROTECTION

Historical reminder

During the past thirty years, the desire to protect more effectively the rights of individuals with respect to private life, along with the development of digital technologies for information and communication, have resulted in promulgation of laws in numerous countries regulating conditions and procedures for exchange of personal data. The Land of Hesse was the first State to have voted for such a law, in 1970, followed by Sweden in 1973, the United States in 1974, Germany and Denmark in 1977, Austria and France in 1978, Luxemburg in 1979 and other States of the European Union over the following two decades. The countries of Central and Eastern Europe have since the 1990s been adopting comparable legislation, as well as non-European States, following the example of Hong-Kong in 1995, Chile in 1999, and Canada in 2000. International agreements, such as the European Convention on Human Rights (art. 8), the Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data (1981), now known as the Guidelines on the protection of privacy and transborder flows of personal data of the OECD, also are dedicated to the principle of respect for private life.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data marked a change of direction, because it obliged member States of the Union to transpose provisions into their national legislation, thus amending the existing laws. It also specified within the European area the principles according to which legislators are enabled to regulate and control processing of personal data, both in the public and private sectors, to protect the interests of individuals in the face of possible commercial or other abuses.

This principle differs from the tradition of some other states where legislation on protection of privacy is restricted to the public sector, like the United States. The United States Privacy Act applies only to public bodies, and the private sector is left to regulate itself. American companies may conclude sector-based agreements, in the financial sector and that of telecommunications in particular, but the level of protection for individuals is very uneven from one sector to another. Note, however, that the American system of jurisprudence, in this context as in others, typically gives to the judiciary, rather than the legislature, responsibility for the enforcement of individual rights. The American judicial system has been increasingly sensitive to claims of invasion of privacy, and notwithstanding the absence of relevant legislation, both federal and state courts routinely grant injunctive relief and monetary damages in cases brought by individuals for breaches of their right of privacy. However, it is difficult to reconcile the American self-regulating and personal litigation approach with the European state approach to protecting the privacy of individuals.

The concept of privacy

Commentators underline the fact that the concept of privacy is very little or not defined at all in the codes and there seems to be no universally accepted definition. Some examples of definitions are given here. The Spanish Constitution guarantees the right of citizens to honour, personal and familial privacy, and to their own image (art. 18.1). The Russian archive law includes in the definition of private life medical data, data relating to the family and intimate relations, the economic situation of the individual, and the

¹¹ See B. DE VRIES, *Openbaarheid in de praktijk*, Archivenblad (Nederland), February 2003, p. 20-23: human considerations on how the Dutch National Archives organize the reception of users who consult the personal files of their parents condemned for collaboration with the German occupants during the second world war.

protection of life and place of residence. The French jurist, Guy Braibant¹², recognizing the absence of a legal definition in France, based his opinion on jurisprudence and defined private life as the elements concerning the individual and his domestic life (name, place of residence, physical identity, customs, sexual identity, philosophic and political opinions, relations of the person and his/her family), but he excludes information relating to patrimony and professional life. Note, however, that France grants a delay of 120 years from the date of birth to career files. Louis Brandeis and Samuel Warren in 1890 defined privacy as "the right to be left alone"¹³. Alan Westin in 1967 defined the concept of private domain as "the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitude and their behaviors to others"¹⁴. This concept is clearly adopted in the preamble of the Australian Privacy Charter of 1994, which asserts that "a free and democratic society requires respect for the autonomy of the individuals, and limits on the power of both state and private organizations to intrude on that autonomy".

The difficulty, if not the impossibility of agreeing a legal definition of privacy is probably one of the reasons why legislation on protection of private life sometimes does not bear a title which refers explicitly to the notion of privacy. In fact, laws aim at preventing the collection, treatment and communication of data relating to individuals without the consent of the persons concerned. They are based on the concepts of "personal data", or "name specific data", which can be very broad and the definition of which is not necessarily based on the concept of private life. The European directive of 1995 identifies the expression "personal data" with the widest meaning of the word: any information concerning an identified or recognizable physical person. A recognizable person is one who can be identified, directly or indirectly, notably in reference to an identification number or to one or several specific elements, appropriate for his (her) physical, physiological, psychological, economic, cultural or social identity (art. 2). There is no matter of privacy in this definition. In France, the law "Informatique et Liberté" of 1978 speaks about "name specific data", a term that includes the notion of information that allows, directly or indirectly, in whatever form, identification of the physical or moral persons to whom they apply (art. 4).

Modalities of access

According to the user and purpose for use

Access to personal data preserved in Archives services is determined by provisions in the laws on archives and on protection of private life/personal data. Coordination between these laws is not always evident, in particular provisions for closure periods. All national systems distinguish the communication of information to the individuals concerned and communication to third parties. While the first is guaranteed, with the exception of the French case already noted of secrecy of origins, the second is more strictly confined and, particularly with some categories of personal data, the consent of the persons concerned is required. If, however, the effort to contact the persons concerned is disproportionate with regard to the objective of data processing, several countries, notably those who follow the regime of the European directive of 1995, authorize consultation within the framework of precise rules.

The use of personal data for the purpose of scientific, medical, statistical and historical research is guaranteed, but also regulated according to strict procedures. Three scenarios are foreseen in the European legal system: (1) coding of the data, (2) making the data anonymous, and (3) conditional processing of personal data under the control of a specific public body. In the first scenario, the holder of the information communicates data coded in such a way that elements containing personal character can be connected with an identified or recognizable person only through the use of a code. In the second scenario, personal data is anonymised, which removes the personal character. In the third scenario, the user can consult the data in its entirety, having supplied proof that his or her research has a scientific end, and having received approval from the authority that controls application of the law on protection of privacy. The two first solutions are difficult to implement by Archives services: they are expensive, time

¹² Cf. G. BRAIBANT, *Données personnelles et société de l'information. Transposition en droit français de la directive no 95/46. Rapport au Premier ministre*, Paris, 1998, p. 18-19.

¹³ Cf. L. BRANDEIS and S. WARREN, *The right to privacy*, Harvard Law Review, 1890, p. 190-220.

¹⁴ Cf. A.F. WESTIN, *Privacy and Freedom*, New York, 1967, p. 7.

consuming, and not very compatible with the average human and material means available, so that in certain countries, they are simply not applied.

Let us emphasize that the European directive does not apply to the treatment of personal data made by a person for the exercise of exclusively personal or domestic activities. Research done in a private capacity, notably by amateur genealogists, is thus authorized. In addition, data that has been manifestly made public by the persons concerned are outside the scope of the European directive and national laws which derive from it. This arrangement guarantees the freedom of the media.

In the member states of the European Union, as well as those who follow the same model of rule regarding the protection of privacy, the sharing of data of a personal nature with third countries depends on the degree of protection these countries provide for privacy. The European Union expressly forbids communication of data to countries that do not guarantee an adequate level of protection. This has raised problems between the United States and Europe, due to differences in application and the absence of legislation in the United States for the protection of privacy in the private sector. In 1998, Europeans and Americans initiated negotiations to conclude an agreement on the transfer of data between their countries, called the Safe Harbor negotiations. They ended in an agreement approved by the European Commission on July 26th, 2000. The commission reserves the right to reopen the negotiations if the application of the agreement does not produce the expected results. European legislation on exchanges with third countries has obvious direct consequences on the use of international information communication networks, in particular the Internet, which is, by definition, worldwide.

Communication delays

The laws on protection of the privacy of individuals are limited, as a rule, to the lifetime of the individuals concerned. However, national provisions contained in other laws (law on archives for instance) can extend or shorten this period. Closure periods in national laws range from 40 to 150 years, from the date of the birth or the date of the death of the persons concerned, according to the data categories. Exceptions to these closure periods are possible to enable academic research, as explained in the first part of the report and in point B.3.1. However, many researchers still do not appreciate that their projects are subject to control and to preliminary license by an independent authority.

Destruction of data

The European directive on personal data protection and most of the national data protection laws of the European member states authorize and even require destruction of certain categories of personal data, when these data will no longer be used for the original purpose for which it was collected. Every citizen has moreover the right to require of the data creators that erroneous data related to him or her should be modified or erased. The aim of these legal requirements is to protect the interests of citizen, but it may have perverse effect on the individuals and on scientific research, as destroyed information is definitively lost. To avoid this, the European legislator has introduced a principle of derogation in favour of scientific, historical, medical research, accepted as compatible purpose. There is then no requirement to destroy the data, because it can be kept for a long as needed for that new purpose.

Responsibilities, penalties and appeals

A point common to almost all systems of protection of privacy is the existence of an authority outside the archives service and the bodies originating the archives that is responsible for controlling implementation of the legislation. This authority, which often takes the form of a committee or a commissioner, operates under the custody of a Minister (Justice, Domestic Affairs, or Prime Minister) or is responsible to a Minister or to Parliament. The committee oversees the creation of files about particular data elements and authorizes access to sensitive data or serves as the appeal authority in appeal cases against the decisions of the creators of archives or archives services. When appeals are not introduced with an authority of this type, they can be presented in front of administrative or judicial courts, according to the country.

Another common point is criminal and civil responsibility attributed to persons who wrongly communicate information, or who make excessive use, harming the interests of the persons concerned. As noted in the first part of this report, disciplinary and penal measures are generally foreseen.

RECOMMENDATIONS

1. The working group recommends to the readers of this report to pay a special attention to the evolution of the national and international legal provisions regarding access to archives and data protection. Nevertheless it is far from our minds to recommend globalisation of the national and regional legislations which would not be respectful of other national and regional traditions and cultures.
2. It is desirable that discrepancies, or incoherencies, should be avoided in the scope of each national or regional legislation.
3. There should be a close co-operation between archivists and legislators during the preparation of legal provisions regarding archives management and communication. Archivists should adopt a proactive attitude towards decision makers when archival legal matters are concerned.
4. Archivists have an important role to play in reminding the decision makers, politicians and senior public servants to allow sufficient budget for archival institutions, proportioned to the real needs of the services and of the users, in order to give access to archives and information in the best possible conditions.
5. Moreover archivists should explain to their public the legal framework in which users and archivists have to collaborate. Users often consider the archivist as responsible for limitations on the right of access. As data/information managers and providers, archivists have to make clear that they and the users are subject to laws and regulations like every citizen.

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M. LAJEUNESSE and F. GRAVEL, *L'utilisation des archives pour la défense et la promotion des droits du citoyen*, Archivum, ICA, vol. XLV, 2000, p. 171-189.

J. LE POTTIER, *La recherche est-elle une prestation ? Dispositions réglementaires et déontologie professionnelle*, La Gazette des Archives, Paris, 2001, n° 192, p. 93-104

E. ORRMAN, *Legislation concerning Access to and Secrecy of Official Records, Archives and personal Data in the Nordic Countries*, Comma, Paris, 2004, n° 1 p. 113-128.

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J. ROELSTRAETE, *Wat kost het aan de genealoog om zijn stamboom op te zoeken?*, De archivaris, de wet en de rechtbank. Verslagboek van de studiedag Archief tussen openbaarheid van bestuur en bescherming van de privacy, Rechtsfaculteit van de Universiteit Gent 13 mei 2002, Brugge, 2004, p. 57-61.

A.F. WESTIN, *Privacy and Freedom*, New York, 1967.

Authenticity: Electronic Signatures or Trusted Custodian?

Udo Schäfer

AUTHENTICITY: ELECTRONIC SIGNATURES

*As a society, we want our leaders and the people who act in our name to be accountable for their actions, and records play a role in rendering that account. So it is in our interest to establish standards for reliable and authentic records, and archivists have a role to play in achieving that objective.*¹ Heather MacNeil, School of Library, Archival and Information Studies of the University of British Columbia, uses this sentence to explain why archivists have to deal with the following question: How can the authenticity of electronic records be ensured? According to the project *International Research on Permanent Authentic Records in Electronic Systems 1* (InterPARES 1), an authentic record is a record that can be proven

1. to be what it purports to be and
2. to be free from falsification and unauthorized alteration.²

One measure to prove the authenticity of electronic records is the use of digital signatures. Digital signatures are based on a public key cryptography, which use algorithmic functions to create a compressed form of the document called the hash result and to generate two different but mathematically related keys called the public and the private key. The digital signature is created by encoding the hash result with the private key. Attached to the document the digital signature will be stored or transmitted with the document. The verification will confirm the authenticity of the document if

1. the digital signature can be decoded with the public key,
2. a new hash result created of the stored or transmitted document is identical with the decoded hash result,
3. a certificate issued by a certification service provider proves that the public key belongs to the person who is named as the author of the document,
4. the digital signature has been generated within the period of validity of the certificate and
5. the algorithmic functions have not lost their applicability as a result of technological advance.

The idea of the digital signature is covered by the broader conception of the electronic signature. The common purpose of the different kinds of electronic signatures is to provide functional equivalents to handwritten signatures and to other authentication measures in a paper based environment.³

THE LAW ON ELECTRONIC SIGNATURES

The International Law

In 1966 and 1967, the United Nations Commission on International Trade Law (UNCITRAL) has been established by the United Nations to enhance the harmonizing of the commercial law. The commission

¹ Heather MacNeil, *Trusting Records in a Postmodern World*. In: *Archivaria*, No. 51, Spring 2001, p. 46.

² *Authenticity Task Force Report*, p. 2. In: *The Long-term Preservation of Authentic Electronic Records: Findings of the InterPares Project*, September 2002 (URL: <http://www.interpares.org>. Retrieval: 2003-08-05). – Heather MacNeil, *Providing Grounds for Trust: Developing Conceptual Requirements for the Long-Term Preservation of Authentic Electronic Records*. In: *Archivaria*, No. 50, Fall 2000, p. 53. – Idem, *Providing Grounds for Trust II: The Findings of the Authenticity Task Force of InterPARES*. In: *Archivaria*, No. 54, Fall 2002, p. 26.

³ Cf. UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001, New York 2002 (URL: <http://www.uncitral.org>. Retrieval: 2002-07-10), pp. 19-31.

has published the UNCITRAL Model Law on Electronic Commerce⁴ in 1996 and the UNCITRAL Model Law on Electronic Signatures⁵ in 2001. A broad conception of the signature is used by the UNCITRAL Model Law on Electronic Commerce in article 7 paragraph 1:

Where the law requires a signature of a person, that requirement is met in relation to a data message if:

- (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and*
- (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.*

This broad concept has been adopted by the UNCITRAL Model Law on Electronic Signatures. In article 6 paragraph 3, the model law describes the requirements for a reliable electronic signature:

An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph 1 if:

- (a) The signature creation data are, within in the context in which they are used, linked to the signatory and to no other person;*
- (b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;*
- (c) Any alteration to the electronic signature, made after the time of signing, is detectable; and*
- (d) Where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.*

The purpose of article 6 is to ensure that the electronic signature is equivalent to the handwritten signature.

The European Law

In Europe, the Council of Europe⁶ and the European Union⁷ have to be distinguished. Both are supranational organisations, which are independent from one another. Whereas the recommendations of the Committee of Ministers of the Council of Europe to member states are not binding, the member states of the European Union are obliged to transfer the directives of the European Parliament and of the Council into national law.

The Council of Europe

In 2003, the Committee of Ministers of the Council of Europe has adopted the Recommendation Rec(2003)15 on archiving of electronic documents in the legal sector⁸. The recommendation provides in principle 7.2 a rule concerning the probative force of electronic documents transferred to archiving services:

⁴ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 (URL: <http://www.uncitral.org>. Retrieval: 2003-09-16).

⁵ UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001 (Note 17).

⁶ Member states: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.

⁷ Member states: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, United Kingdom.

⁸ Recommendation Rec(2003)15 of the Committee of Ministers of the Council of Europe to member states adopted on 9 September 2003 on archiving of electronic documents in the legal sector (URL: <http://www.coe.int>. Retrieval: 2004-07-16).

An archived electronic document should be considered reliable and valid, in the absence of proof of the contrary, regardless of the possibility of continuous verification of its initial electronic signature, provided that it has been transmitted to and preserved by archiving services in accordance with the security requirements as specified in Principle 4.

After the transfer to archiving services electronic documents should be considered authentic if they have been transferred and preserved in accordance with special security requirements, even though the electronic signatures could no longer be verified.⁹

The European Union

The member states of the European Union had to transfer the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market¹⁰ and the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures¹¹ into the national law. The directive on electronic signatures differentiates between

- 1) the electronic signature,
- 2) the advanced electronic signature, and
- 3) the advanced electronic signature which is based on a qualified certificate and which is created by a secure-signature-creation device.

Article 2 of the directive defines the electronic signature and the advanced electronic signature as follows:

Electronic signature means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication.

Advanced electronic signature means an electronic signature which meets the following requirements:

- (a) it is uniquely linked to the signatory;*
- (b) it is capable of identifying the signatory;*
- (c) it is created using means that the signatory can maintain under his sole control; and*
- (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.*

The third category of electronic signatures, the advanced electronic signature which is based on a qualified certificate and which is created by a secure-signature-creation device, shall be called with reference to the German law qualified electronic signature. Merely the digital signature, which is based on a public key cryptography, meets currently the conception of the qualified electronic signature.

The directive on electronic signatures authorizes the member states to introduce a voluntary accreditation of certification service provider and to define additional requirements for the use of electronic signatures in the public sector. With regard to the private sector, the directive on electronic commerce requires in article 9 the legal equalization of contracts concluded by electronic means with paper based charters, while the directive on electronic signatures demands in article 5 that the qualified electronic signature should be supplied with the same probative force as the handwritten signature by the private and the public law.

The Limitations of Electronic Signatures

*Even if one bit in the message has been altered after the message has been digitally signed, the message digest created by the relying party will be different from the message digest created by the signatory.*¹² Therefore the conversion of electronic records, which is mandatory in order to carry out a successful preservation strategy,

⁹ Recommendation Rec(2003)15 of the Committee of Ministers of the Council of Europe to member states adopted on 9 September 2003 on archiving of electronic documents in the legal sector. Explanatory Memorandum, No. 57 (URL: <http://www.coe.int>. Retrieval: 2004-07-16).

¹⁰ Official Journal of the European Communities 2000, L 178, pp. 1-16.

¹¹ Official Journal of the European Communities 2000, L 13, pp. 12-20.

¹² UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001 (Note 17), p. 31.

prevents the verification of digital signatures. In case, the concept of electronic signatures should be realized through time, the signatures have to be verified immediately previous to the conversion, the verification has to be attested by a trusted authority, and the converted documents have to be signed again together with the attestation.¹³ In Australia, the Public Record Office Victoria has decided within the scope of the Victorian Electronic Records Strategy (VERS) that a digital signature shall be added to the VERS Encapsulated Object (VEO) in order to make alterations detectable.¹⁴ The VEO is the core of the VERS Standard. It is intended that the VEO will be self-documenting. In the future, a user shall be capable of extracting sufficient information from the VEO in order to begin the process of extracting the content.¹⁵ Nonetheless, public archives shall have the opportunity to avoid complex and expensive technical solutions and to preserve the probative value of electronic documents. Neither the UNCITRAL model laws nor the directives of the European Union offer a legal solution. The task to preserve the evidential value of signed electronic documents through time has not been considered. However, the recommendation of the Council of Europe solves the problem by replacing the electronic signature by a trusted custodian.

AUTHENTICITY: TRUSTED CUSTODIAN

In 2005, the German legislator has inserted the following article 371 a into the German Civil Procedure Act in order to transfer article 9 of the directive of the European Union on electronic commerce and article 5 of the directive of the European Union on electronic signatures into the German law:

- (1) *The rules concerning the probative force of private charters shall apply to private electronic documents which were provided with a qualified electronic signature. The appearance that a declaration in electronic form is genuine which is based on a verification in accordance with the Signature Act can only be questioned by facts which establish serious doubts that the declaration has been made by the signatory.*
- (2) *The rules concerning the probative force of public charters shall apply to electronic documents which have been drawn up in the prescribed form by a public authority or by a person provided with public faith within in the scope of their competencies (public electronic documents). If the document is provided with a qualified electronic signature, article 437 is applicable.*

The article 371 a supplies private and public electronic documents provided with a qualified electronic signature with the same probative force as paper based private and public charters. Paper based public

¹³ Alexander Roßnagel/Stefanie Fischer-Dieskau/Ulrich Pordesch/Ralf Brandner, Erneuerung elektronischer Signaturen. Grundfragen der Archivierung elektronischer Dokumente. In: Computer und Recht 19 (2003), p. 305. – Stefanie Fischer Dieskau, Elektronisch signierte Dokumente. Anforderungen und Maßnahmen für ihren dauerhaften Erhalt. In: Digitales Verwalten – Digitales Archivieren. 8. Tagung des Arbeitskreises „Archivierung von Unterlagen aus digitalen Systemen“ am 27. und 28. April 2004 im Staatsarchiv Hamburg, ed. by Rainer Hering and Udo Schäfer (Veröffentlichungen aus dem Staatsarchiv der Freien und Hansestadt Hamburg 19), Hamburg 2004, pp. 37–38, 46–50. – Cf. concerning the transformation of signed electronic documents Ralf Brandner/Ulrich Pordesch, Konzept zur signaturgesetzkonformen Erneuerung qualifizierter Signaturen. In: Datenschutz und Datensicherheit 27 (2003), pp. 354–359; Wolfgang Farnbacher, Vom Posteingang in das Archiv. Technische und organisatorische Konzepte des ArchiSig-Projekts. In: Digitales Verwalten – Digitales Archivieren. 8. Tagung des Arbeitskreises „Archivierung von Unterlagen aus digitalen Systemen“ am 27. und 28. April 2004 im Staatsarchiv Hamburg, ed. by Rainer Hering and Udo Schäfer (Veröffentlichungen aus dem Staatsarchiv der Freien und Hansestadt Hamburg 19), Hamburg 2004, pp. 51–66; Stefanie Fischer Dieskau/Thomas Kunz/Andreas U. Schmidt/Ursula Viebeg, Grundkonzepte rechtssicherer Transformation signierter Dokumente (URL: <http://www.transidoc.de>. Retrieval: 2005-08-01); Andreas U. Schmidt/Zbynek Loebl, Legal Security for Transformation of Signed Documents: Fundamental Concepts (URL: <http://www.transidoc.de>. Retrieval: 2005-08-01).

¹⁴ PROS 99/007. Version 2. Introduction to the Victorian Electronic Records Strategy – VERS (Public Record Office Victoria. Advice to Victorian Agencies 9), Date: 31 July 2003, pp. 15–18. – PROS 99/007. Version 2. Specification 2. VERS Metadata Scheme (Public Record Office Victoria. Standard), Date: 31 July 2003, pp. 25, 41, 131–135, 140–142.

¹⁵ PROS 99/007. Version 2. Introduction to the Victorian Electronic Records Strategy – VERS (Note 28), pp. 26–30.

charters have been provided with the presumption of genuineness by article 437 of the German Civil Procedure Act. The rules of evidence contained in article 371 a are also applicable in an administrative law court.

In his statement¹⁶ on the bill¹⁷ containing the draft of article 371 a¹⁸, the Upper House of the German Federal Parliament had accepted the application of the Federal State of Lower Saxony to propose that the following paragraph 3¹⁹ should be added to the article:

(3) The rules concerning the probative force of private and public charters shall apply to electronic documents as defined by paragraphs 1 and 2 which were provided with a qualified electronic signature until they have been converted into a different technical format and transmitted to public archives if

- 1) a verification in accordance with the Signature Act has been carried out immediately previous to the conversion and the transmission,*
- 2) the results of the verification and the documentation of the transmission have been attested by an attestation and*
- 3) the public archives have chosen procedures for the transmission and the preservation which have to be considered as suitable to protect electronic documents against falsification.*

The appearance that a private electronic document is genuine which is based on the compliance with the provisions of sentence 1 can only be questioned by facts which establish serious doubts that the person named as the author is responsible for the document. If the provisions of sentence 1 have been met with regard to public electronic documents, article 437 is applicable.

The proposal intended to substitute the electronic signatures by the attestation of their verification and the recognition of public archives as trusted custodians in case the electronic documents have been transferred to public archives.²⁰ The recognition of public archives as trusted custodians requires that the public archives use procedures for the transmission and the preservation which have to be considered as appropriate for protecting electronic records against unauthorized alteration, falsification and forgery. The suitability of the technical and organizational means has to be proved by the public archives.²¹ The electronic records would be converted and transmitted to the public archives without the electronic signatures. Nevertheless, private and public electronic documents which have been provided with qualified electronic signatures until they have been converted into a different technical format and transmitted to public archives would be supplied with the same probative force as paper based private and public charters. The proposed article 371 a paragraph 3 would transfer the principle 7.2 of the recommendation of the Council of Europe on archiving of electronic documents in the legal sector into the German law. Moreover, the proposal would reintroduce a rule of evidence of the Roman-Canon law and the German public law of the 16th to the 18th century, the *ius archivi*.²² In the German legal science, the

¹⁶ Deutscher Bundestag. Drucksache 15/4067 vom 28. Oktober 2004. Anlage 2. Stellungnahme des Bundesrates, pp. 58–68.

¹⁷ Deutscher Bundestag. Drucksache 15/4067 vom 28. Oktober 2004. Anlage 1. Entwurf eines Gesetzes über die Verwendung elektronischer Kommunikationsformen in der Justiz (Justizkommunikationsgesetz - JKomG), pp. 5–57.

¹⁸ Deutscher Bundestag (Note 31), pp. 7, 34–35.

¹⁹ Deutscher Bundestag (Note 30), pp. 64–65.

²⁰ Deutscher Bundestag (Note 30), p. 65.

²¹ Stefanie Fischer-Dieskau/Alexander Roßnagel/Roland Steidle, Beweisführung am seidenen Bit-String? – Die Langzeitaufbewahrung elektronischer Signaturen auf dem Prüfstand. In: MultiMedia und Recht 7 (2004), p. 454, have serious doubts that the public archives are able to meet this requirement.

²² Udo Schäfer, Authentizität. Vom Siegel zur digitalen Signatur. In: Archivierung elektronischer Unterlagen, ed. by eodem and Nicole Bickhoff (Werkhefte der Staatlichen Archivverwaltung Baden-Württemberg A 13), Stuttgart 1999, pp. 165–181. – Idem, Authentizität: Elektronische Signaturen oder Ius Archivi?. In: Digitales Verwalten – Digitales Archivieren. 8. Tagung des Arbeitskreises „Archivierung von Unterlagen aus digitalen Systemen“ am 27. und 28. April 2004 im Staatsarchiv Hamburg, ed. by Rainer Hering and Udo Schäfer (Veröffentlichungen aus dem Staatsarchiv der Freien und Hansestadt Hamburg 19), Hamburg 2004, pp.13–31.

reflection on the European and the German legal tradition to solve current legal problems is not unusual.²³

In her reply²⁴ to the statement of the Upper House of the German Federal Parliament, the German Federal Government refused the proposal. The rules of evidence contained in article 371 a should be restricted on signed electronic documents.²⁵ The Lower House of the German Federal Parliament followed the opinion of the German Federal Government. Therefore, article 371 a has been enacted without rules of evidence concerning electronic documents transferred to public archives.

The outcome of the legislative procedure was not unexpected because governments and parliaments are seldom aware of the role of public archives in administrative and juridical matters. During the efforts of the Federal Government to agree with the Federal States on the draft, the Federal State of Hamburg had submitted a statement²⁶, on which the application of the Federal State of Lower Saxony in the Upper House of the German Federal Parliament was based. The Federal Government considered the statement and inserted the following sentences²⁷ into the explanatory memorandum:

If an electronic document already transferred to the responsible public archives is needed as a piece of evidence in legal proceedings, the provisions for the preservation prescribed by the archives acts are decisive. If these provisions have been met, the electronic documents are equally supplied with the probative force granted by article 371 a.

The German archives acts do not contain provisions for the preservation of authentic electronic records. In spite of this error, the sentences have to be interpreted as an admission of the Federal Government that the probative value of electronic documents kept by public archives has to be taken into account. The objective to achieve the legal recognition of public archives as trusted custodians with regard to electronic records is not out of reach. The German case can be used as a paradigm for other jurisdictions.

²³ Cf. Reinhard Zimmermann, Roman Law, Contemporary Law, European Law. The Civilian Tradition Today, New York 2001.

²⁴ Deutscher Bundestag. Drucksache 15/4067 vom 28. Oktober 2004. Anlage 3. Gegenäußerung der Bundesregierung, pp. 69-72.

²⁵ Deutscher Bundestag (Note 38), p. 70.

²⁶ Cf. Udo Schäfer, Authentizität: Elektronische Signaturen oder Ius Archivi?. In: Digitales Verwalten – Digitales Archivieren. 8. Tagung des Arbeitskreises „Archivierung von Unterlagen aus digitalen Systemen“ am 27. und 28. April 2004 im Staatsarchiv Hamburg, ed. by Rainer Hering and Udo Schäfer (Veröffentlichungen aus dem Staatsarchiv der Freien und Hansestadt Hamburg 19), Hamburg 2004, pp. 29-31.

²⁷ Deutscher Bundestag (Note 31), p. 35.

Some Problems of Authenticity in an Electronic Environment

Josef Zwicker

ARCHIVES AND AUTHENTICITY

The first and most fundamental reason for creating archives is to prove legal rights. Secondly archives serve as instruments for the administration of an organisation. Information held in the archives are tools or means to do the job in an efficient way. Third: Archives are one of the preconditions for political and social accountability. Finally archives are cultural heritage. All those purposes can be served only with authentic documents, that is with documents that are reliable not only at the moment when they are created but remain reliable for a long time to come. This means that those documents must be preserved from both destruction and alteration.

Even with a superficial knowledge of IT it becomes clear that electronic documents are easy to be manipulated, if it is by intention or by incident. So it is the duty of archivists to tackle the problem. But it is not only our duty, it is our genuine function as archivists: to keep authentic records for practical, legal purpose, for historical research and for transparency.

For me the most inspiring publication of Luciana Duranti still remains "Diplomatics. New Uses for an Old Science" published in *Archivaria* 1989-1991. There in fact she has made the link between classical diplomatics and the problems of authenticity of electronic records.¹

THE PROBLEM

If electronic archives are compared to "conventional" archives a range of special problems with keeping authentic electronic documents becomes obvious.

"Conventional" documents, once created in an orderly way, are rather static and stable objects (physically and chemically), they are "things", entities perceptible by the senses.

The difference with electronic records, i.e. electronically recorded information, is striking. Electronically produced documents actually are not objects at all but rather, by their nature, products that have to be processed each time they are used. No transfer, no reading without re-creation of the information.

One quite basic difficulty with electronic documents should be mentioned – we could call it a problem of culture: The handling of such documents itself is a new phenomenon. Compared to the long and vast experience in dealing with conventional ways of retaining information, processing it electronically has not yet a tradition. In a certain sense even the most professional archivists (and IT-specialists) – in the longer run – may look naïve in dealing with these problems, leaning too much on technical aspects and caring not enough about questions of ergonomics, management and culture.

E-BUSINESS AND AUTHENTICITY

It is of course not possible to deal here with all the technical and legal problems connected with e-business. But it may be helpful to remember that some of those questions are the same as those archivists have to deal with, when thinking about authenticity. First: Business does presuppose the unequivocal,

¹ Duranti, Luciana, *Diplomatics: New Uses for an Old Science* [I], *Archivaria* 28 (Summer 1989), p. 12 and 17. (The text is re-published as part of: Duranti, Luciana, *Diplomatics: New Uses for an Old Science*, The Scarecrow Press, Lanham, Maryland, and London, 1998.)

indubitable identification of the partners involved in business transaction. Hence the importance of the reliability of signature, i.e. digital signature.

Second - and this is exactly the problem of authenticity: Partners involved in a business transaction have to be absolutely sure that a document received is still exactly the same one as the one sent by the business partner, that no third person has made any alteration both of content of the document or of date of signature. It is obvious that some doubts still exist about the reliability and authenticity of documents in e-business. All this, i.e. more security about reliability and authenticity, is necessary to stimulate e-business.

E-government can be considered as a specific case of e-business. It is obvious that identification of the partners involved and non alteration of the documents sent and received are of the utmost importance in e-government, exactly as in e-business, with the same problems concerning authenticity.

DEFINITIONS

We should not - for the moment - too much insist on archival terminology concerning electronic documents. But it is certainly useful to explain some elementary terms briefly. Most important is the distinction between "authenticity" and "reliability".

Reliability refers to the past, in the sense that the facts related in a document are true, are deserving trust - at the very moment of the creation of the document. So examination of reliability means examination of the *creation* of the document.²

Authenticity refers to the connection between past and present, i.e. to the *transmission* of the record from the past time to the present.

HOW TO ENSURE AUTHENTICITY

If control of reliability is connected with the creation of records, it becomes obvious that archivists will have to care about the creating processes and that legislation will have to establish rules about the *creation* of records.

The nature itself of the electronic environment demands intervention already from the very start of the process of creation of the record, or more precisely, from the design of the application that will produce records.

Reliability and authenticity presuppose the control of the creation and transmission of records. Record-keeping has a lot to do with both creation and transmission of records. So record-keeping too is to be regulated by law.

Dealing with the use of a printout of an electronic record as evidence in legal proceedings Ken Chasse describes in a seminal article the dependancy of authenticity and reliability from both organisation and technical procedures, from both the "usual and ordinary course of business" and of system integrity. "An organization or person wishing to use a printout of an electronic record as evidence in legal proceedings must be able to prove:

- (1) the integrity of the electronic *record system* in which that particular record was recorded or stored,
- (2) ...
- (3) its «usual and ordinary course of business» in regard to making, processing and retaining electronic records"

The «electronic record» provisions of the Evidence Acts in Canada (federal, provincial and territorial) state that proof of the integrity of an electronic record is established by proof of the integrity of the

² Duranti, Luciana and Eastwood, Terry: Protecting Electronic Evidence: A Progress Report on a Research Study and its Methodology, in: *Archivi & Computer* (3) 1995, p. 246.

electronic records system in which the record was recorded or stored.³ The most comprehensive text dealing with the problems of authenticity is probably the InterPARES report published in spring 2003⁴.

To ensure reliability and authenticity in the sense of archives we need

- legal norms
- technical means
- adequate management and organisation.

Adequate management and organisation is paramount. If archives take no part in the design of IT applications, if they are not present in the deciding committees that coordinate IT activities, if they are not present in the office responsible for general questions of administration be it the government or a city council or a company, then it is not possible to ensure reliability and authenticity. Technics is important, including also standards such as ISO 15489 about records management, but technics in itself does not solve any problem.

“... The reliability and authenticity of electronic records are best ensured by embedding procedural rules in the overall records system and by integrating business and documentary procedures. ...”⁵. That is a very important and necessary condition to ensure authenticity but not a sufficient one. Personal presence and activity is still and continuously needed.

Legislation

There are *laws about specific activities* which include legal norms about authenticity for the sphere they are dealing with, as in the case of Switzerland the chapter accountability and book-keeping in the Corporation Law. This law has recently been revised, in order to accept electronic records as fully valuable and legally acceptable both for the creation of book-keeping files and for their retention. This is very important because in the Swiss legal system, those paragraphs in the Corporation Law work as a standard for all legal norms concerning retention, that is for retention of tax records, but also as evidence of files to be produced in court or in administrative procedures.

In some countries the Law on Criminal Procedure may be very important by defining authenticity for a specific sphere, so important that these norms by analogy may be valid for other spheres of activities.

An *Evidence Act* and an *Act on Electronic Signature* are of a more general nature. An Evidence Act (such as the Canadian or Australian ones for instance) stipulates rules for all kind of evidence and for all – or at least for several – spheres in which evidence is of some importance.

The same is true for an Act of Electronic Signature: Even if in the ongoing legislation it appears often in the context of laws on e-commerce, legal norms concerning electronic signatures try to cope with the use of electronic signature in different spheres of activities, e-government and others included.

Unfortunately Laws on Electronic Signatures are not fully successful in Europe, mainly because they require rather complicated procedures that do not fit to the real way how business is done in everyday's life.

As far as the promotion of the *qualified electronic signature* is concerned a paradox catches the eye: On the one hand it is said that in an electronic environment every thing is new – technology, methods, procedures, organisation – and on the other hand the electronic signature in a certain sense uses the same methods and the same means as used in a conventional environment, i.e. attaching a seal or reproducing the physical act of signing.

³ Ken Chasse, *Electronic Records as Evidence: From „Paper-Originals“ to „System-Integrity“*, p. 1, http://www.tsacc.ic.gc.ca/content/documents/archived/joint_open_forum_2001/ken_chasse.pdf (March 2001)

⁴ *The Long-term Preservation of Authentic Electronic Records: The Findings of the InterPARES Project*, ed. Luciana Duranti, San Miniato 2005, mainly part one „establishing and maintaining trust in electronic records“ and part three: „trusting to time: preserving authentic records in the long term“ with the corresponding appendices.

⁵ ICA, *Committee on Archival Legal Matters: Creating Authentic, Reliable and Valid Records in the Electronic Environment – Issues for Archives*, Prepared for discussion in August 2000, ICA Congress, Sevilla [by Anne-Marie Schwirtlich], p. 29.

Some subtle and critical contributions concerning electronic signature were made at the DLM-Forum 2002, mainly in the workshops 2, "The use and implication of digital signatures", and 3, "The legal admissibility of digital storage". Probably the most interesting of them is from Per Furberg: "Digital storage – the need for an overall solution observing different legal fields".⁶

As far as *longterm preservation of electronic signatures* is concerned it has become more and more obvious, in my opinion, that longterm preservation of this kind of signature is not possible. "It is clear that the archival of <qualified electronic signatures> was not taken into account when writing the [European Union] e-signature directive".⁷

The elementary *archival legal framework* is about (a) competences and (b) legal definitions.

Competences:

- 1) Archivists must have or be given the competence to examine all projects of new IT-applications and all major changes of existing applications from the point of view of authenticity, that is reliability over time. This competence to interfere in IT-applications concerns of course systems for record-keeping and document management systems but also specific applications.
- 2) The second competence that should be ascertained to archives by law is to establish rules about how *the record creating bodies* have to deal with electronic documents and records in the *administrative* process.

About definitions:

That archives, records – or recorded information – , documents cover all kind of recorded information, whatever the data carrier may be, seems obvious. This definition, must also be fixed by law.

Legal norms can help to enforce what has to be done. But we should not forget, that legal norms have to be enforced in order to be integrated into business-routines . And that – in our case – is not possible without changes in the administrative organisation, and – of course – we need technical means which also translates into : money.

Commercial Law and Archival Legislation

The business sector, of fundamental importance for society and the State, needs a legal framework, which defines the parameters within which the business community operates.

*Revision of the Swiss Commercial Law 32nd title*⁸. Since the late 1990s, ever-increasing use has been made of electronic media for transaction processing and accounting. The legal norms in existence at the time could not be applied to the new technology and actually restricted its use. The revised law should therefore improve the regulatory framework for the business sector. The comments to the bill stated: "This will serve Swiss business and, in particular, its chances in the global arena ..." But future use of the new technology should not result in impaired

- accuracy of documents
- completeness
- security
-
- checkability.

⁶ p. 547- 553 in: Proceedings of the DLM-Forum 2002, @ccess and preservation: best practices and solutions, Office for Official Publications of the European Communities, Luxemburg 2002

⁷ Jos Dumortier and Sofie van den Ende, Electronic signatures an trusted archival services, in: Proceedings of the DLM-Forum 2002, p. 524.

⁸ Opinion communicated to the Swiss Parliament no 99.034, 31 March 1999, Federal Bulletin of the Swiss Confederation 1999, p. 5149 – 5172 (in German).

Technology dating back to the days when companies kept paper accounts has proven to be unsuitable in an electronic environment for two main reasons. Firstly, there are problems with the term "original" and secondly, it is difficult to distinguish between "managing" and "storing" books.

To put it simply, Swiss legislators consider the term "original" to be unsuitable in an electronic environment because what appears on the screen of the person producing the data is a copy of something which exists only in the computer's central processing unit. The legislators therefore refrained from using the term "original".

The revised law allows companies to keep books, bookkeeping vouchers and commercial correspondence in a purely electronic or "comparable" format. (By contrast, companies must continue to prepare their financial statements and balance sheets in the conventional manner.)

If using electronic media, they must meet certain requirements set down in an ordinance⁹, for example:

- Generally, companies must adhere to the principles of orderly data processing. (This means state-of-the-art processing as set out in generally accepted regulations and industry recommendations.)
- The organization, responsibilities, processes and infrastructure of the IT applications must be documented in such a way that the documents can be understood.
- The documents must be stored in such a way that they cannot be changed without the change being detectable.

Throughout the ordinance, particular attention has been paid to "archived information" - "archived" in the commercial accounting sense of the word, means "no longer immediately current". "Archived information" must be

- separated from current information or appropriately labelled so that it can be distinguished from current information
- protected against unauthorized access
- etc.

Furthermore, responsibility for archiving must be clearly specified and organized.

When studying the documents on the revised Commercial Law for the first time, one can not but be surprised by the extent to which the problems of managing accounts in an electronic environment coincide with those faced by archivists. We archivists can undoubtedly learn something if we keep the parallels in mind.

CONCLUSIONS

- If all the necessary measures of making sure that all these activities will be possible for a long time, are not taken at the very beginning, i.e. when the instruments for creating records are designed, then archives as a rational and systematic construction of public memory will no longer exist.
- With the spreading of IT into nearly all fields of economy, mainly in services such as commerce and banking, authenticity and reliability of electronic documents have become issues of utmost impact on economy, on the wealth and the welfare of people.
- Authenticity and reliability has become a question of practically every day life. We archivists have allies - maybe allies who are more powerful in influencing politics and society than we are. And we archivists can contribute a specific know-how needed to solve these practical problems.

In my opinion getting in touch, cooperating with their responsables for the above mentioned laws, concerning, for instance, e-commerce, criminal or civil procedure, evidence, is of the utmost importance for archivists dealing with the legal aspects of authenticity in an electronic environment.

⁹ Systematic collection of Swiss law reports No. 221.431

New Technology and Copyright: The Impact on the Archives

Gary Peterson

INTRODUCTION

We live in a digital world. The daily use of the computer is expanding geometrically and the daily use is just as rapidly shrinking the world. We have experienced a change from a five hundred year tradition of the printed word to the new tradition of an electronic one. As this change is happening, nations are struggling to amend their copyright laws to fit the new technology. Copyright laws are three hundred year old laws based on protecting printing. At every technological change (in the past, the advent of photograph, sound recording and motion pictures), nations have responded by amending the existing law.

In answer to the new copyright challenges brought about by digital technology and the Internet, a new copyright treaty was signed on December 20, 1996. The treaty, known as the World Intellectual Property Organization (WIPO) Copyright Treaty, must be ratified by at least 30 countries to become effective. Countries are now in the process of amending their laws as necessary and ratifying the treaty.

The focus of this document is to identify the issues that archivists must keep in mind as laws are amended and ratification takes place. First, basic copyright law will be explained. No one country's law will be used--the discussion will be general. Next, technology's impact on copyright will be illustrated. Finally, the major international agreements affecting copyright will be explained.

A SYNOPSIS OF COPYRIGHT PROTECTION

"Copyright is founded on the concept of the unique individual who creates something original and is entitled to reap a profit from those labors."¹ Copyright "...protects the results of an author, artist or other creator's intellectual labor, skill and judgement expended in the creation of an original piece of work, whether literature, music, a painting, a photograph, a television programme or whatever."² The work may be expressed solely or as combinations of words, symbols, music and pictures. Copyright generally is owned by the creator of the work. However, if the work was made for an employer it may be the property of the employer. Copyright protection starts as soon as the work is created. Most countries do not require any formalities, such as registration, for a work to receive copyright protection. Copyright protection occurs at two levels: national law and international treaties

Depending on national standards, copyright protects literary works, computer programs and databases, dramatic works, choreographic works, maps and technical drawings, musical works, photographs, artistic works, audio-visual works, sound recordings, and derivative works. Ideas and facts are not protected by copyright; it is the *form* of expression that is protected. The protection is afforded to the owner of the copyright for a period of years, generally life of the author plus from fifty to seventy years.³ Some countries allow the government to copyright works prepared by the government (crown copyright) and others do not. The length of crown copyright varies from 50 to 125 years after the year the work was produced.

¹ Authors and Owners: the Invention of Copyright. By Mark Rose. Harvard University Press, Cambridge, MA, 1993.

² World Information Report 1997/98 General Edition: Chapter 26, Copyright in the electronic age, by Charles Oppenheim. Page 350.

³ Some countries provide protection for lesser time periods for some types of works or uses (e.g., photographs or translations).

One of the confusing things about copyright is its name. The protection afforded by copyright is much broader than just controlling the right to make a copy. Yet, when most people think of copyright, they think of copying. The owner of the copyright has many exclusive rights that can be exploited. The owner has the right to:

1. make copies;
2. distribute the work;
3. rent the work;
4. make sound recordings of the work;
5. perform the work in public;
6. display the work publicly;
7. make derivative works such as adaptations or translations;
8. license or sell any of the above.

In civil law countries another right, the moral right (*droit moral*), is recognized for creators of works.⁴ The four generally accepted moral rights are:

1. the right of paternity, which is the right of an author to be identified as such;
2. the right of integrity, which is the right of an author to prevent or object to derogatory treatment of his work;
3. the right of disclosure, which is the right of an author to withhold his work from publication;
4. the right of non-attribution, the right not to have a work falsely attributed to an author.⁵

Some countries also recognize a fifth moral right, the right to receive a portion of the proceeds if a work is resold (*droit de suite*). The moral rights have the same duration of protection as the other rights. Moral rights cannot be sold but they may be waived.

Although the copyright owner has the exclusive right to exploit the copyrighted work this right has some limits. Limited copying is allowed for research, private study, criticism, comment, news reporting, teaching and scholarship. This exception is called variously fair dealing, fair practice, or fair use.⁶ Typically libraries and archives are also granted rights to copy works for specific purposes such as display or preservation. It is important to note that none of the international agreements discussed in this paper require a state to adopt a fair dealing policy; however, most do.

The purpose of a copyright law is to prevent infringement. Anyone who, without the authorization of the copyright owner, exercises any of the exclusive rights is an infringer.⁷ Various remedies are available to a copyright owner against an infringer, depending on the country. A copyright owner may obtain an injunction against the infringement. A court may award monetary damages, civil penalties may be levied, or criminal sanctions may be imposed.

NEW TECHNOLOGY'S IMPACT ON COPYRIGHT

New technology challenges traditional applications of copyright in three ways: necessity for copying; ease of transmitting; and ability to modify. Given today's technology, it is impossible to run a computer program without copying information into the computer's RAM (random access memory). In other words, to use a computer, one must make a copy. The very act of turning on (booting up) a computer makes a copy of what is stored on a disk and loads it into memory. Saving a file makes a copy of what is

⁴ Civil law is the system of law derived from Roman law (distinguished from *common law*, *canon law*).

⁵ *Whale on Copyright*, Fifth Edition. By Jeremy Phillips, Robyn Durie and Ian Karet. Sweet & Maxwell, London, 1997.

⁶ In this document the term "fair dealing" will be used.

⁷ Fair dealing is an exception to the exclusive rights and is not infringement.

in memory. Looking at an Internet site requires copying. Copying is an ubiquitous but not obvious process when using a computer. It is transparent. For this immensely important and practical reason, the computer and its requirements must override the usual ban on copying that has been the foundation of traditional copyright law.

Not only is copying a challenge, but so is transmitting. Any two-dimensional work can be copied into digital code and stored in digital form. Three-dimensional objects, using speciality programs such as CAD (computer assisted design), can also be represented digitally. These copies can then be sent anywhere, to an individual or to a bulletin board. From there the copy can be sent to others, downloaded, or printed. This ability to transmit applies not only to text, but also to photographs, sound and video recordings, television and motion pictures.

A third challenge to copyright laws is the ability of the recipient to change or modify digital data. The computer allows infringement of copyright by making it possible to download copyrighted material, combine it with other material or delete parts of it, and then claim the result as one's own.

Copyright law, created in response to the printing press, has had to adjust often to newly created technologies. Unanticipated challenges lie ahead and further adjustments will have to be made.

MAJOR INTERNATIONAL LAWS EFFECTING COPYRIGHT

Berne Convention for the Protection of Literary and Artistic Works

The 1886 Berne Convention for the Protection of Literary and Artistic Works (the Convention) is the principal international treaty on copyright. Prior to this time countries entered into bilateral treaties for the protection of each nation's copyright. In the past century the Convention has been revised five times, most recently in Paris in 1971. Approximately 120 countries have become parties to the Convention. An additional fifteen countries have become signatories but do not subscribe to the entire text.

The Convention protects a broad range of works and protects them for a minimum of life of the creator plus 50 years or, where the author is not known, for 50 years from publication. Importantly, the Convention gives mutual protection to citizens of member countries. Thus a citizen of one country enjoys copyright protection in a second country equal to that a citizen of the second country would enjoy and vice versa. The Convention requires that copyrighted works be protected in a second country without formalities such as registration or copyright notice. The Convention recognizes fair dealing and moral rights. The Convention sets out a three part test that must be met before copying is permitted as fair dealing:

1. that the copying is done in certain special cases,⁸
2. that the copying does not conflict with normal exploitation of the work, and
3. that the copying does not unreasonably prejudice the interests of the author.

As noted below, the WIPO Copyright Treaty will amend the Convention to include computers and databases which were not covered by the Convention.

The Swiss government until 1967 administered the Convention. Since that time an assembly of the member nations, the World Intellectual Property Organization, has administered the Convention.

Universal Copyright Convention

The Universal Copyright Convention (UCC) was established in 1952 and revised in 1971. Because a number of major countries had not become members of the Berne Convention⁹, the UCC became the alternative to allow those countries to participate in an international agreement. Approximately 80 nations are parties to the UCC, which is administered by UNESCO.

⁸ National legislation must specify the cases where copying is fair dealing.

⁹ The United States, the Soviet Union and China had not joined by 1952. They had various objections, including the long term of protection, the recognition of moral rights, and the lack of formalities such as registration and copyright notice. All three ultimately joined the Berne Convention.

The UCC provides the same type of mutual protections to foreign works as does the Berne Convention. The minimum copyright term is life of the author plus 25 years. The UCC recognizes fair dealing, but not moral rights. The UCC requires that the symbol (c), the name of the copyright owner, and the year of publication be on the work. No other formalities are required; however, a country can impose additional formalities for its citizens and for works by non-citizens first published in the country. A country may be a member of both the Convention and the UCC. It must apply the Convention to authors of countries that are members of the Convention and the UCC to nationals of countries that are only members of the UCC.

WIPO Copyright Treaty

The Diplomatic Conference at Geneva adopted the World Intellectual Property Organization Copyright Treaty on 20 December 1996. The treaty is the first amendment to the Berne Convention since 1971. WIPO was brought about by the fast changing digital technology and the Internet. In Article 4, the treaty for the first time protects computer programs as literary works. In Article 5, it provides protection for databases; however, in the case of databases, the data is not protected--only its selection or arrangement is protected. Article 6 protects the author of a copyrighted work that is put on an Internet Website.

Article 11 requires signatory states to have legal protection and effective legal remedies guarding any technology that is used to protect a copyrighted work from infringement. Article 12 has the same legal requirements for rights management information. Rights management information is defined in the Article as "...information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work and any numbers or codes that represent such information..." Most countries have not addressed these two issues in their national laws and will have to amend their laws before they can become a signatory.

Of special interest to archivists is Article 10, entitled "Limitations and Exceptions." This is the "fair dealing" Article. Article 10 uses the same three part test used in the Berne Convention. Basically, the treaty does not require changing national laws on fair dealing. Once the treaty is in force, fair dealing will also apply to computer programs and databases.

The treaty became effective on March 6, 2002 after 30 countries had ratified it. So far, 47 countries have ratified the treaty. Currently, countries around the world are amending their national copyright legislation to conform to the WIPO mandates and are going through the treaty ratification process.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS was established in 1994. It is technically a trade agreement that sets a minimum level of intellectual property rights that must be incorporated in the national laws of the members. These include not only copyright but trademarks, patents, and other intellectual property rights. The membership of TRIPS is approximately identical to the Berne Convention. The World Trade Organization (WTO) is charged with enforcement of the TRIPS. Failure to comply with TRIPS can result in WTO sanctions--probably the most effective way for nations to enforce copyright.

Basically TRIPS requires members to comply with the Berne Convention except for the provision on moral rights. Approximately two years before the WIPO Copyright Treaty, TRIPS recognized that computer programs are "literary works" that must be protected under the Berne Convention. It also protects computer databases and recognizes fair dealing. Finally, members may bring claims alleging inadequate copyright protection or non-enforcement of copyright laws before the WTO Dispute Settlement Body.

OTHER INTERNATIONAL LAWS EFFECTING COPYRIGHT

European Union (EU) Directives

The European Union currently has fifteen member states. The EU structure includes a Commission and a Council. Proposed EU legislation comes from the Commission, which is staffed by civil servants but headed by political appointees from the member states. Most legislative measures must be approved the Council, an ever changing group of ministers from each of the member states. In some cases the European

Parliament must also be consulted. Proposed legislation usually takes the form of "Directives." Directives are instructions to member states to harmonise their national laws with the Directive. The member states are given discretion on how harmonisation is accomplished.

Three existing Directives have a direct bearing on computers and computer databases. They are discussed below.

Council Directive 91/250 on the Legal Protection of Computer Programs

The purpose of the Directive is to make the protection of computer software uniform throughout the EU. Members are to protect computer programs as literary works as in the Berne Convention. Protection applies to expression in any form of a computer program, but not to the ideas underlying the program. The program is protected for the life of the author plus 50 years, or in the case of a legal entity, for 50 years after the software was made available to the public. The purchaser of the program is permitted to use the program (making a copy) and to make a back-up copy of the program. The purchaser is also allowed to reverse engineer the program if it is necessary to achieve interoperability of an independently created computer program with other programs. Member states were given until January 1, 1993, to harmonise their national laws with the Directive.

Council Directive 96/9 on the Legal Protection of Databases

The purpose of the Directive is to protect databases in any form, electronic and non-electronic. A database is defined as a collection of independent works, data, or other materials arranged in a systematic way and individually accessible by electronic or other means. The Directive provides copyright protection to a database as if it were a literary work. The copyright protection afforded the author is the selection or arrangement of the contents of the database. The Directive creates a totally new right (*sui generis*) that protects databases that may not be eligible for copyright protection. It protects the database from unfair extraction for a period of fifteen years. The purpose of the *sui generis* right is to protect the investments made by creators of databases. The copyright does not cover the contents. Member states were given until January 1, 1998, to harmonise their national laws with the Directive.

Council Directive 97/628 on the harmonisation of certain aspects of copyright and related rights in the Information Society

The purpose of the Directive is to harmonise EU law with the as yet to be ratified WIPO treaty that protects computer programs and databases. The EU will sign the treaty on behalf of the fifteen member countries. In the area of fair dealing the directive incorporates the three-part test from the Berne Convention. Member states have been given until June 30, 2000, to harmonise their national laws with the Directive.

The North American Free Trade Agreement (NAFTA)

The North American Free Trade Agreement (NAFTA), a regional trade agreement between the United States, Canada, and Mexico, became effective on January 1, 1994. Importantly, the treaty requires Berne convention protection of computer programs as literary works and also protects the selection and arrangement of databases. The treaty incorporates the Berne convention's three-part test for fair dealing.

RECOMMENDATIONS

"Copyright developed as a consequence of printing technology's ability to produce large numbers of copies of text quickly and cheaply. But present-day technology makes it virtually impossible to prevent people from making copies of almost any text--printed, musical, cinematic, computerized--rapidly and at a negligible cost."¹⁰ As technology changes so too will national and international laws on copyright. Archivists must be alert to these changes because commercial companies have every economic reason to

¹⁰ Rose *supra*.

want to limit the right of fair dealing and the right of archives and libraries to make copies using the new technology. In the digital age, archivist must protect access to information and reasonable copying. The fact that fair dealing is a non-compulsory responsibility in the WIPO and EU Council Directive 97/628 presents a risk that fair dealing will not be applied. It is in the best interest of Archivists that the fair dealing exemptions of the pre-digital world be maintained intact in the new digital environment. As countries amend their copyright laws, fair dealing must not become fair game. In reviewing new computer records copyright legislation archivist must insure that access to and reasonable copying of computer information is not impaired.

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- Digital Future Coalition. <http://www.ari.net/dfc>
- European Union. <http://www.eropa.eu.int>
- United States Copyright Office. <http://lcweb.loc.gov/copyright/>
- World Intellectual Property Organization. <http://www.wipo.org>

Controversies around Legal Grounds for the Settlement of International Archival Claims

Władysław Stępnia

The Vienna Convention on succession of States in respect of State property, archives and debts was adopted on 8 April 1983 at the international UN Conference.¹ Thus, a long-lasting and extremely complicated process of codification of the international public law in the area of State succession has been completed.² One could expect that it would be a turning-point in resolving dozens of international claims regarding archive materials. The UN International Law Commission, comprising most outstanding scientific authorities in that domain, conducted profound analyses of practices exercised by States in that respect, submitting proposals of relevant legal regulations, referring to the achievements of UNESCO and the International Council on Archives.

Tradition of many centuries and international practice, constituting the grounds for norms of international law hitherto applicable in respect of archives, were the starting point for the UN ILC in work on the aforementioned codification. In compliance with the principle *lex retro non agit*, it is to refer to future acts of succession, occurring upon its entry into force. In view of the above, its significance might have been perceived mostly as the confirmation of currently binding norms and practices of international law, which have thus been given a significant legal authority.

However, it soon turned out that the success of the UN International Law Commission was definitively opposed by the ICA Secretariat. The French Ministry of Foreign Affairs requested that international professional organisation of archivists to formulate an opinion on the Vienna Convention of 1983. That is the origin of one of most special documents in the history of ICA – a letter of its Secretary General dated 24 January 1984 to all the Membership States, with an attached opinion on the said Convention.³ Professor Marco Mozzati referred to that document analysing the French-Algerian archival dispute, stating that the professional advice of ICA on that matter was a manoeuvre of the French Government in its efforts to deprive Algeria of a significant advantage in its hands that is the Vienna Convention of 1983.⁴ That was a very grave accusation replied to by Dr. Charles Kecskemeti, the former Secretary General of ICA.⁵ No one doubts the significance of reasons which determined the pronouncement of that opinion on behalf of ICA, developed by the team comprised of Leopold Auer (Austria – representative of ICA to the UN Conference at which the Convention was adopted), Eckhardt G. Franz (CITRA Secretary), Oscar Gauye (former President of ICA), Charles Kecskemeti (Secretary General of ICA), Eric Ketelaar, Evert van Laar and Peter Walane (as representatives of ICA research committees).

The evaluation of the UN Vienna Convention act of 1983 formulated by the above mentioned persons, referred to as the “professional advice”, was surprisingly unanimous: the text of the Convention does not provide sufficient basis to deal with problems of the succession of States in respect of archives. Therefore, all members of the experts’ team claimed that States interested in those issues should follow the

¹ See W. Stępnia, *Succession of States in respect of archives*, PWN, Warsaw-Łódź, 1989.

² A convention regarding succession of States in respect of treaties was developed earlier.

³ i.e.: Professional advice formulated in 1983 on the Vienna Convention on succession of states in respect to State property, archives and debts, part III (articles 19-31) in: Council of Europe. Reference dossier on archival claims, Strasbourg, January 1997, pp. 39-47.

⁴ M. Mozzati, *La battaglia degli archivi*, in: *La modernizzazione in Asia e Africa. Problemi di storia e problemi di metodo. Studi offerti a Giorgio Borsa*, Pavia 1989; argued by: Ch. Kecskemeti, *Activities of UNESCO and ICA since 1976* in: CITRA 1993-1995. *Interdependence of Archives*, International Council on Archives, undated, pp. 81-82.

⁵ *Sovereignty. Disputed Claims. Professional Culture. Essays on Archival Policies* by Charles Kecskemeti, Brussels 2000, pp.247-253.

arrangements included in the report of the Director General of UNESCO presented at the 20th Session of that organisation in 1978.⁶

Those recommendations of UNESCO of 1978, although they had been published several times, have never been professionally evaluated in the literature to the subject. They were based on an extensive study developed as a result of co-operation between UNESCO and ICA, in major part written by Ch. Kecskemeti.⁷ The document was prepared during the period of unusual activity of ICA in that respect, related to the significance of those problems, often referred to in the activities of UN and UNESCO. A report of the General Director of UNESCO of 28 August 1978 has a character of a strictly professional document, presenting the principles of archival sciences in respect of the restitution of archive materials in international relations. The starting point for the development of those principles of international distribution of archive materials was the acknowledgement of their direct connection with the sovereignty of any State involved in archival claims. Thus, problems regarding the ownership and transfer of archive materials in international relations are of legal nature and should be resolved by way of negotiations and international agreements, with the use of norms of international public law related to the succession of States. One should also consider the status of archive materials determined by national legislation of States involved in the claim, and apply the retroactive principle of sovereignty in respect of States liberated from colonial slavery. The retroactive principle of sovereignty was applied due to the lack of sufficient precedents related to the settlement of claims for the distribution of archive materials between former colonial powers and new States that would allow for the identification of any principles of conduct.

In the opinion of UNESCO, the following situations are connected with the emergence of archival claims, and consequently determine the substantive scope of recommendations:

- a. change of sovereignty on a given territory, not connected with the establishment of a new State,
- b. transfers of archive materials during wars and occupations,
- c. establishment of new States as a result of divisions of others,
- d. fall of the colonial system.

Recommendations directly regarding the way of dealing with archive materials during the settlement of claims refer, first of all, to the observance, to the highest extent possible, of the principle of provenance, understood as respect for the integrity of any archival fond, in accordance with which archive materials produced by a given administrative body should be preserved as indivisible units remaining at the disposal of that body or its legal successor. The only exception from the above presented principle may be justified in reference to the principle of functional pertinence, often incorrectly referred to in the literature to the subject as the principle of territorial pertinence. In this case, functional pertinence signifies the obligation to transfer to the successor State archive materials requisite for the execution of authority in a given territory, indispensable for administrative purposes. It is obvious, that authors of this conception assumed the possibility of its application only to a very limited, really indispensable extent.

A conception of the joint archival heritage as presented in the recommendations of the UNESCO Director General is very interesting. In the situation when due to territorial changes between States, the archival holdings or a majority of archive materials produced by administrative bodies, the successors of which are two or more States, may not be divided without the impairment of their legal, administrative and historical value, the appropriate solution seems to be just the aforesaid idea of the joint heritage. Thanks to that idea, a given archival fond or archival holdings would remain in the territory of one of the States, as an integral whole, making for the part of its archival legacy. That State would assume the

⁶ Study regarding problems involved in the transfer of documents from archives in the territory of certain countries to the country of their origin (document UNESCO 20C/102), in: Reference dossier on archival claims, pp. 25-32. See: UNESCO Recommendations in respect of the international distribution of archives, in: *Archiwista. Biuletyn kwartalny Stowarzyszenia Archiwistów Polskich*, Vol. XiX, No. 3/4 (74/75), Warsaw, July-December 1983, pp. 11-29.

⁷ Preliminary study on the principles and criteria to be applied in negotiations, in: *Sovereignty. Disputed Claims. Professional Culture*, op. cit, pp. 25-60.

responsibility to administer and protect such materials, and its rights to the contents of those materials would be the same as the rights of the remaining, involved States.

Recommendations of 1978 include one more significant conclusion regarding the right to the historical continuity of nations, which goes beyond the issues of international distribution of archive materials and refers to their availability in international relations. That conclusion is based on the statement that any national community is entitled to preserve its identity developed in the course of historical processes, and the international solidarity requires supporting nations in their endeavours aimed at determining the historical truth.

The General Director of UNESCO expressed his opinion that the basic condition for successful settlement of international claims, in compliance with the above mentioned recommendations, would be a wide-scale international co-operation, filled with the spirit of mutual understanding, and the observance of specific legal norms and moral principles.

The UN International Law Commission considered the arrangements included in the above presented UNESCO document, except for the conception of the joint heritage, in the draft of the Convention developed by the Commission and adopted at the Vienna Conference in 1983.⁸ Considering the above, what were the reasons for such an explicit "disqualification" of the Vienna Convention of 1983 by the group of ICA experts? Was it caused, as Professor Mozzati claims, because of the interest of the ICA hosting State, or of some other States, or perhaps due to strictly substantive reasons?

The basic objection formulated by experts consisted in the statement that during the Vienna Conference, the political approach of States prevailed over substantive reasoning, thus leading to the adoption of mistaken provisions. This assessment refers to several issues, the first one being the omission in Art. 28 of the Convention, regarding new, independent States, of a statement on the primacy of a bilateral (or multilateral) agreement between the States that this type of the succession of States refers to. For example, it would be worthwhile to quote the provision of Art. 27.1 which refers to this issue (type of succession: transfer of a part of the territory of a State): "... If a State assigns a part of its territory to another State, the transfer of State archive materials of the predecessor State to the successor State is regulated pursuant to the agreement concluded between those States".⁹ Art. 28, which refers to a new independent State, really does not provide for that solution, listing specific regulations to be strictly observed by States acceding in the Convention. In the experts' opinion: "Such a conception disregards the very nature of archives as well as the rationale of an international Convention on the succession of States in respect of archives".¹⁰

This statements finds its justification in the recognition of the fact that each State participating in resolving such claims must take into account provisions of its national legislation while making obligations on an international arena. Therefore, it would be reasonable to maintain the primacy of a bilateral (or multilateral) agreement also in respect of new independent States. In 1983, that was not possible due to the relationship between former colonies and their colonial powers. New independent States doubted the effectiveness of the execution of their rights by way of bilateral negotiations. Therefore, that was really very unfortunate, that former colonial powers did not stand up to ensuring the conditions that would allow for taking up substantive discussions with nations enslaved by them in the past. We are of the opinion that there is no need to indicate which parties to that dispute should be deemed wronged in the colonial period and thus entitled at least to a partial compensation. To evaluate properly the reasons for the situation that occurred in Vienna, it is necessary to present in a comprehensive way the policy of colonial powers towards new independent States, which clearly exceeds the scope of the present considerations. Concluding the above, the position of experts on neglecting the principle of the primacy of a bilateral agreement in Article 28 should be deemed justified and reasonable, distancing, however,

⁸ During the proceedings of the Vienna Conference, the Swiss delegation raised the proposal to incorporate that conception into the Convention. That motion, however, was not considered by the majority of States, afraid that it could restrict their rights to take over original archival documents.

⁹ Vienna Convention on the succession of States in respect of State property, archives and debts, in: *Succession of States ...*, p.64.

¹⁰ Reference dossier on archival claims ..., p.41

from the statement that this Article, instead of mitigating controversies in respect of archives, will contribute to the increase of such controversies and claims. That is to happen because former powers and new independent States, which might have been satisfied with the exchange or delivery of copies of documents based on bilateral agreements, pursuant to Article 28, have to transfer originals. The above statement requires further comments. In accordance with Art. 28, paragraph 1, archive materials related to the sovereignty of a new independent State should be transferred to that State as original documents (i.e. in compliance with the UNESCO recommendations of 1978 specified in the Article referring to functional pertinence), while paragraph 2 provides that: "Transfer or adequate reproduction of some State archive materials of the predecessor State, other than those referred to in paragraph 1, of material significance for the territory covered with the succession of States, shall be regulated by way of an agreement between the predecessor State and a new independent State to such an effect that each of them will be able to use those parts of State archive materials of the predecessor State to the possibly widest and fairest degree".¹¹

The position of the group of experts also includes information on the "proper", in their opinion, construction of the Convention, the main article of which, in its part related to State archive materials, should be the provision regarding the primacy of a bilateral or multilateral agreement, in subsequent articles providing details on further principles and criteria as specified in the Convention.¹² They agreed that archive materials subject to transfer should be those requisite for the predecessor State to administer the territory, as provided for under the Vienna Convention in respect of all types of the succession of States, opposing, however, to transferring any other archive materials which exclusively or principally refer to the territory of the successor State. The reason for that objection was deeming the principle of territorial pertinence incompatible with UNESCO recommendations and the principle of provenance. This position finds its explanation in the statement that the origin of a document and not its contents must decide about its ownership. A definition proposed by the working group does not, however, reject the entire provision set forth in the Convention, aiming at its more clear wording: "the part of State archives of the predecessor State created by the transactions of administrations and institutions responsible exclusively or principally for the affairs of the territory to which the succession of States relates". In that provision, we perceive the recognition of the force of the binding principle of functional pertinence, as defined in the UNESCO recommendations, and a reasonable amendment made in respect of the contents of the Convention that relates to State archives.

An absolute novelty, however, also in view of the UNESCO recommendations, is the demand to supplement the above provision with archival consequences of population displacements: "...in case where, in the process of change of sovereignty, a significant part of the population leaves the territory of successor State, this fact shall be taken into account when negotiating the succession of States in respect of archives".

Archive sciences have been confronted with such an approach for years in relation to German archives. Archival consequences of population displacements have not been yet, however, raised in works of international bodies and institutions. Under such circumstances, one can hardly resist the impression that the ICA expertise was used to introduce to international dealings, somehow through the "back door", a German thesis on the necessity to take into account the consequences of mass displacements while making decisions related to the succession of States in respect of archives.¹³ Another

¹¹ Vienna Convention on the succession ..., p. 65.

¹² The proposal reads as follows: „In all cases of succession of States, the passing of State archives from the predecessor State shall be settled by agreement between them. The agreement shall conform to the principles and criteria set in articles [] to [] of the present Convention". (Reference dossier on archival claims ..., p. 42. This proposal would signify departing from the typology of the succession of States as developed by the UN ILC, being the basis for the entire codification of international law in that respect.

¹³ Klaus Oldenhage claimed that the principle of functional pertinence may be used to the best interest of German DPs (Richtlinien und archivische Grundätze der UNESCO zur Beilegung von internationalen Konflikten um Archivalien), in: *Der Archivar*, 1983, No. 2, cols. 173-176, which may be interpreted as the statement applicable only to records regarding specific persons.

statement related to this type of archive materials, that their definition, unless otherwise agreed by partners, does not include records produced by military occupying authorities, confirms the “bow” of experts towards German theses. This statement had to be treated very cautiously by the authors of the evaluation, as one should differentiate records of military units, forced to operate with significant mobility under the war conditions, from records of occupant’s administration closely connected with a given territory.

Another category of archive materials mentioned in archival clauses of the Vienna Convention, are those belonging to a territory. The wording applied in respect to this category by the UN International Law Commission was considered by experts as not sufficiently precise. Experts proposed more explicit and precise wording: “the archives constituted within the territory before it became dependant from the predecessor State and subsequently integrated in the state archives of the predecessor State whether preserved in situ or removed from the territory and entrusted to custodian institutions (archives, libraries, museums) located within the territory of the predecessor State”.¹⁴

Referring to the unsuccessful initiative of the Swiss delegation, aimed at incorporating into the text of the Vienna Convention of an article related to the joint heritage, experts confirmed the justifiability of the application of that measure in international relations, in the events when all the parties have equal rights to certain archive materials, and any division thereof would be harmful. In their opinion, an article related to the joint heritage could ascertain that States declare joint heritage based on the agreement concluded that should determine their rights and responsibility for records.¹⁵

The group of experts raised no reservations as to Articles 21, 23, 24 and 26 of the Convention. As regards Article 25 (Maintenance of the integrity of fonds of State archives), it found an evident mistake in translating into English of the following phrase: “Sauvegarde de l’intégrité des fonds d’archives d’Etat”.¹⁶ It, however, raised no objections as to Article 27, paragraphs 3-5, Article 28, paragraphs 3-7, Article 29, Article 30, paragraphs 2-5, and Article 31, paragraphs 2-5. They almost exclusively refer to the accessibility and delivery of copies of archive materials related to the succession of States. The above also indicates the direction of ICA activities, preferred by the Group of Experts, in respect of issues related to the settlement of international archival claims.

One might indicate the lack of consequence in qualifying individual clauses of the Vienna Convention, or any parts thereof, as acceptable or unacceptable. What was the reason for recognising Article 27 paragraph 1 (“Transfer of a part of the territory of the State”), which reads as follows: “If one State assigns a part of its territory to another State, the transfer of State archives of the predecessor State to the successor State is regulated pursuant to the agreement concluded between those States”¹⁷ as unacceptable if it follows the intentions of authors of the expertise striving for the recognition of the primacy of a bilateral agreement? Expressing the opinion on that Article, it may be worthwhile to remind that it was adopted almost unanimously, with only one vote against, at the UN Conference in Vienna in 1983.¹⁸ One can hardly resist the impression, that current voices of criticism result, first of all, from the omission in the Article of issues connected with the displacement of population from the territory subject to assignment. This problem was not raised during the UN Vienna Conference proceedings in 1983, and the International Law Commission had recognised before that displacements of population introduced no changes to the norms of international law related to the succession of archive materials.¹⁹ Thus, the

¹⁴ Reference dossier on archival claims ..., p. 43.

¹⁵ Proposed wording of this article: „Archive groups created by administrations, functions of which are shared between the predecessor State and the successor State or States, as a result of the succession of States, may be declared in the special archival agreement „Joint heritage“. Rights and responsibilities connected with the custody of and access to the joint archival heritage shall be specified in the agreement” (ibidem, p. 44).

¹⁶ It might be worthwhile to quote the wording of this article as proposed by experts: „In the settlement of the succession of States archives, the predecessor State and the successor State shall observe, as far as possible, the principle of respect for the integrity of archive groups”. (ibidem).

¹⁷ Vienna Convention ..., p. 64.

¹⁸ See: Succession of States in respect of archives ..., p. 44.

¹⁹ Ibidem, pp. 40-41.

initiative of the French Ministry of Foreign Affairs was used to take this problem up, similarly as the one of records produced by military occupying forces, which under regular conditions of the international public law codification had no chance to succeed. Unfortunately, that confirms the instrumental character of the document presented herein, published on behalf of ICA.

According to Ch. Kecskemeti, in the end of March / beginning of April, 1984²⁰, it was obvious that the Vienna Convention of 1983 was dead, the fact which lawyers and politicians reconciled themselves with, and archivists are still to oppose. Pursuant to Article 50 of the Convention, it will enter into force on the thirtieth day upon the submission of the fifteenth document of ratification or accession. Until now, 10 States have done so (Algeria, Argentina, Croatia, Egypt, Estonia, Georgia, Yugoslavia, Niger, Peru and Ukraine). This process proceeds really slowly, which is caused not only by reasons related to inheriting of archive materials. To an equal extent, the Convention refers to State property and debts, thus entering the scope of general codification of legal problems related to the succession of States. The first legal act in that respect was the Vienna Convention on the succession of States in respect of treaties²¹, which faced similar problems. The conclusion that the Vienna Convention of 1983 has no chance to enter into force, seems, however, premature and risky.

The authorities of the international professional organisation of archivists, among the members of which States wronged as a result of historical processes prevail in number, including new independent States, were aware of the significance of the decision made regarding the evaluation of the Convention. That was the action that could ruin the codification of international public law developed by the UN related to the succession of States in respect to matters other than treaties. Consequently, that had to result in the increased activity of ICA in the area discussed. Those problems were dealt with at the XXX and XXXI International Conferences of the Round Table on Archives, held in 1994 and 1995 in Thesalonika and Washington.²² Those Conferences, however, gave no specific effects and proposals, which could contribute to solving the key issue regarding the existence of specific rules and principles acceptable by States, members of the contemporary international community. Furthermore, many presentations delivered within the frames of CITRA seem not to bring us any closer to counteracting the confusion caused upon the adoption of the Vienna Convention on the succession of States in respect of State property, debts and archives.

The above also finds its expression in the last document adopted by ICA at the meeting of the Executive Committee on 10-13 April 1995 in Guangzhou (China). This document (Position Paper) was entitled: "the view of the archival community on the settling of disputed claims". From the formal point of view, this document should be considered as presenting the current formal position of ICA on matters related to archival claims. I am of the opinion that CLM should deal with that document with particular care, as it aims not only at summing up our current achievements in this area, but also at indicating directions for future action. Several issues in this document arouse critical comments. Firstly, one may not agree with the opinion that archival claims were satisfactorily settled until the outbreak of the Second World War, while afterwards, the existing principles and methods of acting were abandoned to a dramatic extent. Although the Executive Committee of ICA calls for return to traditional methods of settling claims, it itself significantly complicates the situation, promoting ideas incompatible with the basic principle of functioning of the international community, i.e. the priority of international public law over the legislation of individual States. In view of the above, the attempt to impose the principle of inalienability of title to public archives under the conditions of the succession of States without the consent of the State that produced those records, arouses firm objections. That conclusion of the Executive Committee reads as follows: "National laws agree in conferring the status of inalienable and imprescriptible public property on public records. The transfer of ownership of public archives especially in the case of succession of States can therefore only occur through a legislative act of the State which

²⁰ The author refers to the correspondence of the ICA Secretariat with UN not quoting its contents.

²¹ See R. Szafarz, *Sukcesja państw w odniesieniu do traktatów we współczesnym prawie międzynarodowym*, Warsaw-Wrocław 1982.

²² See CITRA 1993-1995. *Interdependence of Archives. Proceedings of the XIX, XXX and XXXI International Conferences of the Round Table on Archives*. Dordrecht 1998.

created them". One could generally assume, that this stipulation so conflicting with the international public law, is just a misunderstanding resulting from the lack of competence of the organ that adopted it. This is not the case, however, as we have to do with activities wilfully aimed at reduction, to a maximum degree, of the transfer of original archive materials in international relations substituting it with the transfer of copies, ensuring general access to records for all interested parties and introducing the conception of the joint heritage.

The attention should also be drawn to substantive mistakes in the evaluation of the process of restitution of archive materials after the Second World War, which was said to be non-existent! That is another example of either ignorance of historical facts or adapting them in order to justify the main thesis, i.e. that the transfer of original archive materials in the course of international claims settling is anachronistic and harmful. First of all, one may not agree with the statement that the lack of a peace treaty with Germany after the Second World War was one of the reasons of this state of affairs. Several decisions made by powers which exercised sovereign authority over that State upon its unconditional capitulation and carried out extensive restitution activities to the benefit of plundered States or were transferring archive materials to neighbouring States, according to new German borders, contradict that statement. Those legal grounds for activities of Allied authorities automatically became a part of the national legislation of both German States after 1948.

One may not exclude the possibility that the position presented by the Executive Committee in 1995 became an incentive to take up actions aimed at dependence of the fulfilment of international obligation in respect of the restitution of archive materials on provisions of the national law. The Parliament of the Russian Federation proved the above in the law enacted on 15 April 1997 on cultural values transferred to the USSR as a result of the Second World War and currently located in the territory of the Russian Federation.²³ International community was very distinctly forced to face the consequences of the way of reasoning in accordance with which national laws of one country would determine the scope and terms of the restitution of cultural values in international relations. In 1999, the Constitutional Tribunal of the Russian Federation mitigated, to a significant degree, those provisions of that legal act of the Russian Parliament which were most contradictory to international public law, still, a very severe precedent had been made.

Under those conditions, we should treat with due consideration that part of the Position Paper of Guangzhou in which the Executive Committee announces counteracting the existing situation referring to the need to apply traditional methods of settling international archival claims in currently carried out negotiations and to take up practical actions leading to the adoption of a new international convention. Therefore, CLM will have to assume very important duties related to preparing proposals of specific solutions. The first one should consist in the attempt to describe traditional practices of States in settling international archival claims. Let me present the following proposition in that respect:

Principles of international legal protection of archive materials were being shaped throughout ages. The problem of archives in international relations belongs to the category of issues related to public property and it appears in treaties regarding mostly territorial changes. Therefore, problems of archives were included within the scope of political decisions regarding changes of sovereignty in a given territory, being directly connected with the problem of the succession of States. The complexity of those problems, and, on the other hand, its practical significance, made the theory of the succession of States one of most basic issues of international public law. In respect to problems discussed in this paper as regards the succession of States, the basic rule states that everything that is in the territory of the State, shares its fate (*Quod est in territorio, es etiam de territorio*). State property fully shares the fate of the territory, therefore, it passes over to the successor.

²³ The law which aroused objections on an international arena and serious doubts in Russia itself, was submitted for evaluation to the Constitutional Tribunal of the Russian Federation which in 1999 ordered to differentiate regulations regarding the property of former enemy States and former Allies of the former Soviet Union. However, it is still an example of using national legislation for purposes of public settlement of problems related to transferred cultural values in the manner contrary to provisions of international public law.

The practice of settling problems related to international inheritance of archive materials based on treaties, reaching back to early Middle Ages in Europe, had very significant impact on the development of that rule. Clauses on archives incorporated into treaties, apart from decisions related to international distribution of archive materials, are often connected with the restitution of archives in the case of plunders or various types of transfers.

Protection of archive materials under the conditions of armed conflicts significantly precedes the time of privileged treatment of other types of movable property, including cultural values. This privileged treatment of archive materials was gradually extended to cover other cultural values, in particular in the 19th c., including the recognition of the principle of territorial provenance of cultural values, obviously, archives above all.

Legal protection of cultural values under the conditions of armed conflicts became the institution of international public law as a result of acts codifying the law of war. The subject of a declaration which initiated this process of codification, adopted at an international conference held on 27 August 1874 in Brussels, included the protection of cultural values, of interest for us here. Article 8 of this declaration recommended equal treatment of cultural values with private property, i.e. on a privileged basis. Destruction, seizure or profanation of such values should be punishable. In order to create proper conditions for protection of cultural values, they should be properly marked already at peacetime, and above all, should not be used for war purposes.

Solutions proposed in the Brussels Declaration were later on applied in conventions adopted at international conferences in 1899 and 1907 in the Hague. Twelve conventions drawn up as a result of the proceedings of the second conference, which constituted the repetition and development of resolutions of the first one, became the basic and most comprehensive set of laws of war. The most important convention among those signed in 1907 in the Hague referred to laws and practices of a land war (so called 4th Hague Convention). Article 56 of "Regulations on laws and practices of a land war", being the integral part of that convention, stipulates as follows: "Property of communes, church, welfare, educational, scientific institutions, institutions of fine arts, although belonging to the State, will be treated as private property. Any seizure, destruction or wilful profanation of such institutions, historical monuments, works of art and science shall be prohibited and should be punishable". Articles 27 and 46 of the Regulations provide for saving "sanctuaries, buildings serving the purposes of science, art and welfare, historical monuments" in the course of military operations, and stipulate that "Private property is not subject to forfeiture".

Provisions on the protection of cultural values under the conditions of armed conflicts, of analogous contents as those of Article 56 of Executive Regulations of the 4th Hague Convention, were incorporated into the 9th Hague Convention of 1907 in respect of bombardments by naval forces during the war (Article 5). Those Hague Conventions constituted the basis for legal protection of cultural values during two world wars. Experiences resulting from those two wars, first of all, the scale of plunders and destruction made by Germans in the years 1939-1945 in German-occupied countries of Europe, contributed to considering problems of legal protection of cultural values in armed conflicts as the subject of further and improved codifying efforts. The Hague Convention on the protection of cultural values in the event of armed conflicts, with executive regulations and the protocol attached regarding problems of restitution, was the result of those efforts. This Convention was elaborated under the auspices of UNESCO, and it was signed on 14 May 1954.

This Convention, with all related legal acts, supplements legal norms binding until its development and adoption by many States, as included, first of all, in the Hague Conventions of 1899 and 1907. The definition of cultural values is one of its most significant provisions. Cultural values, regardless of their origin and owner, were deemed including, among others, important collections of archive materials and archival repositories (archives). The above terms should be understood as archival holdings and buildings in which they are preserved (Article 1).

The scope of international legal protection of cultural values, in compliance with Article 2 of the Hague Convention of 1954, includes due care exercised by the State which owns them and due respect for them on the part of the State exercising control over them during an armed conflict. Detailed legal provisions pertaining to such protection are set forth in Articles 3, 4 and 523.

The aforesaid Convention, in its entirety, confirms the principle of territorial provenance of cultural values, making it a legal norm of international public law. The Convention provides even for penal sanctions in the event of infringements of this norm.

The Hague Convention of 1954 was generally considered as a legal act of critical importance for international legal protection of cultural values. It also had a decisive impact on legal regulations in respect of issues discussed in this paper, developed after its adoption. The codification process of international public law in that respect grew to the size allowing to ascertain the fact of the existence of international cultural law.

Legal regulations prepared after 1954 within the frames of codification of that law include the following documents: I and II Additional Protocol to the Geneva Convention of 12 August 1949 on the protection of war victims and convention on measures aiming at prohibiting and preventing illegal transport, export and transfer of ownership rights to cultural values, adopted on 14 November 1970. Another legal act which extends the legal protection of cultural values under peacetime conditions is the convention on the protection of world cultural and natural heritage, adopted on 21 November 1972. All those legal acts assume as a starting point, in compliance with the provisions of the preamble to the Hague Convention of 1954, that: "any damage made to cultural values, regardless of the nation they belong to, is the loss for the cultural heritage of entire humanity, as any nation has its share in the development of the world culture". The Paris Convention of 1970 relates to international co-operation of States under peacetime conditions in respect of the protection of cultural values. Its authors should be fully aware of the fact that this co-operation should protect cultural output of any State.

Legal institutions of international protection of cultural values do not exhaust all measures of this protection in respect of archive materials; as archive materials, apart from features covered by the definition of "cultural values", play many other functions determining the specificity of legal regulations applied in respect of them. Long-lasting practices of settling archival disputes arising due to territorial changes between States on the basis of treaties, relatively early allowed to determine the principles of dealing with them – in reference to the situation in the 17th c. on an all-European scale, and much earlier in the Polish practice of treaties, as the principle of transferring all archive documents related to a given territory together with that territory was generally observed there. However, apart from this solution consisting in the return of all archive materials pertaining to a given territory, another clause simultaneously emerged. It sanctions leaving archive materials – as well as other movables – in those places where they were located at the moment of signing the treaty. Since then, both solutions have been applied in treaties. The principle of territorial provenance of archive materials was developed based on treaty settlements of that type. In the application of that principle in practice, the fate of archive materials created and preserved in the territory which was changing its State affiliation was not disputable. Those archive materials share the fate of this territory as "quod est in territorio, est etiam de territorio". However, archival holdings of the successor State, and registries of its offices, first of all central ones, include archive materials created as a result of administering this territory. Those archive materials were also often provided to the successor State. At present, such approach would be compliant with the scope of the definition of the principle of functional pertinence.

The principle of territorial provenance of archive materials always used to favour victorious States. After 1918, in Europe, enormous changes had to take place in respect of the contents of archival holdings of many States. States, which suffered great territorial losses, defended themselves against the principle of territorial pertinence of archive materials as the binding principle in resolving problems of succession of archive materials in international relations. For that purpose they referred to the principle of indivisibility of an archival fond (principle of provenance) applied in archive sciences in Europe from mid 19th c., in particular from 1910. Advocates of the principle of territorial pertinence of archive materials, which allowed the States building the foundations of their statehood almost from the scratch to organise public and cultural life in a most optimum way, used to assume an attitude towards this principle as accurately expressed by Paczkowski: "the principle of provenance covers the arrangement of records within the borders of a given state and usually within the frames of certain archives, having no applicability beyond those borders [...]".

On the basis of above outlined studies, it was possible to determine that *communis opinio doctorum juris*, in respect of the subject of interest, resolves itself to the following statements:

- official records kept in archives belong to the territory they were created on ;
- in the case of changes of state borders, archive materials share the fate of their seats, and the State which owns the seat becomes the owner of those archive materials. Records pertaining to territories located on the same side of the border are owned by the State that those territories belong to, which takes over those archive materials regardless of the location of the seat of the archives they are kept at. Records pertaining to territories located in both sides of the border are possessed by the State on the territory of which the seat of archives is situated. In such events, the neighbouring State has an unrestricted right to use such archive materials. Sometimes the co-ownership of records is agreed upon. They may also be delivered to the neighbouring State, if they refer to the territory of that State to a greater degree than to the State on the territory of which the seat of archives is situated;
- there is an obligation to return archive materials taken in the past out of the territory being the subject of succession;
- records must be returned to the successor regardless of the title by virtue of which they were acquired, if their origin is known;
- lapse of time from the moment of coming into the possession of archive materials is of no practical significance and influence on the change of the ownership title thereto;
- archival consequences of territorial changes between States also include separating and transfer of records of central authorities (offices) related exclusively to the territory subject to succession (introduction of chronological limits in respect of the division of records of central authorities is a frequent phenomenon). Records of that type constitute archival fonds for a given territory regardless of the place of operations of the office;
- in the case of the private archives the decisive is the will of their owner.

Palestine Archives: Dispersal, Destruction and Reconstruction

Khalid Hafiz Abu Dayeh

INTRODUCTION

This century is considered the memory of the nation because archive materials are an important part of writing nations' history; they can access the people to what happened in the past. They are important media of information and the use of them forms part of the nation's cultural life. They reflect all kinds and types of human activities, and they may be called the memory of mankind. In order for a Palestinian nation to survive, each generation must re-appropriate its past and draw vitality and awareness from its roots, the records of our past are considered the most important legacy left to us. Palestinian archives are of great importance as national history, cultural property and national heritage, as well as a key factor for studying the history of Palestine people. Archives contain demographic, economic and social information.

Palestinian historians and researchers are becoming aware more and more of the importance of the evidence of Palestine history in documents and archives to rewrite Palestine history, they had no possibility of studying the Palestine history objectively, basing their work upon reliable sources because archives are available outside Palestine. From this point the Palestine researcher's reaction would be one of horror that an archive was being moved out of its national and social context, and that physical access to the archive would be severely restricted. For example Public Record Office (UK), is direct control over all the Palestine archives activities and strict censorship to use them over 100 years old.

As far as the Palestine State was existing on 15 November 1995 as a new State came into being, setting up the decree of the Palestine National Archives Centre since 13th September 1995. Palestine nation has right and responsibility to preserve its archives as national heritage. From its establishment in 1995, the Palestine National Archives Centre has recognised the importance of the Palestine documentary heritage were found in various countries and should be returned to the rightful custodians. Because archives by nature are unique, loss archives are irreplaceable, any loss is final, and reconstruction is impossible. If Palestine nation losing its archives losing its past, losing its cultural legacy, it loses its soul.

Also Palestine National Archives Centre and governmental departments have recognized the importance of the Palestine documentary heritage were found in various countries and should be returned to the rightful custodian. Much attention was paid to archival work by it to collect, and save precious archives created in the past. Unesco and The International Council on Archives (ICA) has worked to raise awareness of the common written cultural heritage as a right and a means of priority for understanding among people of different nation.

HISTORICAL BACKGROUND OF PALESTINE ARCHIVES PERIODS

Palestine is a country about the size of Wales. It is part of the Arab area, Palestine ruled by the following nations:

1. Roman Empire until 780. Archives of this period still not known to us.
2. Islamic Empire from 780-1517. Archives of this period are found in Baghdad, Demascus and Cairo State Archive Centers.
3. Ottoman Empire from 1517 -1917, much of Palestine's archive for this period is to be found in the State Archives in Istanbul²⁸.

1. Palestine National Archives Centre, 1999. p.3.

4. The British Mandate from 1917-1948, after the First World War, Palestine was placed under the British Mandate, where it remained until 1948. The Balfour Declaration of 2 November 1917, which committed Britain to facilitate the development and establishment of a Jewish National Home in Palestine, led to serious civil riots between Palestinians and Jews on one side and the Palestinians and the British Mandate on the other. This period saw the creation of the most important archives in the history of Palestine. Most of the archives relating to Palestine from the period of the British Mandate are now located in Britain; in the Public Record Office, India Record Office, British Library, School of Oriental and African Studies at the University of London, Middle East Centre at the Oxford University, The National Library of Wales, and other British Institutions.
5. The Jordanian Administration in West Bank from 1948-1967, the period of Jordanian created extensive archives relating to different aspects of Palestinian social life, these archives are now kept in Amman.
6. The Egyptian Administration in Gaza Strip from 1948-1967, the Egyptian Administration also created a collection of archives, which are now kept in the State Archives in Cairo,
7. The Israeli Occupation to West Bank and Gaza Strip from 1967-1995, vast amounts of government archives were created. It is the largest single quantity of archives on Palestinian social life, the history of Palestinian resistance and the Palestine Liberation Organization (P.L.O). These archives are now kept in the Israel State Archives in Jerusalem,
8. Palestinian refugees in the most Arab countries such as Iraq, Kuwait, the Arab Gulf States, Saudi Arabia, Tunisia, Syria and Lebanon,
9. The history of the Palestine Liberation Organization itself and the Palestinian resistance to Israeli rule from 1967 to 1982. Palestinian National Authority claims that Israel troops during its invasions to Lebanon in 1982 were transferred all the records, documents and archives to the Israeli State Archives Center.
10. The Palestinian Authority from 1995 till now. Records of this period are still active. Palestinian National Authority claims that Israel troops during its invasions to its territory in April 2002 were transferred all the records, documents and archives available in the Ministries, The Society Arab Studies and from the Palestine Government Departments and its Institutions.

In addition to the archives of the various administrations during these periods, there are also important collections of manuscripts relating to the history of the area in private libraries or in the libraries of certain Mosques. The private libraries were founded by such aristocratic families as the Al-Hussini, Al-Nashashibi, Abdel-Hadi, and Al-Budiri. Religious libraries or manuscripts' libraries are to be found in Mosques such as the Jafa Mosque Library, Hebron Mosque Library, Al-Ahmadiya Mosque Library, Haj Nimer Nabulsi Mosque Library, Al-Aqsa Mosque Library, and the Department of Firvival and Islamic Heritage Library.

Therefore, various different administrations and many different systems of state archives have existed in and outside Palestine since the beginning of the twentieth century. Bulk of records transferred to these countries will easy suffer from neglect, it destroy they values by their historic location by forcibly removing them to another country would shock the public conscience. The reasons why this dispersal has taken place are simple to suggest:

- The different occupations in Palestine (1518-1995) have almost without exception transferred all the archives to their own countries,
- The lack of regulations or legislation to protect archive materials,
- The absence of qualified people to keep them,
- A lack of awareness of the important of archival materials (no repository facilities exist in Palestine).

These ambitious nationalist projects and from the very beginning, was encountered with a multitude of impediments including:

- The new political situation created as a result of the Oslo Accords, and many of Palestine government departments were created and produced records and documents.

- The Diaspora archival materials, which created by Palestinian such as Palestine Liberation Organization, and archives related to Palestinian refugees in Arab countries.
- The lack of published volumes relating to Palestine archives, the lack of accurate information on the size, type, form and location in the Arab countries and colonized countries such as Great Britain and Israel, which represents one of most serious drawbacks.

PROTECTION OF PALESTINE NATIONAL AND CULTURAL HERITAGE

Palestinian National Authority has right to recover the Palestine archives from any country as mentioned in draft resolution in Paris 16-18 March 1976²⁹: "that right of each state to the recovery of archives which are part of it archival heritage and which are now kept outside its territory, as well as the right of each national community to have access under agreed conditions, to records belonging to other countries and relevant to its own history and to copy them". And the Universal Declaration of Human Rights December 10, 1948. And the Universal Human Rights such as European Council Convention on Protection of Human rights signed by the Council members on November 4, 1950.

UNESCO has led to the "Convention for the Protection of Cultural Property in the Event of Armed Conflict" which was signed in The Hague on 14 May 1954. The European Convention on Human Rights of 1959 and the American Convention on Human Rights 1969 and the African Charter of Human and the People Rights grant the something in 1981. In 1991 the General Assembly of the United Nation approved a resolution which recommended restitution of alienated cultural property to the countries of origin. For example, the bilateral co-operation between Palestinian National Authority and the Turkish Government had successes to sign agreements in March 2003 which led to open all archives relating to Palestine for Palestinian researchers.

WHAT IS THE SOLUTION?

Do we as Palestinians see sensible to raise claims for restitution or return of archival material beyond and certain limit of time. At the minimum we accept a restitution of archives is justified at all, or the exchange of quality microform copies and their finding aids won't be equally satisfactory means for resolving such disputed claims. There are many ways that Palestinian National Authority can follow a reconstruction policy to recover and restore their archives:

Bilateral and Multilateral Co-operation

In the case of Palestine State as new State creation, there has been general recognition of the principle that such state has a right to certain archives, which they have, been created and therefore automatically located outside the national territories of this new state. According to Article 28 state³⁰: "archives of the predecessor State during the period of dependence shall pass to the newly independent State". Also "the passing of the appropriate reproduction of parts of the State archives of the predecessor State, shall be determined by agreement between the predecessor State and the newly independent State". Also "the right of the successor State to cover any archives relates to its history" and later "Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the people of those States to development, to information about their history, and to their cultural heritage".

The 1987 Convention de Public Archives are of succession to public property; they are close connection to the cultural and national heritage and identity of the people concerned. For example, the

2. ICA. Professional Principles: Supported by the Archival Community and Expressed by ICA. CITRA XXIX, 1993. p. 245.

3. Vienna Convention on Succession of States in Respect to State Property, Archives and Debts (April 1983). CITRA XXXI, 1995. p.264

bilateral co-operation between the United States of America National Archives and the German Federal Archives had led to the return of almost all captured German records to Germany³¹. And the same kind of co-operation was carried out between Great Britain and Germany. Another agreement reached with the Netherlands the Austrian State Archives and the German Federal Archives exchanged public archives from the time when Austria was a part of Nazi Germany. Another example was in 1992, restitution agreements were signed with Belgium, France, Liechtenstein and the Netherlands.

According to the Luxembourg and Trier conferences in 1986 and 1987 belongs the reconstitution of the archival heritage of developing countries. With regard to records of occupation administration as described under (b), in particular by granting free access and allowing reproduction.

International Assistance

The Convention of UNESCO prohibiting and preventing the illicit import, exports and transfers of ownership of cultural property. Also it adopted a Resolution in 1975 inviting the Member States of UNESCO "to give favourable consideration to the possibility of transferring documents from archives constituted within the territory of other countries related to their history, within the framework of bilateral agreements".

According to the 1983 UN Vienna Convention on succession of States in Respect of State Property, Archives and Debts, which was deemed "as it now stands.... inapplicable"³². As Palestinian can use UNESCO Intergovernmental Committee for International Return of Cultural Property. It means that archives produced by Palestinian people during the British Mandate, as a given entity within its activity must not be intermingled with those of any other provenance. Also that archives produced by an entity dealing with a precise geographic area must be kept by the geographically and structurally relevant archives.

In 1991, the European Parliament states "the right of nations to information concerning their history and the return of national archives". It included the following elements:

- The right to culture and to information concerning history is a fundamental right of individuals and nations.
- The wish of certain countries to reconstruct their cultural inheritance is a legitimate cultural aspiration,
- EC Member States should return of archives to the developing countries,
- EC Member States should not refuse to make copies of archives available to developing countries, and that the developing countries must have full and free access to archives held in the EC,
- EC should support projects likely to help developing countries to acquire and / or inspect archive data relevant to them.

Copying Project

International Council on Archives and UNESCO was created climate to microfilm copies from former colonies "The International Microfilming Programme for Developing Countries" to which application can be made. An example of copying project such archives Brynner's Program for Canada government since 1892 when he spent extended period in London listing collections relating to Maritime Canada³³.

Palestinian National Authority signed agreement with the Turkish government in one side and The Jordanian Government from other side to supply the Palestinian National Authority with copies of microfilms for all archives relating to Palestinian land Registration.

I wish, the memory of this success might be advantages to lead for all Palestine archives captured or removed to other countries will return to Palestinian National Authority as soon as possible.

4. Oldenhage, Klaus. Bilateral and Multilateral Co-operation for the Reconstitution of the Archival Heritage. CITRA XXX, 1994. p. 129.

5. Bastien, Herve. About Archival Claims. CITRA XXX, 1994. p. 62.

6. Wilson, Bruce G. Bringing Home Canada's Archival Heritage: the London Office of the Public Archives of Canada 1982-1986. Archiva, no 21 Winter, p. 30.

Reconstruction Policy

Palestinian National Authority created in 1995, the Palestinian State has had the right and responsibility to preserve its archives. It should formulate, through legislation and regulation, a policy of archival reconstruction for the state of Palestine. A reconstruction policy should include providing access for researchers and historians to study and examine these archives through:

- Establishing a National Archives Commission to superintend the establishment of a National Records and Archives Agency, and to prepare legislation and regulations.
- Developing a manpower plan for the Agency, including a programme of training and development for staff, developing an information technology strategy, and introducing government-wide records management systems and programmes to ensure that current records provide the archives of the future
- Instigating a wide-scale programme of microfilming for those Palestinian archives which are spread throughout the world
- Collecting the private archives together in the National Archives, and developing an oral history programme
- Adopting international standards for the arrangement and Title of archives, and increasing public awareness of the importance and the value of archives
- Fostering international cooperation in locating and inventorying records and helping the Palestine State to retrieve these records by bilingual cooperation projects, such as Palestine-Britain, Palestine-Israel, Palestine-Jordan, Palestine-Egypt, and Palestine-Turkey
- Building appropriately equipped facilities for storage, conservation and preservation of the archives, in whatever format or generation.