

Kamil Zeidler

University of Gdańsk
kamil.zeidler@ug.edu.pl
ORCID: 0000-0002-8396-3608

Małgorzata Węgrzak

University of Gdańsk
malgorzata.wegrzak@ug.edu.pl
ORCID: 0000-0003-2956-3117

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Cultural heritage law as a complex branch of law

1. Introductory remarks

The evolution of law is a constant process and it covers diverse aspects of reality. Those who oppose any modification to an already proposed and adopted way of putting law in order, claim that excessive fragmentation of law is not efficient for a legal system. Others not only understand law differently, but also require recognition of changes in its internal structure and appreciate the role of its principles. This kind of controversy arises when discussing cultural heritage law as a complex branch of law and the criteria for its autonomy.

It will be demonstrated that cultural heritage law is recognized at present as a complex branch of law and that it meets the criteria for being seen as autonomous.¹ Research is being carried out on cultural heritage law in the international arena both on theoretical and dogmatic levels. Analyzing the premises for recognizing its autonomy, one should stress the criterion of the object of regulation, the criterion of its theory and its doctrine, the criterion of its sources in law, the institutional criterion, and the criterion of its legal principles.²

¹ K. Zeidler, "Prawo ochrony zabytków jako nowa gałąź prawa" [in:] *Prawo ochrony zabytków*, ed. K. Zeidler, Wydawnictwo Uniwersytetu Gdańskiego – Wolters Kluwer, Gdańsk – Warszawa 2014, p. 28; K. Zalańska, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*, C.H. Beck, Warszawa 2020, p. 8.

² C.R. Liesa Fernandez, "Cultura y Derecho Internacional", *Cuadernos de la Catedra de Democracia y Derechos Humanos* 2012, no. 8, p. 58; J. Garcia Fernandez, *Estudios sobre el derecho del patrimonio historico*, Colegio de Registradores de la Propiedad, Madrid 2008, p. 25; see also: J.H. Merryman, "The Public Interest in Cultural Property", *California Law Review* 1998, vol. 77, no. 2; A.F. Vrdoljak, "Self-determination and Cultural Rights" [in:] *Cultural Human Rights*, eds. F. Francioni, M. Scheinin, Martinus Nijhoff Publishers, Leiden – Boston 2008; F. Francioni, "La proteccion del patrimonio cultural a la luz de Derecho internacional publico" [in:] *La protection juridico internacional del patrimonio cultural. Especial referencia a Espana*, eds. C.F. Liesa, J.P. de Pedro, VVAA, Editorial Colex, Madrid 2009; O. Yasuki, "A transcivilizational perspective on global legal order in the twenty first century: A way to overcome West – centric and judiciary centric deficits in international legal thoughts" [in:] *Towards world constitutionalism*, eds. R.J. MacDonald, D. Johnston, Martinus Nijhoff Publishers, The Hague 2005, p. 78.

It is not possible to limit the discussion to a normative analysis. The model of the system of cultural heritage protection should take into account at least three instruments: legal instruments, financial instruments, and those that raise social awareness of the importance of the issue, including, in particular, public participation and the awareness of state authorities.³ Moreover a movement from a vertical to a horizontal perception in legal terms can be observed which, as a consequence, distinguishes between specific interdisciplinary branches. The criteria for differentiating public and private law are unreliable nowadays, and distinguishing between private and public law is really a matter of approval of certain values.⁴ Some branches of law have characteristic features specific to both types of law, and the classical division into three main branches of law – civil law, criminal law, and administrative law – are complicated by the existence of what are known as comprehensive branches of law. There are sets of norms that are distinguished on the basis of different criteria. The basic criterion is the purpose and subject matter of the regulation; however, the criterion of legal principles can be applied as well. It is also worth adding that the law on the protection of cultural heritage is divided and fragmented precisely because of its connection with legal studies, and the branch of law, legal field, or discipline within which research is conducted.

With regard to one of the aspects of cultural heritage – historical monuments and their protection – one must note that the law concerning this subject constitutes a separate subsystem within the detailed sections of administrative law. The term “protection of historical monuments (cultural property)” is understood very broadly – as an ensemble of activities protecting material cultural documents from destruction, damage, devastation, theft, or export, as well as activities connected with collecting and making them available (art. 5 of the Act of 23 July 2003 on the protection and preservation of monuments, consolidated text: *Journal of Laws* of 2021, item 710, as amended). This definition also refers to the creation of conditions for permanent preservation, extraction of artistic values, and proper use of cultural goods, as well as clarification of conditions relating to their financing. However, cultural heritage law contains legal norms not only relating to the protection of monuments itself, or only to administrative law, but also to constitutional law, criminal law, civil law, international law, etc. It also includes issues from other fields of studies, such as art history and archaeology. Thus, cultural heritage law has developed as a special branch of law, and, indeed, a complex branch of law.

³ K. Zeidler, *Zabytki. Prawo i praktyka*, Wydawnictwo Uniwersytetu Gdańskiego – Wolters Kluwer, Gdańsk – Warszawa 2017, p. 79.

⁴ S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, Ars boni et aequi, Poznań 2001, pp. 192–196; see also: J. Nowacki, *Prawo publiczne – prawo prywatne*, Wydawnictwo Uniwersytetu Śląskiego, Katowice 1992.

2. The branches of law with regard to cultural heritage law

It should be stressed that legal studies uses the term “branch of law” in a broad sense. A branch of law is recognized on the basis of various criteria. The method of distinguishing between branches of law recognized in legal doctrine is to define the subject, the method of regulation, and the entities to which legal norms are addressed etc. Distinguishing branches of law is usually carried out in a lively manner, supported by longstanding tradition and habits. The axiological basis and the content of norms related to the values that are protected are also underlined.

It has to be noted that the legislator rarely clearly defines to which branch of law the norms that are created are classified, and this is mostly the work of jurisprudence and legal doctrine. Moreover, the strict division of the system of law into branches, because of the interpenetration of relations between the branches of law and because of the influence of international law, is complicated by a constant development of legal culture. These divisions, however, should not be arbitrary and random; they should always be rational and, most importantly, be based on clear, readily explicable criteria. At the same time, it is important that the distinction of any branch of law is not currently dependent on its having any separate legal regulation. The delimitation of boundaries between branches and disciplines of law serves different purposes and, consequently, the boundaries set for one purpose do not necessarily coincide with those set for others.⁵

At present, next to or more often within several branches of law, there is a recognition of what are called complex branches of law.⁶ Excessive fragmentation of law is controversial; however, changes in this area are inevitable. Branches of law are understood as sets of legal norms distinguished according to specific criteria. Because of this, such branches of law as environmental law have been developed. In the case of environmental protection law, the most important prerequisite for autonomy is the criterion of the subject and of the sources of such law, including the principal legal act, the Act of 27 April 2001 on environmental protection law (consolidated text: *Journal of Laws* of 2020, item 1219).⁷ The regulations of environmental protection law are currently considered to be one of the dynamically developing areas of law.

In the case of cultural heritage law, similarly to environmental protection law, it is not possible simply to assign its norms to basic branches of law. There are relationships between the norms that are the basis for their separation. In cultural heritage law, the obligations set out by legal norms functionally linked to the protection of cultural heritage are elementary. They can be seen as a combination of public and private law norms concerning both the subjects of that law and the systemic rules involved.

⁵ *Integralność prawa administracyjnego. Perspektywa polska*, ed. J. Zimmermann, Wolters Kluwer, Warszawa 2019.

⁶ S. Wronkowska, Z. Ziemiński, *Zarys teorii...*

⁷ J. Ciechanowicz-McLean, “Kształtowanie się gałęzi prawo ochrony środowiska jako wzór dla prawa ochrony dziedzictwa kultury” [in:] *Prawo ochrony zabytków...*

Currently, the axiological provenance and normative content of the principles of law, as well as their functions in the legal order, particularly in terms of application and interpretation of law by courts, are crucial. Ronald Dworkin, opting for an integral theory of law, points out that law, which is the basis for judicial judgements, consists of rules and principles. It must be noted that judges resolve cases on the basis of such principles. Principles are considered dominant norms and they create borders within which other norms should be situated.⁸

At present, reference to moral responsibility and the role of social acceptance are of great significance for the creation of norms within the legal system, including the consolidation of the legal principles it consists of. This indirectly affects the way in which legal norms are organized, also in the area of grouping specific norms and rules into branches of law. The social attitude towards the law depends on the conformity of legal norms with elements of culture, the components of which are the accepted ideas and views on social life and values that are protected by the norms of cultural heritage law. The assessment of values can be regarded as a kind of cognitive process similar to legal interpretation, or even to a type of axiological interpretation. Such an approach to cultural heritage, a value-based approach, is clearly visible, and, thus, here an axiological approach to law is being applied. For example, an evaluation process occurs when making an entry to or deletion from the register of monuments. It also occurs in restitution cases. Restitution advances international cooperation in the art trade by proposing a due diligence framework involving all actors in the art market, thus changing the approach of buyers and sellers with regard to the respect they accord the overall value of cultural property.

Moreover, the characteristics of cultural heritage are defined differently in various legal acts, mostly depending on the culture from which the terms used originate and the connotations associated with cultural heritage. The term "cultural heritage" is the most universally utilized, as it concerns movable and immovable cultural objects and notions. However, the term "heritage" implies that the object named as part of such represents collective values, while cultural "property" may but does not need to possess that quality. While terms such as "cultural heritage", "cultural property", "cultural objects", "monuments", "antiquities", and "works of art" are often used interchangeably, they each have a specific meaning that can only be retrieved if seen through the values they represent. The function they perform is also important because of the concept of cultural heritage as a common good as a result of its special qualities and values. This may lead to the conclusion that cultural heritage is, in fact, "public property."⁹

⁸ See: R. Dworkin, *A Matter of Principle*, Harvard University Press, Cambridge, USA 1995; *idem*, *Law's Empire*, Harvard University Press, Cambridge, USA 1986.

⁹ See: J. H. Merryman, "The Public Interest..."; L.V. Prott, P.J. O'Keefe, "'Cultural Heritage' or 'Cultural Property'?", *International Journal of Cultural Property* 1992, vol. 1, no. 2; also: J.L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*, The University of Michigan Press, Michigan 2001.

3. Cultural heritage law and its place in the Polish legal system

Cultural heritage – the source of the identity of the Polish nation – is subject to legal protection guaranteed by the legislator in the Constitution of the Republic of Poland and in the Act of 23 July 2003 on the protection and preservation of monuments, supplemented by a number of other legal acts. This expands the subject matter of the regulation and, thus, introduces the foundations of the system of protection of cultural heritage, which is shaped as the entirety of a set of norms. The concept of a legal norm is fundamental to legal studies, and, as a directive statement, it sets out a specific pattern of behaviour for its addressee in given circumstances. Legal norms are those which, on the basis of specific rules of inference, are interpreted from the legal provisions contained in a legislative act. The entire body of legal norms binding in a given country, within a specified period of time, ordered on the basis of adopted criteria, form a system of law.

Legal norms that are part of the system are hierarchically differentiated and undeniable. Assuming that “a system of law is conceived as a set of norms connected by logical and systemic relations and is based on common principles”, one can see that the very definition of a system of law determines the importance of principles in its creation, and a lack of principles makes it impossible to call such a set of norms a system of law. The principles of law, therefore, set the substantive limits of the remaining norms and make them unified. The assumption that a given norm within the system acquires the status of a principle is not definitive, as any legal system evolves, and some norms may lose the status of principles, while others gain it.¹⁰

It should be stressed that a system of law is subject to different divisions, on the basis of which the legal norms that are part of that system are classified. The norms within a legal system may be arranged in a vertical manner – whereby the legal norms within a legal system are categorized according to the legal force of the normative act to which they belong – or in a horizontal manner – whereby the legal norms are arranged according to the content of the social relations normalized by them. Within a horizontal division, legal norms may be systematized into subsets referred to as branches of law. With regard to cultural heritage law, it is difficult to speak of the uniformity of legal norms, because of the comprehensive way in which it is regulated and its interdisciplinary dimension. The legal norms relating to cultural heritage law in the Polish legal system belong to many branches of law, including constitutional, administrative, civil, criminal, and financial law, and others. Moreover, case law is significant, and courts refer to principles of cultural heritage law in their rulings. The principles of particular branches of law constitute the basic principles of the legal order, and judges in justifying their decisions refer to such principles as well as to the views of legal doctrine.

¹⁰ See: M. Kordela, *Zasady prawa. Studium teoretycznoprawne*, Wydawnictwo Naukowe UAM, Poznań 2014; J. Wróblewski, *Sądowe stosowanie prawa*, PWN, Warszawa 1998.

A system of law can also be understood as a specific system (a set of norms binding in a given country at a given time) and as a system of a specific type (the civil law system of continental European countries, and a common law system). In the currently changing legal culture, thinking about law can no longer be only two-dimensional, because there are various differences and mutual influences in terms of the basic features within a given type of system of law. In a system of law in continental European countries, courts and their jurisprudence are increasingly becoming important.

The legal norms concerning cultural heritage law are not only contained in the provisions of the Act of 2003 on the protection and preservation of monuments, but also in legal regulations regarding spatial planning and development, construction law, real estate management, and environmental protection law, and others. An extension of the subject of protection shifts the regulation of cultural heritage protection law from "heritage protection" to "heritage management" and shapes the system of cultural heritage law. The function of the norms constituting this system is not only to preserve cultural heritage in an undisturbed state. Therefore, in addition to protective objectives, consideration is increasingly given to utility-orientated objectives concerning the use of particular components of cultural heritage, thus adapting the law to contemporary realities.¹¹

4. The criteria for distinguishing cultural heritage law as a branch of law

Currently the strict division of the legal system into branches is difficult in an evolving legal culture because of the mutual interaction of those branches and the influence of international law. Depending on tradition, methods of regulation, and doctrinal opinions, certain groups of legal norms regulating a specific sphere of social relations are considered to be a branch of law. Many factors have contributed to the process of dividing law into branches. These include economic, historical, and organizational factors, and those directly related to the functioning of society. The most frequently used criteria for distinguishing a branch of law are the method of regulation, the subject of regulation, the entities to which legal standards are addressed, and the criterion of legal principles and legal theory. What are known as complex branches of law are said to be distinguished according to specific criteria, alongside or more often within several branches of law. Some criteria in reference to cultural heritage will be presented below.

4.1. The criteria of purpose and subject matter of the regulation, and the regulation's legal source

The criterion of purpose and subject matter of the regulation concerns the scope of matters governed by the law, that is, the field of activity covered by the regulation in

¹¹ K. Zeidler, *Prawo ochrony dziedzictwa kultury*, Wolters Kluwer, Warszawa 2007.

question and its objective, which is usually expressed in the general principles of the given branch of law. In the case of cultural heritage law, this is the protection of the cultural legacy of previous generations. The law for the protection of cultural heritage is distinguished by the content relationships of legal norms, in which the subject of regulation, in general, and the subject of legal protection, in particular, are important. Legal protection of cultural heritage often results from declarations adopted in state constitutions, for example, in the Constitution of the Republic of Poland in the Preamble, which indicates that there is a moral obligation *vis-à-vis* future generations to preserve cultural heritage in the best possible condition, and that the Republic of Poland guards its national heritage and assists Poles living abroad to preserve their links with the Polish cultural heritage. In the Constitution of the Republic of Poland, one finds definitions of the subject of protection such as: "heritage of the Nation" (Preamble), "national heritage" (art. 5), "cultural goods" (art. 6(1) and art. 73), and "national cultural heritage" (art. 6(2)). In turn, the Spanish Constitution speaks of "the historical, cultural and artistic heritage of the people of Spain" (Constitution of Spain of 27 December 1978, *Bioletin Oficial del Estado*, No. 311, as amended).

Definitions of the terms "national heritage" and "national cultural heritage" cannot be found in Polish law. Such a definition, however, can be derived through interpretation of articles 5, 6, and 73, and indirectly from art. 35 of the Constitution of the Republic of Poland. Article 5 refers to the Republic of Poland as guarding Poland's "national heritage", while, according to art. 6, "the Republic of Poland shall create conditions for the dissemination and equal access to cultural assets, which are the source of the identity of the Polish nation, its duration and development". Further, the Republic "shall provide assistance to Poles living abroad in preserving their links with the national cultural heritage". Besides those articles, art. 35 of the Constitution of the Republic of Poland also refers to ensuring that "Polish citizens belonging to national and ethnic minorities" have the freedom "to maintain and develop their own language, to preserve their customs and traditions and to develop their own culture", and that they have the right "to establish their own cultural institutions (...) and to participate in the resolution of matters relating to their cultural identity". One notices here that the legislator treats the Polish nation more as a cultural than an ethnic community.¹²

The broad term "cultural heritage" is not legally defined in Polish law, but it is used to describe a material and spiritual heritage transmitted by successive generations. It should be noted, however, that in the Polish legal system a definition of "monument" and "cultural good" can be found. "Cultural goods are one of the sources of national identity and are part of the 'national heritage', but they are a broader notion, encompassing not only material evidence of civilizational development, but also the intellectual and spiritual heritage of a specific community", serving to satisfy cultural, scientific, economic, and social needs. It is assumed that a "cultural good" is any movable or immovable object, old or contemporary, which is important for heritage and cultural development because of its historical, scientific, or artistic value. The term

¹² *Ibidem*.

“cultural good” is also substantially broader than the term “monument”, because not every cultural good is a monument, but every monument is a cultural good.

A definition of “cultural goods” is contained in the Act of 25 May 2017 on restitution of national cultural property (consolidated text: *Journal of Laws* of 2019, item 1591). Pursuant to art. 2 point 1 of the aforementioned Act, a cultural good is a monument within the meaning of art. 3 point 1 of the Act, that is, a movable object which is not a monument, as well as its components or ensembles, the preservation of which is in the public interest because of its artistic, historical, or scientific value, or because of its significance for heritage and cultural development. It should be noted, however, that this definition does not refer to intangible cultural goods, which are also a part of cultural heritage.

In turn, the term “monument” has been legally defined in the Act of 2003 on the protection and preservation of monuments. In art. 3 point 1, it is defined as immovable or movable property, parts or units thereof, being the work of human beings or related to their activities and bearing witness to a bygone era or to an event, the conservation of which is in the public interest because of its historical, artistic, or scientific value. It is also noted that libraries and their collections, which constitute a national asset as do museums, also serve to preserve the national heritage, based on art. 21 of the Act of 26 November 1996 on museums (consolidated text: *Journal of Laws* of 2020, item 902, as amended) and art. 3(1) of the Act of 27 June 1997 on libraries (consolidated text: *Journal of Laws* of 2019, item 1479, as amended).

The national archival resources are archival materials that are kept on a permanent basis and that serve science/scholarship, culture, the national economy, and the needs of citizens (art. 2, sentence 1 and art. 3 of the Act of 14 July 1983 on national archive holdings and archives (consolidated text: *Journal of Laws* of 2020, item 164, as amended). It, therefore, covers the whole of the state archives, archive holdings, and non-state archive holdings. The main purpose of the archives is to safeguard the cultural heritage at their disposal. According to art. 5 of the Act of 1997 on libraries, library materials are, in particular, documents containing a recorded expression of human thought, intended for distribution, regardless of the physical medium and method of recording the content, and in particular: graphic (writing, cartographic, iconographic, and musical records), audio, visual, audiovisual and electronic documents. In accordance with art. 3(1) of this Act, libraries and their collections constitute a national asset and serve to preserve the national heritage.

An important feature of the distinction and development of national law for the protection of cultural heritage is its internationalization. Polish heritage consists of a common European heritage, one which influences the global cultural heritage.¹³ It should be emphasized that all the international legal acts in the field of cultural heritage protection law that are applicable in Poland, are not contained in the conventions regarding cultural heritage protection such as: the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, together with

¹³ See: J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015.

its implementing regulations; the Protocol for the Protection of Cultural Property in the Event of Armed Conflict (*Journal of Laws* of 1957 No. 46, item 212); the Convention concerning the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done in Paris on 16 November 1970 (*Journal of Laws* of 1974 No. 20, item 106); the Convention on the Protection of Cultural and Natural Heritage adopted in Paris on 16 November 1972 (*Journal of Laws* of 1976 No. 32, item 190); the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects; and the Convention on the Value of Cultural Heritage for Society, adopted in Faro on 27 October 2005, which has been just ratified in Poland. Underwater cultural heritage also falls within the scope of the subjects of protection of cultural heritage law, and the ratification of the UNESCO Convention on the Protection of the Underwater Cultural Heritage (adopted on 2 November 2001), which has been just ratified in Poland. It is also important to remember that cultural heritage, in response to a demand for a holistic approach to such matters, includes both tangible and intangible goods (in particular, language, customs, rituals, traditions, and the performing arts).

The meaning of the term “intangible cultural heritage” has evolved over time, and the understanding of the term is now based on the definition adopted by UNESCO in the Convention for the Protection of the Intangible Cultural Heritage, drawn up in Paris on 17 October 2003 (*Journal of Laws* of 2011 No. 172, item 1018). Thus, intangible cultural heritage may be considered part of the overall cultural heritage of the “world heritage of humanity”; but its specificity makes it a challenge to reconcile the simultaneous protection of national, regional, and ethnic heritage with the global one. An intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in relation to their environment, the impact of nature and their history, and it provides them with a sense of identity and continuity. A recognition of intangible cultural heritage contributes to an increased respect for cultural diversity and human creativity.¹⁴ In the light of the above mentioned legal regulations, the subject of protection of cultural heritage law is defined by using numerous value-added terms. The characteristics and significance of cultural objects are defined differently in different legal acts, and while “intangible” heritage refers to “practice” that deserves protection, “tangible” heritage is narrowed down to objects.

4.2. The criteria of its own regulatory methods and its own theory

Cultural heritage law refers to the regulation of the classic branches of law within which individual institutions operate, primarily administrative law, but also criminal and international public law. Because it is possible to analyze the area of regulation at different levels, one can distinguish between administrative and legal issues, criminal law issues, and civil law issues. Because of the interdisciplinary nature of cultural

¹⁴ See: *Safeguarding Intangible Cultural Heritage – Challenges and Approaches*, ed. J. Blake, Institute of Art and Law, Bulth Wells 2007; H. Schreiber, “Intangible Cultural Heritage and Soft Power – Exploring the Relationship”, *International Journal of Intangible Cultural Heritage* 2017, vol. 12.

heritage law, it is difficult to distinguish its own distinctive methods of regulating this branch of law. This is also influenced by the multiplicity of regulations, the dispersal of norms in many legal acts of various ranks, and the wide use of undefined terms.

These terms, however, are specified in doctrinal opinions, and cultural heritage law can be considered to have its own legal theory. Undoubtedly, cultural heritage law has its theory, just as other legal dogmatics do (e.g. civil law, criminal law, and administrative law). A solid doctrinal basis for cultural heritage law in Poland was provided by Jan Pruszyński, who stressed that legal issues regarding cultural heritage protection form a separate area with its own legal principles. Specific rules for the creation and application of cultural heritage law, in particular in decision making by conservation authorities, have been formulated.

4.3. Research, educational, institutional, and personal criteria

The issue of cultural heritage protection is a subject of educationally-oriented research in many areas of scholarship, including law, art history, sociology, architecture, conservation, cultural studies, political science, archeology, and ethnology. If one considers the special subject of protection, the most important aspect seems to be action aimed at the protection of the stock of immovable monuments, a stock that cannot be restored or enlarged. Cultural heritage protection may be distinguished on the basis of educational needs. The separation of a set of norms regarding cultural heritage results in the recognition of them as a separate branch or department of law, and practice in the field of legal studies will become an indicator of this. For the above reasons, there is a need to continue interdisciplinary research on cultural heritage on many levels. Such research is conducted, in particular, at the University of Gdańsk, at the Faculty of Law and Administration, in the field of cultural heritage protection in its comparative and theoretical aspects.

Institutional and personal criteria are related to a need to establish and operate organizational units within universities which conduct research on cultural heritage law. Lectures, seminars, and studies, as well as research in the field of cultural heritage protection law are conducted in academic research centers in Poland. For example, at the Law Library of the University of Gdańsk, a new section 7.22 entitled "Cultural Heritage Protection Law" has been created. Gdańsk University Press publishes the books series titled: "The Library of Cultural Heritage Law".

4.4. The criterion of entities to which legal standards are addressed

In the case of the law on the protection of cultural heritage, the addressees of the standards are the public entities making decisions, as well as other entities, e.g. the owners of monuments, that is a group of items towards which their owners, users, and representatives of conservation services have special competences and responsibilities. The general rule provided for by law is to impose the obligation to take care of monuments, including the financing of maintenance work on monuments, on entities

holding legal title to dispose of monuments. Regardless of the obligations arising from the care of monuments specified in art. 5 of the Act of 2003 on the protection and preservation of monuments, obligations of an informational nature are imposed on the owner or holder of the monument (art. 28 of this Act).

Mutual cooperation of government and local government administration in the area of protection of cultural heritage is crucial. Social participation in this process should be considered as well. Pursuant to art. 82 of the Constitution of the Republic of Poland, it is the duty of each citizen to take care of the common good, and, as a result, all citizens are obliged to protect the Polish cultural heritage. The task of the bodies for the protection of monuments is to prevent any actions that could hinder the maintenance of a monument, make its preservation impossible, or cause its values to be reduced or lost.

4.5. The criterion of its own legal principles

An argument in favor of distinguishing cultural heritage law as a branch of law is the existence of its own legal principles. Extensive research is being conducted at present to identify them and to formulate their suggested catalogue.¹⁵

The term “legal principle” is ambiguous and there are different classifications of legal principles in jurisprudence. Principles of law are considered to be important for the process of interpreting legal texts and the application of entire sets of norms. In such a process, invoking a specific principle should be justified each time by indicating the grounds on the basis of which a given “principle” is considered to be legally binding. Then, when it has been established what values are protected, and what are the objectives, institutions, and concepts of fundamental importance, a catalogue of such principles may be created.¹⁶

Legal principles also deserve particular attention especially because at present they have become the most important instrument of judicial activism. It is said that principles differ from other norms in the legal system because of their particular importance or because they protect important values. Currently such an axiological approach to legal principles is in the process of development.¹⁷

Principles of law can be expressed directly in a legal text but may also be interpreted from the set of rules which create some legal institution. As a result, they may be derived from a whole system of law and embrace a combination of different criteria,

¹⁵ K. Zeidler, “Zasady prawa ochrony dziedzictwa kultury – propozycja katalogu”, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2018, no. 4, p. 147; M. Wegrzak, *Zasady prawa ochrony dziedzictwa kultury w orzecznictwie sądów administracyjnych*, series: Biblioteka Prawa Ochrony Zabytków, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2020, *passim*.

¹⁶ See: S. Wronkowska, M. Zieliński, Z. Ziemiński, *Zasady prawa. Zagadnienia podstawowe*, *Ars boni et aequi*, Warszawa 1974, p. 187.

¹⁷ M. Kordela, *Zasady prawa...*; L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Wydawnictwa Prawnicze PWN, Warszawa 2003; see also: S. Tkacz, *O zintegrowanej koncepcji zasad prawa w polskim prawoznawstwie. Od dogmatyki do teorii*, Wydawnictwo Adam Marszałek, Toruń 2014.

including axiological, functional, and behavioral ones. At the same time, it should be remembered that some principles are universal, while others may be common for only one or more branches of law.

Principles derived from the Constitution (constitutional principles) are hierarchically higher than others and proclaim the standards underlying ordinary legislation. It is said that the principle of cultural heritage protection that is a constitutional principle is of great importance. This principle has the character of the so-called metaprinciple of cultural heritage protection law, and not only should other principles of law be interpreted in the light of this principle, but, indeed, all provisions of national law without exception – both those that fall under cultural heritage protection law as well as others classified under other branches of law.¹⁸

Such a constitutional principle is based on the Preamble and on art. 5 and 6(1) of the Constitution of the Republic of Poland, and in the light of this principle not only other principles of cultural heritage law but also legal regulations regarding the given subject should be interpreted. Among other relevant principles mentioned in legal doctrine and case law are: the principle of proportionality, the principle of the rule of law, the principle of sustainable development, the principles of property protection, the principle of access to cultural heritage, the principle of access to information, the principle of social utility of cultural heritage, the principle of the discretionary power of conservation authorities, the principle of control of cultural heritage, the principle of funding by a monument owner, the principle of funding from public resources, the principle of the protection of a monument's integrity, the precautionary principle, the principle of controlling the export of cultural property, the principle of objective truth, the principle of ownership of newly discovered archaeological monuments belonging to the State, accidentally found or acquired as a result of archaeological research, and European Union principles regarding cultural heritage.¹⁹

In many cases, it is necessary to weigh up the principles and, in specific cases, to give priority to one of them. In other circumstances, however, a settlement might be different because of another "weighing up" of values. For this reason when two or more principles compete, it is necessary to balance them, using Dworkin's theory. While examining hard cases in cultural heritage law, for example in the area of restitution, it is not always possible to find one correct judgement, and, in fact, several competing decisions might be acceptable.²⁰ Such an axiological approach to cultural heritage law

¹⁸ K. Zeidler, "Zasady prawa ochrony dziedzictwa...", p. 147; M. Węgrzak, "Zasada ochrony dziedzictwa kultury w świetle wybranego orzecznictwa sądów administracyjnych", *Zeszyty Naukowe Sądownictwa Administracyjnego* 2017, XIII, no. 3(72), p. 52; *eadem*, *Zasady prawa ochrony dziedzictwa kultury...*

¹⁹ M. Węgrzak, "Zasada dostępu do zbiorów muzealnych a ich ochrona" [in:] *Muzea. Aspekty praktyczne i prawne*, eds. I. Gredka-Ligarska, A. Rogacka-Lukasik, D. Rozmus, Wyższa Szkoła Humanitas, Sosnowiec 2018, pp. 13–20; *eadem*, "Zasada społecznej użyteczności zabytków w kontekście turystyki kulturowej" [in:] *Prawo ochrony dóbr kultury jako narzędzie innowacyjności turystycznej w strukturach lokalnych*, eds. P. Dobosz *et al.*, Publikacje Naukowe Koła Naukowego Prawnej Ochrony Dóbr Kultury, Kraków 2019, pp. 41–57.

²⁰ See: R. Dworkin, *A Matter of Principle...*; *idem*, *Law's Empire...*; K. Zeidler, *Restitution of Cultural Property. Hard Cases – Theory of Argumentation – Philosophy of Law*, Gdańsk University Press – Wolters Klu-

is appropriate because a conflict of principles is ultimately a conflict of values and the subject matter of regulation of principles. Abolishing such a conflict is tantamount to abolishing the incompatibility of values which are important for a particular case in the process of coming to a verdict. It has to be noted that the principles of cultural heritage law are cited in legal literature and courts' justifications for their verdicts, even if they are not called such in a straightforward manner. Judges refer to them in their rulings and resolve cases based on such principles.²¹

4.6. The criteria of a separate general part, of the form of codification, and of the functional link between norms

These criteria are mainly fulfilled at the functional level, and the provisions of the law on the protection of cultural heritage are contained in various legal acts. Within the framework of its own legal theory and the existence of its own legal principles, it is possible to reconstruct a set of norms forming the general part of this branch of law, and, further, the norms of cultural heritage protection laws are functionally linked to each other. The systematics of a legal act indicates the place where principles exist through separate parts in legal acts entitled "General principles" or "Preliminary principles". Principles of law are often created within the framework of codes, which play the role of a kind of "constitution" for a given branch of law and ensure the stability of this branch and maintain its uniformity. The Act of 2003 on the protection and preservation of monuments plays such a role for the law on the protection of cultural heritage; however, it would be most appropriate to accord this regulation the rank of a cultural heritage protection law or the form of a code. It is precisely this form – a Code – which comprehensively regulates issues relating to the protection of cultural heritage and functions in Italy, and France among other countries. Codification makes it possible to put a given branch of law in order. Incorporating cultural heritage protection in the form of a code would meet one of the criteria for distinguishing a branch of law and would contribute to even better protection of cultural heritage.

5. Conclusions

Having analyzed the prerequisites for the autonomy of cultural heritage law, we come to the conclusion that it fulfills most of these criteria. Both in doctrine and practice, cultural heritage law consist of a whole set of norms of national law, and of European and international law, consisting of a set of legal norms governing social relations in reference to the protection of cultural heritage. In legal doctrine, it is stipulated that the differentiation of branches of law is based primarily on practical rather than theo-

wer, Gdańsk – Warsaw 2016.

²¹ K. Zeidler, "Zasady prawa ochrony dziedzictwa...", p. 147; M. Węgrzak, "Zasada ochrony dziedzictwa kultury...", p. 52; *eadem*, *Zasady prawa ochrony dziedzictwa...*

retical factors. The fact that certain regulations are within the scope of differentiated branches of laws has the following important practical significance: it influences how these regulations will be interpreted and applied in accordance with the legal principles adopted in the relevant branch of law and in such a way ensures their praxeological compatibility and functional connections.²² It might be concluded that not all theoretical criteria should be fulfilled in order to distinguish a branch of law. After all, the practical aim of this process should be kept in mind, because it affects the application of legal norms, including their interpretation, creation, and amendment.

Because of its interdisciplinary status, cultural heritage law holds a special position within the legal system. An important criterion for distinguishing the law on the protection of cultural heritage as a complex branch of law is the criterion of legal principles that at present are being constantly developed, especially in case law. The actual impact of court jurisprudence on the interpretation of legal regulations concerning cultural heritage protection and explanation of the meaning of law is becoming increasingly significant; however, the greatest influence can be seen in the establishment of its principles. Legal cases of cultural heritage are more or less difficult to solve and the principles offer guidance for the executive authorities to come to a decent decision. It has also been noted that the development of social awareness and values connected with culture guarantees preservation of its heritage for future generations.

Literature

- Blake J., *International Cultural Heritage Law*, Oxford University Press, Oxford 2015.
- Blake J. (ed.), *Safeguarding Intangible Cultural Heritage – Challenges and Approaches*, Institute of Art and Law, Bultth Wells 2007.
- Ciechanowicz-McLean J., „Kształtowanie się gałęzi prawo ochrony środowiska jako wzór dla prawa ochrony dziedzictwa kultury” [in:] *Prawo ochrony zabytków*, ed. K. Zeidler, Wydawnictwo Uniwersytetu Gdańskiego – Wolters Kluwer, Gdańsk – Warszawa 2014.
- Dworkin R., *A Matter of Principle*, Harvard Univeristy Press, Cambridge, USA 1995.
- Dworkin R., *Law’s Empire*, Harvard Univeristy Press, Cambridge, USA 1986.
- Francioni F., “La proteccion del patrimonio cultural a la luz de Derecho internacional publico” [in:] *La protection juridico internacional del patrimonio cultural. Especial referencia a Espana*, eds. C.F. Liesa, J.P. de Pedro, VVAA, Editorial Colex, Madrid 2009.
- Garcia Fernandez J., *Estudios sobre el derecho del patrimonio historico*, Colegio de Registradores de la priopedad, Madrid 2008.
- Kordela M., *Zasady prawa. Studium teoretycznoprawne*, Wydawnictwo Naukowe UAM, Poznań 2014.
- Liesa Fernandez C.R., “Cultura y Derecho International”, *Cudernos de la Catedra de Democracia y Derechos Humanos* 2012, no. 8.
- Merryman J.H., “The Public Interest in Cultural Property”, *California Law Review* 1998, vol. 77, no. 2.
- Morawski L., *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Wydawnictwa Prawnicze PWN, Warszawa 2003.

²² S. Wronkowska, M. Zieliński, Z. Ziemiński, *Zasady prawa...*

- Nowacki J., *Prawo publiczne – prawo prywatne*, Wydawnictwo Uniwersytetu Śląskiego, Katowice 1992.
- Prott L.V., O'Keefe P.J., "'Cultural Heritage' or 'Cultural Property'?", *International Journal of Cultural Property* 1992, vol. 1, no. 2.
- Sax J.L., *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*, The University of Michigan Press, Michigan 2001.
- Schreiber H., "Intangible Cultural Heritage and Soft Power – Exploring the Relationship", *International Journal of Intangible Cultural Heritage* 2017, vol. 12.
- Tkacz S., *O zintegrowanej koncepcji zasad prawa w polskim prawoznawstwie. Od dogmatyki do teorii*, Wydawnictwo Adam Marszałek, Toruń 2014.
- Vrdoljak A.F., "Self-determination and cultural rights" [in:] *Cultural human rights*, eds. F. Francioni, M. Scheinin, Martinus Nijhof Publishers, Leiden – Boston 2008.
- Węgrzak M., "Zasada dostępu do zbiorów muzealnych a ich ochrona" [in:] *Muzea. Aspekty praktyczne i prawne*, eds. I. Gredka-Ligarska, A. Rogacka-Łukasik, D. Rozmus, Wyższa Szkoła Humanitas, Sosnowiec 2018.
- Węgrzak M., "Zasada ochrony dziedzictwa kultury w świetle wybranego orzecznictwa sądów administracyjnych", *Zeszyty Naukowe Sądownictwa Administracyjnego* 2017, XIII, no. 3(72).
- Węgrzak M., "Zasada społecznej użyteczności zabytków w kontekście turystyki kulturowej" [in:] *Prawo ochrony dóbr kultury jako narzędzie innowacyjności turystycznej w strukturach lokalnych*, eds. P. Dobosz, W. Górny, A. Mazur, A. Koziń, Publikacje Naukowe Koła Naukowego Prawnej Ochrony Dóbr Kultury, Kraków 2019.
- Węgrzak M., *Zasady prawa ochrony dziedzictwa kultury w orzecznictwie sądów administracyjnych*, series: Biblioteka Prawa Ochrony Zabytków, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2020.
- Wronkowska S., Zieliński M., Ziemiński Z., *Zasady prawa. Zagadnienia podstawowe*, Ars boni et aequi, Warszawa 1974.
- Wronkowska S., Ziemiński Z., *Zarys teorii prawa*, Ars boni et aequi, Poznań 2001.
- Wróblewski J., *Sądowe stosowanie prawa*, PWN, Warszawa 1998.
- Yasuki O., "A transcivilizational perspective on global legal order in the twenty first century: A way to overcome West – centric and judiciary centric deficits in International legal thoughts" [in:] *Towards world constitutionalism*, eds. R.J. MacDonald, D. Johnston, Martinus Nijhoff Publishers, The Hague 2005.
- Zalasińska K., *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*, C.H. Beck, Warszawa 2020.
- Zeidler K., *Prawo ochrony dziedzictwa kultury*, Wolters Kluwer, Warszawa 2007.
- Zeidler K., "Prawo ochrony zabytków jako nowa gałąź prawa" [in:] *Prawo ochrony zabytków*, ed. K. Zeidler, Wydawnictwo Uniwersytetu Gdańskiego – Wolters Kluwer, Gdańsk – Warszawa 2014.
- Zeidler K., *Restitution of Cultural Property. Hard Case – Theory of Argumentation – Philosophy of Law*, Gdańsk University Press – Wolters Kluwer, Gdańsk – Warsaw 2016.
- Zeidler K., *Zabytki. Prawo i praktyka*, Wydawnictwo Uniwersytetu Gdańskiego – Wolters Kluwer, Gdańsk – Warszawa 2017.
- Zeidler K., „Zasady prawa ochrony dziedzictwa kultury – propozycja katalogu”, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2018, no. 4.
- Zimmermann J. (ed.), *Integralność prawa administracyjnego. Perspektywa polska*, Wolters Kluwer, Warszawa 2019.

Summary

Kamil Zeidler

Małgorzata Węgrzak

Cultural heritage law as a complex branch of law

The aim of this paper is to discuss cultural heritage law as a complex branch of law primarily by demonstrating the basic criteria of its autonomy. In particular, the criterion of the subject of regulation, and the criterion of the possession of its own principles of law and its own theory and sources of law will be presented. Research was undertaken at several levels, corresponding to the sections of this article, mainly using the apparatus of administrative, criminal, civil, and administrative law. The methodology adopted in terms of the theory and philosophy of law, in turn, made it possible to analyze the research problem. It should be noted that cultural heritage law is subject to divisions and fragmentation because of its connection with legal studies, traditional branches of law, and the field of law and the discipline within which the research was conducted.

Because of the interdisciplinary nature of cultural heritage, both the internal and external integration of legal studies and law is only one of the elements that contribute to this subject. Others include art history, architecture, archaeology, and conservation, etc. Because of this interdisciplinary aspect, cultural heritage law contains norms not only relating to the protection of monuments and administrative law, but also to constitutional law, criminal law, civil law, and international law, etc. The principles of cultural heritage law have developed, and this applies to its own theory, its subject of protection, and its own legal sources. If we take this into account, we can see that cultural heritage law as a complex branch of law has developed most criteria that make it possible to consider it autonomous.

Keywords: cultural heritage law, cultural heritage, branches of law, principles of law, cultural property, monuments

Streszczenie

Kamil Zeidler

Małgorzata Węgrzak

Prawo ochrony dziedzictwa kultury jako kompleksowa gałąź prawa

Celem niniejszego artykułu jest przedstawienie prawa ochrony dziedzictwa kultury jako kompleksowej gałęzi prawa, przede wszystkim poprzez wykazanie występowania podstawowych przesłanek jego autonomizacji. Omówiono przede wszystkim kryterium przedmiotu regulacji, kryterium własnych zasad prawa oraz własnej teorii i źródeł prawa. Badania przeprowadzono na kilku płaszczyznach, odpowiadających częściom niniejszego artykułu, wykorzystując w tym zakresie aparaturę pojęciową odpowiednio prawa administracyjnego, karnego, cywilnego i międzynarodowego. Do analizy tego problemu badawczego zastosowano metodologię z zakresu teorii i filozofii prawa.

Ze względu na interdyscyplinarny charakter ochrony dziedzictwa kultury, prócz regulacji odnoszących się do samej ochrony zabytków czy też regulacji z zakresu prawa administracyjnego, prawa konstytucyjnego, prawa karnego, prawa cywilnego czy prawa międzynarodowego, prawo ochrony dziedzictwa kultury obejmuje także zagadnienia z dziedziny innych nauk, np. historii sztuki, architektury, archeologii, konserwacji itd. Na przestrzeni ostatnich lat rozwinęły się zasady prawa ochrony dziedzictwa kultury, jak również jego źródła, teoria i przedmiot ochrony. Mając to na uwadze, należy stwierdzić, że prawo ochrony dziedzictwa kultury spełnia większość z kryteriów pozwalających uznać je za kompleksową gałąź prawa.

Słowa kluczowe: prawo dziedzictwa kultury, dziedzictwo kultury, gałęzie prawa, zasady prawa, dobra kultury, zabytki