# Gdańskie Studia Prawnicze

Rok XXV — Nr 2(50)/2021

Cultural Heritage Law

Edited by
Kamil Zeidler

Wydawnictwo Uniwersytetu Gdańskiego
Gdańsk 2021

Czasopismo sfinansowane ze środków własnych
Wydziału Prawa i Administracji Uniwersytetu Gdańskiego
oraz Wolters Kluwer Polska Sp. z o.o.


Adres redakcji:
ul. Bażyńskiego 6, 80-952 Gdańsk



ISSN 1734-5669

Wydawnictwo Uniwersytetu Gdańskiego
ul. Armii Krajowej 119/121, 81-824 Sopot
tel. (+48) 58 523 11 37
e-mail: wydawnictwo@ug.edu.pl
www.wyd.ug.edu.pl
Księgarnia internetowa: http://www.kiw.ug.edu.pl

Druk i oprawa
Zakład Poligrafii
Uniwersytetu Gdańskiego
ul. Armii Krajowej 119/121
81-824 Sopot
tel. (+48) 58 523 14 49

# Cultural Heritage Law

## Table of contents

**ARTICLES**

**COMMENTARIES**

**VARIA**

# Prawo dziedzictwa kultury

## Spis treści

**ARTYKUŁY**

**GLOSY**

**VARIA**

# Articles

**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

https://doi.org/10.26881/gsp.2021.2.01

# 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 demonstated 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. Zalasińska, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*, C.H. Beck, Warszawa 2020, p. 8.

[2] C.R. Liesa Fernandez, "Cultura y Derecho International", *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 Nijhof 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 transcivilzational 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. Ziembiński, *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 enviromental 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. Ziembiński, *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 be 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 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, Builth 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. Ziembiński, *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 cutural 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-Łukasik, 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 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, Builth 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. Ziembiński, *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. Kozień, 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., Ziembiński Z., *Zasady prawa. Zagadnienia podstawowe*, Ars boni et aequi, Warszawa 1974.

Wronkowska S., Ziembiński Z., *Zarys teorii prawa*, Ars boni et aequi, Poznań 2001.

Wróblewski J., *Sądowe stosowanie prawa*, PWN, Warszawa 1998.

Yasuki O., "A transcivilzational 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

**Ren Yatsunami**
Kyushu University, Fukuoka
yatsunami@law.kyushu-u.ac.jp
ORCID: 0000-0002-8711-6174

https://doi.org/10.26881/gsp.2021.2.02

# A methodological consideration on international trafficking of cultural property: An approach from Bayesian statistics[1]

## 1. Introduction

As international instruments in the area of Cultural Heritage Law, both the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter: the 1970 UNESCO Convention)[2] and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter: the 1995 UNIDROIT Convention)[3] have played central roles in regulating international trafficking in movable cultural objects. The year 2020 naturally became an important milestone for these international regimes, as the year marked the fiftieth anniversary of the 1970 UNESCO Convention, and it also marked the twenty-fifth anniversary of the 1995 UNIDROIT Convention. Thus, in 2020 there was a series of events celebrating the achievements of these international instruments so far, and enlightening the public about the current challenges to the governance of the international art market, even though some of the celebratory activities had to be rescheduled to 2021 because of the COVID-19 pandemic.[4]

For example, on 8 and 9 October 2020, "The 1995 UNIDROIT Convention: Cultural objects at the crossroad of rights and interests," a two-day academic event to celebrate the twenty-fifth anniversary of the 1995 UNIDROIT Convention, was held in the form of a hybrid conference, at which some participants appeared in UNIDROIT and online

[1] This work was supported by JSPS KAKENHI Grant Number 20K20744.

[2] The 1970 UNESCO Convention was adopted on 14 November 1970 and entered into force on 24 April 1972. The text of the 1970 UNESCO Convention is available at *United Nations – Treaty Series* 1972, vol. 823, pp. 231–252.

[3] The 1995 UNIDROIT Convention was adopted on 24 June 1995 and entered into force on 1 July 1998. The text of the 1995 UNIDROIT Convention is available in: H.S. Burman, "International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects", *International Legal Materials* 1995, vol. 34 , issue 5, pp. 1322–1339.

[4] "Report of the Secretariat on its activities", UNESCO Doc. C70/20/8.SC/5 (a working document for the 8th session of the Subsidiary Committee of the 1970 Convention), p. 4.

participation was also available.[5] Also, the German Federal Foreign Office took the initiative to organize an international online conference "Cultural Heritage and Multilateralism: Regional and International Strategies for the Protection of Cultural Heritage", held from 16 to 18 November 2020 in Berlin and broadcast online.[6]

Inspired by those events, which consisted of thought-provoking speeches by various experts and stakeholders, this article focuses on the topic of illicit trafficking of movable cultural property. More specifically, with the aim of promoting methodological development in the field of Cultural Heritage Law, this article proposes the introduction of a probabilistic tool as a way of analyzing problems concerning the international trafficking of movable cultural property.

## 2. The need for a methodological approach in the area of the international trafficking of cultural property

### 2.1. The regulatory development on the disposition of movable cultural properties

The first part of this article briefly summarizes the historical background to the development of international instruments concerning the disposition of movable cultural properties since the Second World War (2.1).[7] It then highlights recent challenges that are considered very important in this field (2.2), with the purpose of pointing out the need to develop a methodological perspective to consider those challenges (2.3).

The disastrous destruction of cultural property during the Second World War led to a movement to prepare a comprehensive international regime dealing specifically with the protection of cultural heritage, commencing with the establishment of the United Nations Educational Scientific and Cultural Organization (UNESCO).[8] In the history of international law, the Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter: the 1954 Hague Convention) was the first treaty dealing

[5] The report and program of the academic event is available at: https://www.unidroit.org/89-news-and-events/2958-unidroit-celebrates-25th-anniversary-of-1995-convention-on-cultural-property (accessed: 30.11.2020).

[6] The program and other materials of the online conference are available at: https://cultural-heritage-and-multilateralism2020.com/ (accessed: 30.11.2020).

[7] For attempts at regulating the movement of cultural property before the end of the Second World War, see, for example: P.J. O'Keefe, *Commentary on the 1970 UNESCO Convention*, 2nd ed., Institute of Art and Law, Builth Wells 2007, pp. 3–4.

[8] The Constitution of the United Nations Educational, Scientific and Cultural Organization was adopted on 16 November 1945 and entered into force on 4 November 1946. See: C. Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law: With a Case Study on the Khmer Rouge's Destruction of Cambodia's Heritage*, Martinus Nijhoff, Leiden 2013, p. 42; see also: R. Atwood, *Stealing History: Tomb Raiders, Smugglers, and the Looting of the Ancient World*, St. Martin's Press, New York 2004, pp. 150–151.

exclusively with cultural property after the Second World War.[9] Before that, we can only observe the prohibition of pillage by occupying forces within the framework of the laws of war and war crimes, as can be seen in the Hague Conventions of 1899 and 1907.[10]

Article 4(3) of the 1954 Hague Convention stipulates that the "High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property". This provision is seen as an important turning point by which the right to booty in cultural property was hereby excluded from the institutions of international law.[11]

In the following period, it is clear that the adoption of the 1970 UNESCO Convention was one of the most significant legislative developments for controlling the trafficking of movable cultural property. By 2020, 140 countries had become State Parties of the 1970 UNESCO Convention.[12] In a recent development, in 2015, at the third Meeting of State Parties, "Operational Guidelines for the Implementation of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property" was adopted.[13]

In the early 1990s, the European Union made efforts to regulate illicit trade in national treasures with the establishment of the single market. A significant regional regulation in the European Union during this period is the Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (OJ L 74, 27.03.1993, pp. 74–79). Directive 93/7/EEC stipulates that cultural objects unlawfully removed from one Member State to another "shall be returned in accordance with the procedure and in the circumstances provided for in this Directive" (art. 2), and it also imposes an obligation on Member States to cooperate for the purpose of returning such unlawfully removed cultural objects (art. 4). The Directive attracted attention in the art market, together with the contemporaneous Council Regulation (EEC) No. 3911/92 of 9 December 1992 on the export of cultural goods (OJ L 395, 31.12.1992, pp. 1–5), which was later replaced by Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (codified version: OJ L 39, 10.02.2009, pp. 1–7). Although Directive 93/7/EEC offered the prospect of affecting many practices relating to the return of unlawfully removed cultural property, in fact it was applied in a relatively small number of cases.[14] Thus, to improve

---

[9] The 1954 Hague Convention was adopted on 14 May 1954 and entered into force on 7 August 1956. The text of the Convention is available at *United Nations – Treaty Series* 1956, vol. 249, pp. 240–364.

[10] See, for example: H. Zhong, *China, Cultural Heritage, and International Law*, Routledge, New York 2019, pp. 88–89.

[11] See, for example, K. Zeidler, *Restitution of Cultural Property: A Hard Case – Theory of Argumentation – Philosophy of Law*, Gdańsk University Press – Wolters Kluwer, Gdańsk – Warsaw 2016, p. 156.

[12] A list of the State Parties of the 1970 UNESCO Convention is available at: https://en.unesco.org/fighttrafficking/1970 (accessed: 30.11.2020).

[13] The Operational Guideline of the 1970 UNESCO Convention is available at: http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/operational-guidelines/ (accessed: 30.11.2020).

[14] A. Jakubowski, *State Succession in Cultural Property*, Oxford University Press, Oxford 2015, p. 251.

the situation, a new instrument, Directive 2014/60/EU,[15] was implemented with four substantial modifications. These are: 1) the elimination of the annex giving age or financial thresholds; 2) the extension of the time limit for offences; 3) the improvement in administrative cooperation through the Internal Market Information System; and 4) the shift of the burden of proof.

Efforts in the early 1990s also resulted in the adoption of the 1995 UNIDROIT Convention.[16] The 1995 UNIDROIT Convention is designed to complement the regime of the 1970 UNESCO Convention, especially in terms of private law issues, such as due diligence, good faith acquisition, duty of care, indemnity, and so on.[17] Furthermore, although the current number of Contracting States is smaller than that to the 1970 UNESCO Convention, it is noticeable that the 1995 UNIDROIT Convention has even had an indirect impact on the domestic legislation of states that have not yet ratified it.[18]

With these regulatory frameworks in mind, some of the specific issues on the international trafficking of cultural properties will be highlighted in the following section (2.2).

## 2.2. Challenges of high importance in recent years

### 2.2.1. The role of inventories and databases

The establishment of appropriate data banks on pieces of cultural property and their status is one of the key preventive measures for controlling the illicit art trade. There have been many efforts to manage inventories or databases for this purpose, although it is also frequently pointed out that there remain cases in which inventories are not managed appropriately and cases where such inventories are non-existent.[19] For police and customs authorities, such data banks are essential tools for effectively detect-

---

[15] Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State, and amending Regulation (EU) No 1024/2012 (Recast), OJ L 159, 28.05.2014, pp. 1–10.

[16] For a discussion of the relation between Directive 2014/60/EU and the 1995 UNIDROIT Convention, see, for example: W.W. Kowalski, "Ratification of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, in Light of Directive 2014/60/UE on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State: The Perspective of Poland", *Santander Art and Culture Law Review* 2016, no. 2, pp. 165–178; see also: M. Schneider, "The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive", *Santander Art and Culture Law Review* 2016, no. 2, pp. 149–164.

[17] See, for example: L.V. Prott, "UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects", *Uniform Law Review* 1996, vol. 1, issue 1, pp. 59–71; see also: *idem, Commentary on the UNIDROIT Convention*, Institute of Art and Law, Leicester 1997, p. 15.

[18] See, for example: A. Jakubowski, "Return of Illicitly Trafficked Cultural Objects Pursuant to Private International Law" [in:] *Illicit Traffic of Cultural Objects in the Mediterranean*, eds. A. F. Vrdoljak, F. Francioni, 2009/09 *EUI Working Paper AEL*, pp. 142–148, https://cadmus.eui.eu/bitstream/handle/1814/12053/AEL_2009_09.pdf (accessed: 30.11.2020).

[19] P.J. O'Keefe, L.V. Prott, *Cultural Heritage Conventions and Other Instruments: A Compendium with Commentaries*, Institute of Art and Law, Builth Wells 2011, p. 65.

ing cases of illicit trafficking. Also, with reference to art dealers and other possessors of cultural property, both art. 4(4) of the 1995 UNIDROIT Convention and art. 10 or the Directive 2014/60/EU, with regard to the obligation of exercising due diligence or due care and attention, expect them to consult "any accessible register of stolen cultural objects."

For those purposes, databases on stolen cultural properties have been developed at various levels.[20] As an example, a department of the French Central Office for the Fight against Illicit Trafficking in Cultural Goods (OCBC) has a database of stolen cultural objects called "TREIMA" (Thesaurus of Electronic and Image Research in Artistic Matters).[21] As another example, the ICOM Red Lists Database provides a useful platform, and Emergency Red Lists published by ICOM are authorized reference materials in this field.[22]

The birth of specialized units for the protection of cultural heritage contributed to the development of a scheme for comprehensively collecting information on stolen artifacts and on related criminal events. On 3 May 1969, the Italian Carabinieri for the Protection of Cultural Heritage (Comando Carabinieri per la Tutela del Patrimonio Culturale, the TPC) was set up.[23] The Carabinieri manages a database of unlawfully removed cultural property called "Leonardo", developed in the 1980s and now provided for by art. 85 of the Italian Code of Cultural Property and Landscape (Legislative Decree of 22 January 2004, no. 42).[24]

In the management of comprehensive information about art crimes, INTERPOL is also an important actor. Since its first involvement in 1925, INTERPOL has also played a significant role in controlling art theft and the trafficking of looted cultural property.[25] In 1947, with the creation of a Works of Art Unit, INTERPOL started circulating International Notices on Stolen Art Works. Since 1990, this effort by INTERPOL has evolved into a computer-based system, namely the Stolen Works of Art Database.[26] Through the project codenamed PSYCHE (Protection System for Cultural Heritage), which was organized under the leadership of the Carabinieri in collaboration with INTERPOL, updates in their databases are now synchronized. With such comprehensiveness, use of

---

[20] S. Manacorda, "Criminal Law Protection of Cultural Heritage: An International Perspective" [in:] *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*, eds. S. Manacorda, D. Chappell, Springer, New York 2011, p. 20.

[21] See, for example: S. Gauffeny, "The Preventive Measures in the Fight against Illicit Trafficking of Cultural Property and the Database TREIMA" [in:] *3rd International Conference of Experts on the Return of Cultural Property, Athens – Ancient Olympia, 23–27 October 2013: Proceedings*, ed. S. Choulia-Kapeloni, Archaeological Receipts Fund, Athens 2014, p. 245.

[22] ICOM Red Lists Database and Emergency Red Lists are available at: https://icom.museum/en/resources/red-lists/ (accessed: 30.11.2020).

[23] See, for example: G. Nistri, "The Experience of the Italian Cultural Heritage Protection Unit" [in:] *Crime in the Art and Antiquities World*…, p. 183.

[24] See, for example: P. Montorsi, "The Italian Carabinieri for the Protection of Cultural Heritage" [in:] *3rd International Conference of Experts*…, p. 239.

[25] See: T.D. Bazley, *Crimes of the Art World*, Praeger, Santa Barbara 2010, pp. 159–160.

[26] See, for example: F. Panone, "INTERPOL's Role in the International Prevention and Combat against Illicit Traffic of Cultural Goods" [in:] *3rd International Conference of Experts*…, p. 233.

the Stolen Works of Art Database is highly important in practice in relation to the obligation to exercise due diligence.[27]

A further need for development of data management and its effective utilization is anticipated as an outcome of technical advance, such as the rise of blockchain, AI, and so on. Recognizing this, the methodological discussion below (4.1) pays attention to the problem of how the consultation of such data banks affects the control of the illicit art trade.

#### 2.2.2. Synergy between international regimes

As another noteworthy trend in Cultural Heritage Law, the discussion on how to enhance synergies between international instruments has become an increased point of focus. This trend can also be seen in relation to the trade in movable cultural property.[28]

It is pointed out that there is "the lack of intersection among the treaties that address wartime circumstances and those that address peacetime movement",[29] placing an obstacle to effectively governing the trade in movable cultural property. The comprehensiveness of the 1970 Convention and the 1995 UNIDROIT Convention can be evaluated positively in the sense that they are applicable to movements of cultural objects either during armed conflict or during peace time. However, there remains room to discuss their effectiveness in situations of armed conflict.[30]

For instance, the Croatian War of Independence (1991–1995) resulted in a massive loss of movable cultural objects. Nevertheless, the actual data on missing works of art during the period could hardly be reported since, presumably, considerable numbers of them were in store-rooms, destroyed, or plundered.[31]

The situation following the Second Gulf War in 2003 also raised a similar problem. The invasion caused considerable damage to various types of cultural property in Iraq such as archaeological objects, monuments, manuscripts, and so on.[32] Data collection on the missing properties was so difficult and time-consuming, as the "looted objects find their way to European, American, Asian, and Arab black markets".[33]

Together with the importance of the data banks (2.2.1), in the methodological discussion, attention will be paid to how efforts at data sharing between the regime on armed conflict and peacetime can have a positive impact on the process of detecting illicit trade in art (4.2).

---

[27] Z. Boz, "Repatriation of Cultural Antiquities Forming a Legal and an Archaeological Procedure" [in:] *3rd International Conference of Experts*…, pp. 219–224.

[28] See, for example: "Report of the Secretariat on its Activities," UNESCO Doc. C70/20/8.SC/5 (a working document for the 8th session of the Subsidiary Committee of the 1970 Convention), p. 7.

[29] P. Gerstenblith, "The Disposition of Movable Cultural Heritage" [in:] *Intersections in International Cultural Heritage Law*, eds. A. Carstens, E. Varner, Oxford University Press, Oxford 2020, p. 19.

[30] *Ibidem.*

[31] B. Šulc, "The Protection of Croatia's Cultural Heritage during War, 1991–95" [in:] *Destruction and Conservation of Cultural Property*, eds. R. Layton, P. Stone, J. Thomas, Routledge, New York 2001, p. 162.

[32] S. Eskander, "Wars, Uprisings, Invasions, and Terrorism: The Looting and the Recovery of Iraq's Cultural Property" [in:] *3rd International Conference of Experts*…, p. 179.

[33] *Ibidem.*

### 2.3. Methodological consideration: The potentials of a probabilistic approach

In view of the challenges of high importance summarized above, this article proposes the introduction of a probabilistic approach in Cultural Heritage Law (3). Before moving on to the argument in favor of probabilistic analyses, this section will explain in what way the probabilistic approach that this article proposes has prospects for contributing to solving these challenges.

For the State Parties of the 1970 UNESCO Convention, from May to June 2020, an online consultation was organized by the UNESCO Secretariat for preparing UNESCO's Medium-Term Strategy 2022–2029 (41 C/4) and the Programme and Budget for 2022 (41 C/5). The Secretariat received sixty responses. The result of this consultation exercise was reported as an annex to a working document in the 8th Session of the Subsidiary Committee of the 1970 UNESCO Convention.[34] In the questionnaire, in which the State Parties were asked to specify the "key indicators of success in the operationalization of the 1970 Convention during the 2022–2029 period," approximately 90% of respondents chose the item "reinforce capacity of stakeholders, in particular police and customs officials and cultural heritage professionals, to prevent and fight against the illicit trafficking in cultural property" as an indicator of "high importance".[35]

In relation to the effective utilization of databases (2.2.1), a probabilistic methodology facilitates assessment of cases involving trade in movable property in practice, and, moreover, it enables scholars to create for academic purposes a model to depict how the data contribute to the determination of illicit art trade by police or customs authorities. In relation to the synergy between different regimes (2.2.2), the model proposed in the following sections also describes how information from the laws of war affects the control of the art trade.

## 3. Introduction of Bayesian statistics in cultural heritage law

### 3.1. The perspective of Bayesian statistics and its possible impact on cultural heritage law

In the following part, this article initially elaborates what type of statistical approach can be proposed as an effective tool in the area of cultural heritage law (3.1). Then, it sets out definitions of some mathematical concepts (3.2) as preparatory notes for discussing a statistical model relating to the control of illicit trafficking of cultural property.

In a broad perspective, this article focuses on the methodological merits of statistics, more specifically those of statistic inference, which is a way for data analysis to

[34] Annex "Consultation with the Governing Bodies of the 1970 Convention on the preparation of UNESCO's Medium-Term Strategy 2022–2029 (41 C/4) and Programme and Budget 2022–2025" (41 C/5) [in:] "Report of the Secretariat on its activities," UNESCO Doc. C70/20/8.SC/5 (a working document for the 8th session of the Subsidiary Committee of the 1970 Convention), pp. 10–16.

[35] *Ibidem*.

infer properties of underlying probability distribution. Since it provides a description of a past phenomenon and some predictions about a future phenomenon of a similar nature[36], it is worth setting out a probabilistic modeling of actions by art dealers or a probabilistic modeling of operations on the part of police or customs authorities.

In a more detailed view, there are two different approaches in the area, namely frequentism and Bayesianism[37]. This paper advocates the latter approach and proposes a way of applying the Bayesian approach in the field of Cultural Heritage Law for the following reasons. Differently from the frequentist method, the Bayesian approach can be applicable even in cases in which a small amount of data or evidence is available. Furthermore, Bayesian inference can lead to suggestive interpretations with regard to the subjective belief or decision of an actor, as will be demonstrated in subsequent parts (4.1 and 4.2).

## 3.2. Definitions

### 3.2.1. Probability

In this section, we discuss the definition of probability. Where a set is the set of all outcomes ("sample space"), to each subset ("event"), we define the "probability of $A$" ($p(A)$) as follows:

$$p(A) = \frac{|A|}{|\Omega|}.$$

In the equation, $|A|$ is the number of outcomes where the event $A$ occurs, and $|\Omega|$ is the number of all outcomes. The probability of $\Omega$ is normalized to be $p(\Omega) = 1$, and $p(\Phi) = 0$. We also take as an axiom that, if $A_1, A_2, A_3 \cdots$ are mutually exclusive (disjoint subsets of $\Omega$), then $p(A_1 \cup A_2 \cup A_3 \cdots) = p(A_1) + p(A_2) + p(A_3) + \cdots$.

In summary,

1. $0 \leq p(A) \leq 1$, $p(\Phi) = 0$, $p(\Omega) = 1$.
2. If $A_1, A_2, A_3 \cdots$ are mutually exclusive,
   then $p(A_1 \cup A_2 \cup A_3 \cdots) = p(A_1) + p(A_2) + p(A_3) + \cdots$.

From what we have summarized above, it follows that where $A^C$ means an event in which $A$ does not occur, $p(A^C) = p(\Omega) - p(A) = 1 - p(A)$. Of course, $0 \leq p(A^C) \leq 1$.

### 3.2.2. Conditional probability

A "conditional probability" is a probability taking into account a given condition. It means the probability of an event $A$ occurring, given that another event $B$ has already

---

[36] C.P. Robert, *The Bayesian Choice: From Decision-Theoretic Foundations to Computational Implementation*, 2nd ed., Springer, New York 2001, pp. 1–2.

[37] As regards frequentism, see: J. Neyman, E.S. Pearson, "On the Problem of the Most Efficient Tests of Statistical Hypotheses", *Philosophical Transactions of the Royal Society – A* 1933, vol. 231, pp. 694–706. As regards Bayesianism, see: T. Bayes, R. Price, "An Essay towards Solving a Problem in the Doctrine of Chances", *Philosophical Transactions of the Royal Society of London* 1763, vol. 53, pp. 370–418.

occurred. If we write $p(A|B)$ in symbols, we read it as "the probability $A$ of given $B$" and take the definition as follows:[38]

$$p(A|B) = \frac{p(A \cap B)}{p(B)}.$$

As an example, suppose there is a pair of standard dice thrown, and we add up the numbers that come up.[39] Under this rule, let us suppose that $A$ is the event in which the total is 10. There are $6^2 (= 36)$ ways in total. Because there are only three ways, including (4,6), (5,5), and (6,4), to make 10, we can conclude that the probability of $A$ is $\frac{3}{36}$ $(= \frac{1}{12})$. In symbols, we write: $p(A) = \frac{1}{12}$.

However, if we add another assumption that we have already observed that the first die came up as a 6, the probability of the event that the total will be 10 becomes updated. Here let us suppose that $B$ denotes the event that the first die comes up as a 6. Now, we can calculate that the "conditional probability" that the total is 10, given the information of $B$, is $\frac{1}{6}$. This means the probability that the other die comes up as a 4, under the assumption that the first die came up as a 6. Here we can write: $p(A|B) = \frac{1}{6}$.

### 3.2.3. Bayes' Theorem

Having defined probability and conditional probability, this section will summarize the concept and formula of Bayes' Theorem.

For obtaining the formula of Bayes' Theorem, we can start with the definition of the conditional probability shown below:

$$p(A|B) = \frac{p(A \cap B)}{p(B)}.$$

From this equation, it follows that $p(A \cap B) = p(A|B) \cdot p(B)$.

Then, since $p(A \cap B)$ is the same as $p(B \cap A)$, we obtain the equation below:

$$p(A|B) \cdot p(B) = p(B|A) \cdot p(A).$$

Therefore, dividing this equation through by $p(B)$, we obtain the formula:

$$p(A|B) = \frac{p(B|A) \cdot p(A)}{p(B)}.$$

This is the formula called Bayes' Theorem. As a significant feature of this formula, we can observe that the conditional probability of $A$ given $B$ ($p(A|B)$) is expressed in

[38] In other words, the probability of $A$ given $B$ is defined to be the probability of $A$ and $B$ divided by the probability of $B$.

[39] For this example, see: T. Gowers, "Bayesian Analysis" [in:] *The Princeton Companion to Mathematics*, eds. T. Gowers, J. Barrow-Green, I. Leader, Princeton University Press, Princeton 2008, p. 159.

terms of the conditional probability of *B* given *A* ($p(B|A)$). Accordingly, if *A* denotes a hypothesis and *B* denotes a set of data or evidence, $p(A)$ can be regarded as a probabilistic statement of belief about *A* before obtaining *B*.[40] In this interpretation, $p(A|B)$ can be regarded as a probabilistic statement of belief *A* about after obtaining *B*.[41] This means, having specified $p(B|A)$ and $p(B)$, this formula works as a probabilistic model to depict the problem of how to learn from data or evidence.

## 4. Bayesian inference on the legal status of a movable cultural property

### 4.1. Prior probability and posterior probability

With the concepts defined in the previous section (3.2), the following sections set out a tentative probabilistic model for depicting the process whereby a trade in stolen cultural property is detected (4.1 and 4.2).

Suppose that a piece of cultural property is exported from State X to State Y. A customs official in State Y suspects that it is a stolen object. Thus, in order to check the legal status of the object, the official examines available evidence on the trade. The official finds that the object is registered in the Stolen Works of Art Database of INTERPOL. With this evidence, the official increases his/her suspicion concerning the illicit trade.

In summary, this situation can be described with the concept of conditional probability as follows;

What the customs official needs to consider is $p(A|B)$ where;

*A* : the event that the object is a stolen cultural property

*B* : the event that the object is registered
in the Stolen Works of Art Database of INTERPOL.

As will be set out below, Bayes' Theorem makes it possible mathematically to observe the process of detection of stolen cultural properties in such a situation.

As the first step, we can start with settling the "prior probability" ($p(A)$), which denotes the prior belief or instinct that the customs official has had before making reference to the database or any other source of evidence. Generally, in Bayesian inference, prior probability can be tentatively based on a small amount of objective data or even developed in a subjective manner. Moreover, a Bayesian approach allows us to start with allocating an equal probability to each event (like that $p(A) = \frac{1}{2}$ and $p(A) = \frac{1}{2}$ ) with the "principle of insufficient reason".

It goes without saying that the number of pieces of cultural property illegally distributed by theft in the world changes constantly. In order to examine our tentative model, let us make an initial assumption that, at the time when we need to determine whether the object in question is stolen or not, the customs official knows or believes that 10% of pieces of imported cultural property are stolen ($p(A) = 0.1$, and it

[40] J.M. Bernardo, A.F.M. Smith, *Bayesian Theory*, John Wiley and Sons, Chichester 1994, p. 2.
[41] *Ibidem.*

follows $p(A^C) = 1 - p(A) = 1 - 0.1 = 0.9$) (see: the top line of the diagram in Figure 1-1). Here, $p(A) = 0.1$ means "prior probability" that the object in question is a stolen cultural property.

Then, suppose further that, at that time, objects of 80% of the stolen cultural properties in the world are registered in the Stolen Works of Art Database of INTERPOL, despite the inference that this percentage will also change from time to time, and that in a later stage the registration rate will be higher if the country of origin act in a correct manner. This means $p(B|A) = 0.8$, and it follows that $p(B^C|A) = 1 - p(B|A) = 1 - 0.8 = 0.2$ (see: the left-side of the diagram in Figure 1-1.) With these assumptions, we can obtain two probabilities as follows. Firstly, $p(B \cap A) = p(B|A) \cdot p(A) = 0.8 \cdot 0.1 = 0.08$; and secondly, $p(B^C \cap A) = p(B^C|A) \cdot p(A) = 0.2 \cdot 0.1 = 0.02$ (see: Figure 1-1).

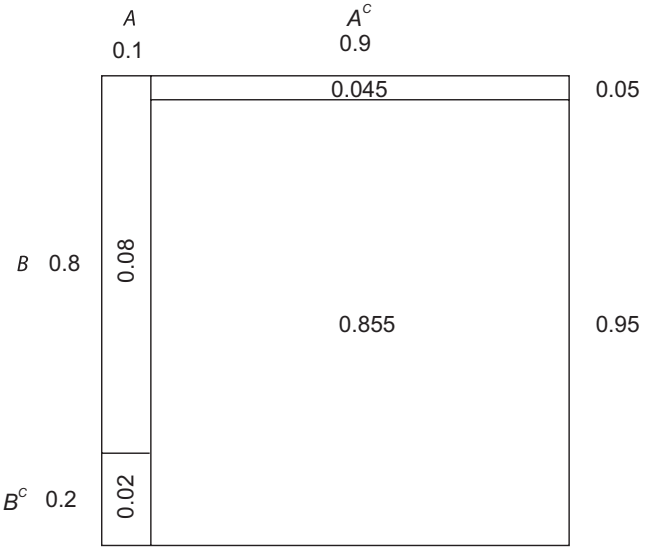


Figure 1-1

In addition, let us tentatively suppose that the rate of false registration in the database, at the same time, is only 5%. This means that $p(B|A^C) = 0.05$, and it follows that $p(B^C|A^C) = 1 - p(B|A^C) = 1 - 0.05 = 0.95$ (see: the right-side of the diagram in Figure 1-1). Then we obtain the probabilities, including $p(B \cap A^C) = p(B|A^C) \cdot p(A^C) = 0.05 \cdot 0.9 = 0.045$, and $p(B^C \cap A^C) = = p(B^C|A^C) \cdot p(A^C) = 0.95 \cdot 0.9 = 0.855$ (see: Figure 1-1).

Here, in the diagram in Figure 1-1, we can confirm that the sample space ($\Omega$), or the universal set of probabilities, is normalized to be $p(\Omega) = 1$, since this square diagram is drawn to be 1 in area ($p(B \cap A) + p(B^C \cap A) + p(B \cap A^C) + p(B^C \cap A^C) = 1$).

As a second step, we can now introduce the additional information that the customs official has actually found that the object was registered in the Stolen Works of Art Database of INTERPOL. Confirming that the event $B$ has been observed, what we should to do next is to erase the areas of probabilities concerning $B^C$ from the diagram in Figure 1-1. The result of this task is Figure 1-2.

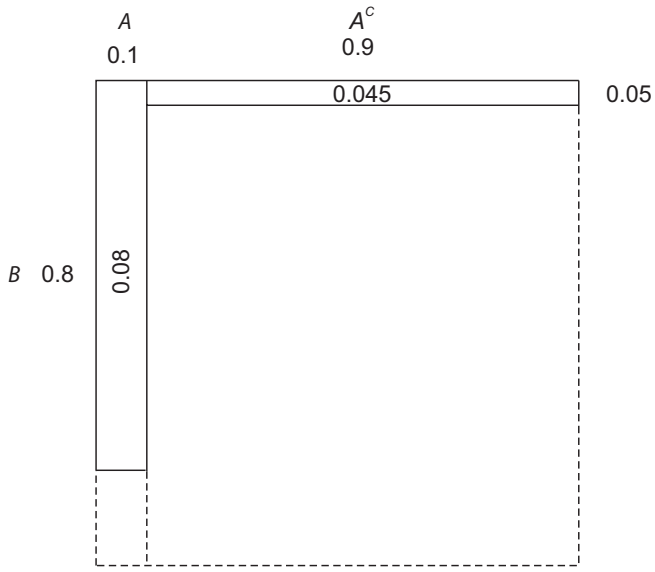


Figure 1-2

Figure 1-2 suggests that, given the evidence that the event *B* had been observed, now the probability that the object is a stolen cultural property must be updated. Then, we can write down the remaining probabilities in the form of a ratio, with the process of normalization, as follows:

$$p(B \cap A) : p(B \cap A^C) = 0.08 : 0.045$$
$$= \frac{0.08}{0.08 + 0.045} : \frac{0.045}{0.08 + 0.04}$$
$$= 0.64 : 0.36.$$

Thus, we obtain, $p(A|B) = 0.64$. Of course, in another way of calculation, we can use the formula of Bayes' Theorem as shown below:

$$p(A|B) = \frac{p(B|A) \cdot p(A)}{p(B)}$$
$$= \frac{0.8 \cdot 0.1}{0.08 + 0.045}$$
$$= 0.64.$$

As a result of calculation, this model suggests that, given that the event *B* has been observed, the percentage of the chance that the object is a stolen cultural property is increased from 10% to 64%. In this sense, in Bayes' Statistics, $p(A|B)$ is conceptualized as "posterior probability".

It should be noted that the calculation process above shows how important the Stolen Works of Art Database of INTERPOL is, by quantifying the actual impact of the matching check of the database in the process of detecting stolen cultural property. In this way, mathematical modelling seems to have potential to provide a methodological tool for evaluating each current tool or instrument for fighting against illicit trafficking in cultural property.

### 4.2. Sequential Bayesian updating

As a continuing scenario from the previous section (4.1), let us suppose the following story. After having updated the inference on the legal status of the object in question by reference to the Stolen Works of Art Database of INTERPOL, the customs official now has a "posterior" belief that $p(A) = 0.64$. Moreover, the official checks the social situation of the Country of Origin (State X) with the aim of further updating his/her inference. Then the official confirms that there is an armed conflict underway within State X. With the knowledge that the occurrence of armed conflict negatively affects the trafficking of stolen cultural properties, the official strengthens his/her suspicion regarding the legal status of the object.

What the customs official is considering is $p(A|C)$, where:

$A$ : the event that the object is a stolen cultural property
$C$ : the event that in the State X (Country of Origin)
there is an armed conflict occurring

The model depicted by Figure 2-1 makes the assumptions given below.

Firstly, as a prior probability at this stage, we can take $p(A) = 0.64$ (see: the top of the diagram in Figure 2-1). This probability is the one drawn as the "posterior probability", given the event $B$ (see: the section 4.1). With this assumption, it follows that $p(A^C) = 1 - p(A) = 1 - 0.64 = 0.36$ (see: the top of the diagram in Figure 2-1).

Secondly, suppose that, at the time of examination, 30% of stolen cultural property was exported from a country where an armed conflict is in progress. This means that $p(C|A) = 0.3$, and $p(C^C|A) = 1 - 0.3 = 0.7$ (see: the left-side of the diagram in Figure 2-1). From these, we can obtain probabilities such as $p(C \cap A) = p(C|A) \cdot p(A) = 0.3 \cdot 0.64 = = 0.192$ and $p(C^C \cap A) = p(C^C|A) \cdot p(A) = 0.7 \cdot 0.64 = 0.448$ (see: Figure 2-1).

Thirdly, suppose that, if we see the space where the cultural properties are not stolen ($A^C$), at the time of examination 10% of the properties come from a site of armed conflict. This means that $p(C|A^C) = 0.1$, and $p(C^C|A^C) = 1 - 0.1 = 0.9$ (see: the right-side of the diagram in Figure 2-1). Then we obtain the probabilities that include $p(C \cap A^C) = = p(C|A^C) \cdot \cdot p(A^C) = 0.1 \cdot 0.36 = 0.036$, and $p(C^C \cap A^C) = p(C^C|A^C) \cdot p(A^C) = 0.9 \cdot 0.36 = 0.324$ (see: Figure 2-1).

Again, in the diagram in Figure 2-1, we can confirm that the sample space ($\Omega$) is normalized to be $p(\Omega) = 1$, as this square diagram is drawn to be 1 in area ($p(C \cap A) + + p(C^C \cap A) + p(C \cap A^C) + p(C^C \cap A^C) = 1$).

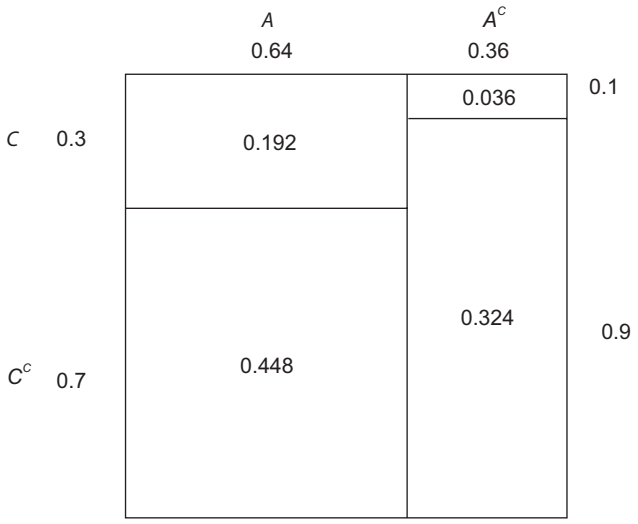


Figure 2-1

Under these assumptions, let us introduce the condition that the customs official actually confirms that the exporting country is a site of armed conflict. As the event *C* has been observed, we can erase the areas of probabilities concerning $C^C$ (see: Figure 2-2).

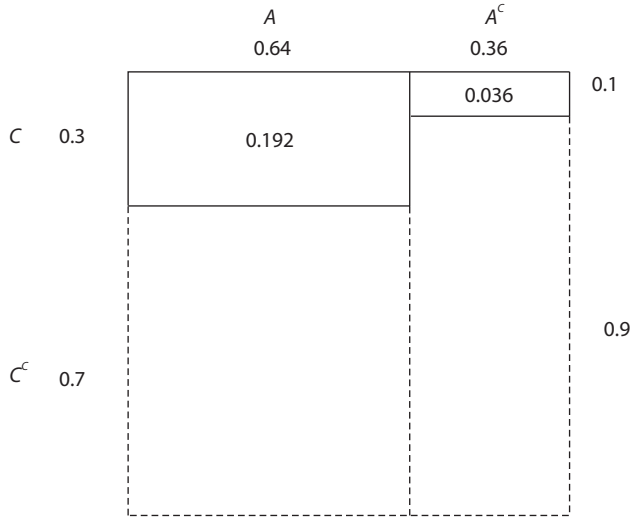


Figure 2-2

Now we can calculate the posterior probability as shown below:

$$\begin{aligned} p(C \cap A) : p(C \cap A^{\complement}) &= 0.192 : 0.036 \\ &= \frac{0.192}{0.192 + 0.036} : \frac{0.036}{0.192 + 0.036} \\ &= 0.84210526 : 0.15789474. \end{aligned}$$

(They are rounded to nine decimal places.)

Thus, we obtain $p(A|C) = 0.84210526$, We can go over the accounts by the formula of Bayes' Theorem as shown below:

$$\begin{aligned} p(A|C) &= \frac{p(C|A) \cdot p(A)}{p(C)} \\ &= \frac{0.3 \cdot 0.64}{0.192 + 0.036} \\ &= 0.84210526. \end{aligned}$$

The calculation above shows a process in which, by obtaining the evidence that the object was exported from a site of armed conflict, the probability of illegal export/import is further updated to be approximately 84%. In this sense, the model here suggests the effectiveness of data sharing between the regime of armed conflict and that of peacetime.

This continuous updating process in Bayesian inference is called "Sequential Bayesian Updating". Importantly, the results of updating the probability will be equal between 1) in the case where the customs official updates his/her belief with the observation *B* of and *C* in a sequential manner, and 2) in the case where the official updates his/her belief with the simultaneous observation of *B* and *C*.

### 4.3. Methodological merits of Bayesian inference in the field of illicit trafficking in cultural property

This section discusses possible issues to which the tentative statistical model shown above can be applied with the aim of considering how the model should be developed in the future.

Firstly, the tentative model shown above would contribute to the development of methodological study in police and customs authorities and provide informative tools in their capacity-building activities. The statistical assumptions may be set out on a case-by-case basis, according to the regional features of the importing country and the characteristics of the object in question.

Secondly, in the experimental application in the previous section (4.1), this article takes a situation where the customs official refers to the database of INTERPOL. However, these data banks are useful not only for police or customs officials in order to enhance their detection capabilities, but also for dealers to ensure that they take action

in accordance with their obligation to exercise due diligence. Thus, a similar attempt at modelling could be developed for analyzing ethical conduct on the part of art dealers and other stakeholders.

Thirdly, as another way of utilization, the model could be developed to be a methodological tool for monitoring regulations, since, for example, we may consider the probability of an event in which a stolen object is found in a State Party of the 1995 UNIDROIT Convention. With such assumption, there is room to discuss the impact of increase in its State Parties from a statistical viewpoint.

## 5. Conclusions

This article makes an experimental attempt to introduce a statistical methodology in Cultural Heritage Law. As discussed with regard to the tentative model, the method of Bayesian inference can be a useful tool in this field for analyzing how the belief or recognition of stakeholders, by which they make decisions, is updated through the process of collecting data or evidence.

As a limitation of the tentative model in this article, both the evidence obtained from the consultation of INTERPOL's database and the evidence on the exporting country are obviously matters in the control of the art trade. Accordingly, in any future research, a trial study is expected in order to examine what other facts can affect the assessment of lawfulness in the art trade.

As another limitation, the article has set out a mode dealing with a case of detecting a piece of stolen cultural property, but it does not explore cases of trade in movable cultural property in a comprehensive manner. Thus, there remains a need to consider whether this kind of statistical model works in other situations involving the illicit art trade.

## Literature

Annex "Consultation with the Governing Bodies of the 1970 Convention on the preparation of UNESCO's Medium-Term Strategy 2022-2029 (41 C/4) and Programme and Budget 2022–2025" (41 C/5) [in:] "Report of the Secretariat on its activities," UNESCO Doc. C70/20/8.SC/5 (a working document for the 8th session of the Subsidiary Committee of the 1970 Convention).

Atwood R., *Stealing History: Tomb Raiders, Smugglers, and the Looting of the Ancient World*, St. Martin's Press, New York 2004.

Bazley T.D., *Crimes of the Art World*, Praeger, Santa Barbara 2010.

Bayes T., Price R., "An Essay towards Solving a Problem in the Doctrine of Chances", *Philosophical Transactions of the Royal Society of London* 1763, vol. 53.

Bernardo J.M., Smith A.F.M., *Bayesian Theory*, John Wiley and Sons, Chichester 1994.

Boz Z., "Repatriation of Cultural Antiquities Forming a Legal and an Archaeological Procedure" [in:] *3rd International Conference of Experts on the Return of Cultural Property Athens – Ancient*

*Olympia, 23–27 October 2013: Proceedings*, ed. S. Choulia-Kapeloni, Archaeological Receipts Fund, Athens 2014.

Burman H.S., "International Institute for the Unification of Private law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects", *International Legal Materials* 1995, vol. 34, issue 5.

Ehlert C., *Prosecuting the Destruction of Cultural Property in International Criminal Law: With a Case Study on the Khmer Rouge's Destruction of Cambodia's Heritage*, Martinus Nijhoff, Leiden 2013.

Eskander S., "Wars, Uprisings, Invasions, and Terrorism: The Looting and the Recovery of Iraq's Cultural Property" [in:] *3rd International Conference of Experts on the Return of Cultural Property Athens – Ancient Olympia, 23–27 October 2013: Proceedings*, ed. S. Choulia-Kapeloni, Archaeological Receipts Fund, Athens 2014.

Gauffeny S., "The Preventive Measures in the Fight against Illicit Trafficking of Cultural Property and the Database TREIMA" [in:] *3rd International Conference of Experts on the Return of Cultural Property Athens – Ancient Olympia, 23–27 October 2013: Proceedings*, ed. S. Choulia-Kapeloni, Archaeological Receipts Fund, Athens 2014.

Gowers T., "Bayesian Analysis" [in:] *The Princeton Companion to Mathematics*, eds. T. Gowers, J. Barrow-Green, I. Leader, Princeton University Press, Princeton 2008.

Gerstenblith P., "The Disposition of Movable Cultural Heritage" [in:] *Intersections in International Cultural Heritage Law*, eds. A. Carstens, E. Varner, Oxford University Press, Oxford 2020.

Jakubowski A., "Return of Illicitly Trafficked Cultural Objects Pursuant to Private International Law" [in:] *Illicit Traffic of Cultural Objects in the Mediterranean*, eds. A.F. Vrdoljak, F. Francioni, 2009/09 *EUI Working Paper AEL*, https://cadmus.eui.eu/bitstream/handle/1814/12053/AEL_2009_09.pdf (accessed: 30.11.2020).

Jakubowski A., *State Succession in Cultural Property*, Oxford University Press, Oxford 2015.

Kowalski W.W., "Ratification of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, in Light of Directive 2014/60/UE on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State: The Perspective of Poland", *Santander Art and Culture Law Review* 2016, no. 2.

Manacorda S., "Criminal Law Protection of Cultural Heritage: An International Perspective" [in:] *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*, eds. S. Manacorda, D. Chappell, Springer, New York 2011.

Montorsi P., "The Italian Carabinieri for the Protection of Cultural Heritage" [in:] *3rd International Conference of Experts on the Return of Cultural Property Athens – Ancient Olympia, 23–27 October 2013: Proceedings*, ed. S. Choulia-Kapeloni, Archaeological Receipts Fund, Athens 2014.

Neyman J., Pearson E.S., "On the Problem of the most Efficient Tests of Statistical Hypotheses", *Philosophical Transactions of the Royal Society A* 1933, vol. 231.

Nistri G., "The Experience of the Italian Cultural Heritage Protection Unit" [in:] *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*, eds. S. Manacorda, D. Chappell, Springer, New York 2011.

O'Keefe P.J., *Commentary on the 1970 UNESCO Convention*, 2nd ed., Institute of Art and Law, Builth Wells 2007.

O'Keefe P.J., Prott L.V., *Cultural Heritage Conventions and Other Instruments: A Compendium with Commentaries*, Institute of Art and Law, Builth Wells 2011.

Panone F., "INTERPOL's Role in the International Prevention and Combat against Illicit Traffic of Cultural Goods" [in:] *3rd International Conference of Experts on the Return of Cultural Property*

*Athens – Ancient Olympia, 23–27 October 2013: Proceedings*, ed. S. Choulia-Kapeloni, Archaeological Receipts Fund, Athens 2014.
Prott L.V., *Commentary on the UNIDROIT Convention*, Institute of Art and Law, Leicester 1997.
Prott L.V., "UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects", *Uniform Law Review* 1996, vol. 1, issue 1.
Robert C.P., *The Bayesian Choice: From Decision-Theoretic Foundations to Computational Implementation*, 2nd ed., Springer, New York 2001.
Schneider M., "The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive", *Santander Art and Culture Law Review* 2016, no. 2.
Šulc B., "The Protection of Croatia's Cultural Heritage During War 1991–95" [in:] *Destruction and Conservation of Cultural Property*, eds. R. Layton, P. Stone, J. Thomas, Routledge, New York 2001.
*United Nations – Treaty Series* 1956, vol. 249; 1972, vol. 823.
Zeidler K., *Restitution of Cultural Property: A Hard Case – Theory of Argumentation – Philosophy of Law*, Gdańsk University Press – Wolters Kluwer, Gdańsk – Warsaw 2016.
Zhong H., *China, Cultural Heritage, and International Law*, Routledge, New York 2019.

## Summary

***Ren Yatsunami***

**A methodological consideration on international trafficking of cultural property: An approach from Bayesian statistics**

Focusing on issues of illicit trafficking in movable cultural property, this article proposes the introduction of a probabilistic tool called Bayesian Inference in the area of cultural heritage law. With a tentative probabilistic model, it is demonstrated how Bayesian Inference can be utilized for quantifying the actual impact of evidence on the process whereby a customs official detects illicit trade in stolen cultural property.

**Keywords:** Bayesian Inference, Movable Cultural Property

## Streszczenie

***Ren Yatsunami***

**Rozważania metodologiczne dotyczące międzynarodowego handlu dobrami kultury – podejście ze statystyki bayesowskiej**

W niniejszym artykule, tematycznie osadzonym w zagadnieniach nielegalnego handlu ruchomymi dobrami kultury, zaproponowano stosowanie narzędzia probabilistycznego znanego jako wnioskowanie bayesowskie w sprawach z zakresu prawa ochrony dóbr kultury. Postulowany model probabilistyczny pokazuje, w jaki sposób można wykorzystać wnioskowanie bayesowskie

do oszacowania wpływu materiału dowodowego na całość postępowania w przypadku, w którym organy celne wykryłyby taki właśnie nielegalny handel.

**Słowa kluczowe**: wnioskowanie bayesowskie, ochrona ruchomych dóbr kultury

**Antonio Leo Tarasco**
Academy of Fine Arts, Rome
leo@antonioleotarasco.com
ORCID: 0000-0002-7850-3420

https://doi.org/10.26881/gsp.2021.2.03

# Proprietary fragmentation and public-private management of UNESCO sites owned by the Italian state

## 1. Italian state UNESCO sites: Public property

The theme of the fragmentation of the ownership of the fifty-five Italian UNESCO sites and its effects on management and financial returns enables us to investigate, from an original point of view, the actual consideration that the national legal system recognizes for UNESCO sites, i.e. the de facto importance that, beyond official declarations, the UNESCO sites have within the internal legal order.

As is known, the "Italian UNESCO sites and elements" have long been contained exclusively in the Convention for the Protection of the World Cultural and Natural Heritage signed in Paris on 16 November 1972 by the countries adhering to the United Nations Educational, Scientific and Cultural Organization (UNESCO), and enforced in Italy by Law no. 184 of 6 April 1977. This was then supplemented – thanks to art. 1, para. 1, letters b), c) and d) of Law no. 44 of 8 March 2017 – by the Convention for the Safeguarding of Intangible Cultural Heritage, adopted in Paris on 17 October 2003, and enforced in Italy by Law no. 167 of 27 September 2007.

Leaving aside for present purposes the elements of intangible cultural heritage and focusing only on tangible UNESCO sites belonging, even on a non-exclusive basis, to the Italian State, one can observe that an analysis of their position within the Italian government's organisation of cultural heritage makes it possible to analyze not only the concrete management methods of each site , but also to understand if and to what extent the organizational reforms of the Italian Ministry for Cultural Heritage and Activities and Tourism (hereinafter: MiBACT) have taken into account the UNESCO qualification previously operated by the United Nations (UN).

As is known, the selection of a site by UNESCO, although, on the one hand, it does not alter the legal status of the goods which it includes, on the other hand, it obliges the Contracting States to recognize that the heritage identified by the International Organization "constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate" (art. 6 the UNESCO Convention 1972); furthermore, "the duty of ensuring the identification, protection, conservation,

presentation and transmission to future generations of cultural and natural heritage (...)" – according to art. 4 – "belongs primarily to that State", that is, to the state in which the sites are located.

The recognition of a site as "world heritage" does not, therefore, imply that the site is owned by a sole entity; like a web, the UNESCO site covers places that the history of administration has scattered all over the place. Nonetheless, once a place is recognised as a "world heritage site", public authorities cannot remain indifferent towards ensuring not only a level of protection for the site but also adequate management so as to allow the public to grasp the original unitary value of the site.

In other words, the recognition of UNESCO sites is independent of the sites' ownership model; it occurs for natural or historical and cultural reasons, and – rightly – has nothing to do with the underlying proprietary ownership model: this is the case for the historic city of Rome; the historical centers of Florence, Naples, Siena, and San Gimignano; the Amalfi Coast; and Venice and its Lagoon. If anything, it is the duty of the public administration to ensure that the diversity of legal regime does not adversely affect a site's need for protection or public enjoyment, ensuring uniform enjoyment. If and how this happens will be the theme of this article, which will analyse concrete management methods and their results, including financial ones.

Italian jurisprudence has dealt with Italian UNESCO sites mainly because of the possibility that this qualification may or may not, per se, lead to the independence of the area, regardless of the adoption of administrative measures that identify the area in question as cultural or landscape property.

The Italian Constitutional Court (C. cost., 11.02.2016, no. 22) has clarified that UNESCO sites "do not enjoy protection of their own right, but, also because of their considerable typological diversity, they benefit from different forms of protection for cultural and landscape heritage, according to their specific characteristics". Consequently, it declared as inadmissible the questions of the constitutional legitimacy of articles 134, 136, 139, 140, 141, and 142 para. 1, of the Legislative Decree no. 42, raised with reference to articles 9 and 117 para. 1 of the Italian Constitution. They do not provide the municipal administration with an obligation to protect UNESCO sites in its territory, nor do they include these sites among the landscape assets subject to legal restrictions; and art. 142 para. 2 letter a) of the same Decree – in the part in which it does not exclude the urban areas recognized and protected as UNESCO heritage from the possibility of derogating from the landscape authorization regime provided for areas A and B of the municipal territory – in relation to the interposed parameters provided by the articles 4 and 5 of the UNESCO Convention 1972.

This principle is followed by the predominant strand of administrative jurisprudence (Regional Administrative Court of Lazio, Latina, sec. I, 30 January 2020, no. 46; Tar Campania, sec. VII, 13 December 2018, no. 7151, according to which the recognition of an area as a UNESCO site does not coincide with the automatic imposition of an absolute building constraint on it). In particular, according to the Regional Administrative Court of Toscana, sec. I, 12 December 2019, no. 1694, "the inclusion in the UNESCO list does not entail any automatic procedure for the purpose of qualifying

the asset that is a cultural asset, given that pursuant to art. 7 *bis* of Legislative Decree no. 42/2004, for this purpose, the conditions for the applicability of art. 10 must exist".

This clearly prevailing jurisprudence is partially contradicted by other rulings which have to date remained isolated. According to the Regional Administrative Court of Lazio, Rome, sec. II-quater, 29 May 2020, no. 5757, for example, the UNESCO Convention of 1972 would oblige the State in which a site declared "World Heritage" is located to ensure its safeguarding regardless of any formalized binding measures. According to administrative judges, in fact, "UNESCO World Heritage sites as recognized as having 'outstanding universal value' from the point of view of cultural or landscape interest must benefit from a degree of protection at least corresponding to that guaranteed to the landscape assets bound by the National Authorities, insofar as they are recognized as having 'significant' landscape interest, pursuant to art. 136 of Legislative Decree no. 42/2004 (Code of Cultural Heritage and Landscape), or declared of 'particularly' important cultural interest, pursuant to art. 13 of that same Code: the principle of proportionality and reasonableness requires ensuring a degree of protection corresponding to the degree of value of the protected asset". According to administrative judges, it would be paradoxical not to protect the most valuable goods; if this happened, a "dangerous 'protection vacuum' would be created precisely for areas of greater value, even of a 'universal' level of value – declared 'Common Heritage of Humanity' precisely on the basis of the recognition of their absolutely 'exceptional' importance (therefore of an importance of higher degree than the importance of only a 'notable' degree required in the internal system for being subject to landscape constraint, pursuant to art. 136 of Legislative Decree no. 42/2004)".

## 2. From UNESCO state sites ownership to management plans

By focusing on UNESCO sites owned by the Italian state (twenty-five out of fifty-five: 45.55%), one can observe how a heterogeneity of legal ownership is also associated with a heterogeneity of management models. The effects of the fragmentation of a given UNESCO site, owned by the State, on the management of that site can be summarized as follows: 1) differences in management models; 2) differences in the recruitment of staff, especially of top figures; 3) differences in quality and methods of use; 4) differences in economic profitability; 5) differences in the accounting framework, which are also associated with difficulties in clearly reconstructing costs and revenues in managing the site; and 5.1) the absence of a clear reconstruction of the costs and revenues of the site, which consequently makes it impossible to define any strategic program to reduce costs and/or increase revenue.

Looking, for example, at the Bourbon royal complex of Caserta, one can notice how the unity of the UNESCO site is broken up by the different ways in which the various elements are managed, each of which is subject to multiple proprietary regimes (State: Royal Palace; Municipality: complex of San Leucio). The fragmentation in ownership affects the management of the site, since the management of the municipal part is

public and entirely direct. The site is nothing more than an office of the Municipality: it is neither an organ of the Municipality nor a third-party body with a legal personality. In the state part, on the other hand, management is partly direct and partly, for certain services, outsourced to the public sector. However, the Royal Palace of Caserta is not a mere office but rather a ministerial body that is qualified as a management office (among other things of a general kind, atypically general, as it is not articulated into subordinate management offices). It is evident that this organizational diversity (negatively) influences the enjoyment of the site, since the conditions for the enjoyment of the site are different, including from a financial point of view (different entrance fees). This is why, for example, when visiting one, there is no certainty that the others can be visited on the same day and at the same time. And if the diversity of enjoyment (not so much from a proprietary point of view) is already, in principle, unequal between several elements of the same UNESCO site, this is even more so when the site spreads within a single Municipality and, moreover, to elements only a few meters apart (as in the case of Caserta).

If one takes a wider look at all of the fifty-five Italian UNESCO sites, it becomes apparent how these describe a rather varied panorama by reason of the legal regime they belong to: sites of exclusive private ownership can be found (the Amalfi Coast), as well as sites where the property is public and private (Venice and its Lagoon); sites belonging to foreign states that exist on Italian territory, since they are geographically located within it (the Vatican City).[1] When the enjoyment of the sites occurs mainly by admiring its exterior, as in the case of historical centers, the plurality of subjects who own the individual elements that make up the site does not significantly affect the enjoyment of the site; in such cases, an applicable legal framework is offered not only by the law of cultural heritage (national and international law) but, first and foremost, by urban planning law.[2]

---

[1] The bibliographies on the subject of UNESCO sites are very extensive. Prominent items are: A. Guerrieri, "La tutela dei siti UNESCO nell'ordinamento italiano, tra prospettiva interna e comparata", *Il Diritto dell'economia* 2019, no. 1, p. 461 ff; G. Armao, "Tutela e valorizzazione integrata del patrimonio culturale dei siti UNESCO. Il caso del sito seriale 'Palermo arabo-normanna e le Cattedrali di Cefalù e Monreale'", *Aedon* 2018, no. 1, p. 1 ff; X. Camerini, "L'attuale quadro normativo internazionale della tutela del patrimonio culturale mondiale", *Rivista di Diritto delle Arti e dello Spettacolo* 2018, no. 2, p. 7 ff; L. Uccello Barretta, "Quale tutela per i siti patrimonio dell'UNESCO?", *Osservatorio AIC*, 30 gennaio 2016, p. 1 ff; C. Migliorati, "Il sito archeologico di Pompei a rischio di cancellazione dalla lista del patrimonio mondiale", *Diritto comunitario e degli scambi internazionali* 2013, no. 4, p. 723 ff; G. Garzia, "La valorizzazione dei beni e degli spazi pubblici di interesse culturale attraverso la diffusione delle moderne tecnologie informatiche: il caso della c.d. 'Piazzetta degli Ariani' di Ravenna", *Aedon* 2013, no. 3, p. 1 ff; S. Marchetti, "La gestione dei Siti UNESCO di Villa Adriana e di Villa D'Este a Tivoli", *Aedon* 2011, no. 1, p. 1 ff; *La globalizzazione dei beni culturali*, ed. L. Casini, Bologna 2010, in this book particular see chapter: M. Macchia, *La tutela del patrimonio culturale mondiale: strumenti, procedure, controlli*, p. 57 ff. On the "right to culture" in international conventions, even beyond those rights stipulated in UNESCO, see: A. Budziszewska, "The Right to Culture in International Law", *Diritto umani e diritto internazionale* 2018, no. 2, pp. 315–332.

[2] On the overlap between different levels of regulation of historic centers, see: M.V. Lumetti, "Il centro storico, un «iperluogo» tra urbanistica, cultura, paesaggio e immaterialità", *Diritto e processo amm.* 2018, no. 2, p. 583; T. Bonetti, "Pianificazione urbanistica e regolazione delle attività commerciali nei

This situation is only apparently simpler when the UNESCO site includes elements belonging exclusively to a single public entity and, for present purposes, to the Italian State. In this case, it is not so much the ownership that is fragmented, but rather the various management models. Analysing these assets allows one to verify the (ir)rationality of the choices of the legislator on an organizational level.

Indeed, some sites (Castel del Monte; Cenacolo Vinciano; the Etruscan necropolises of Cerveteri and Tarquinia) feature a traditional model of direct management by the site owner, except for certain public services. Such structures are governed in the same way as they were governed before the 2014 reform (Prime Ministerial Decree no. 174 of 29 August 2014), namely without any legal (administrative), financial, and accounting autonomy; the directors are recruited internally to the Administration of cultural heritage among officials (non-managers). This means, among many other things, that the non-executive director cannot, in principle, take on expenditure commitments, which are instead the responsibility of the superordinate executive; the absence of a budget determines the impossibility not only of directly receiving financial resources but also of clearly reporting expenses.

Within the same Italian state, other UNESCO sites have been identified by the organizational regulations as institutes with a special autonomous status, pursuant to art. 33 para. 3 letters a) and b), Prime Ministerial Decree no. 169 of 2 December 2019. These sites, like the ones mentioned above, are also directly managed by the body owning it (the Italian State, specifically the MiBACT). However, the particular legal qualification it assumes within the ministerial organization gives them a legal, financial, and accounting autonomy that the ones mentioned above do not possess[3]. In this way, at least the above-mentioned limitations are overcome. This happens, for example, in the UNESCO site which includes the archaeological areas of Pompeii, Herculaneum, and Torre Annunziata (where the Archaeological Park of Pompeii and the Archaeological Park of Herculaneum are located). Similarly, in the "Historic Centre of Rome" we find, in addition to private places or those belonging to various public bodies, the Archaeological Park of the Colosseum and the Barberini Palace, the National Roman Museum, and the Archaeological Superintendence of Rome, which all possess legal, financial and accounting autonomy within the state organization.[4]

In other cases, a UNESCO site includes both institutes with special autonomy and museums without any autonomous profile: this happens, for example, with the site

centri storici", *Rivista Giuridica di Urbanistica* 2017, p. 386; A. Sau, "La rivitalizzazione dei centri storici tra disciplina del paesaggio, tutela e valorizzazione del patrimonio culturale", *Le Regioni* 2016, p. 955 ff; *I centri storici tra norme e politiche*, eds. C. Lamberti, M.L. Campiani, Jovene, Napoli 2015.

[3] So-called statutory autonomy is entirely negligible, devoid of any practical consequence and improperly attributed to a profile of the autonomy of the institute or place of culture (the statute, in fact, is not approved by the institute but by superior political authority; this appears to be the exact opposite of the concept of autonomy).

[4] For the distinction between museums-organs (organizational structure of the ministerial juridical person) and museums-bodies (endowed with independent legal personality with respect to the constituent ministerial body) see the Council of State, sec. V, 24 March 2020, no. 2055, para. 4.1.2 and para. 5.

"Venice and its Lagoon", which includes both the Accademia Gallery of Venice – which has special autonomy, pursuant to art. 33 para. 3 letter a) of Prime Ministerial Decree no. 169/2019 – and three museums (the Galleria "Giorgio Franchetti" alla Ca' d'Oro; the Archaeological Museum, the Museum of Oriental Art; and the Museum of the Palazzo Grimani) which have no legal, financial, or accounting autonomy since they are organizational structures of the Regional Museum Directorate of Veneto (art. 42 Prime Ministerial Decree no. 169/2019). In other cases, a UNESCO site, as far as its ministerial status is concerned, is in use by third parties (as is the case of "Su Nuraxi" in Barumini, assigned to the Regional Museum Management of Sardinia and, therefore, having no financial and accounting autonomy, but being granted for use to the Municipality of Barumini and entrusted by the latter to the "Fondazione Barumini Sistema Cultura" in Sardinia). This case, although scarcely known or analysed, is interesting from a legal point of view since it testifies to the fact that the outsourcing of the management of an archaeological area declared common heritage of mankind to a private entity is common (from a legal point of view, this case would be equivalent to outsourcing the management of the archaeological area of the Palatine and the Colosseum or of Pompeii, Herculaneum, and Torre Annunziata, both equally archaeological areas declared universal heritage by UNESCO). Another management model (and one that could be defined as mixed) is the direct management model of property by the MiBACT Regional Museum Management (according to a scheme of the absence of financial and accounting autonomy) and the entrustment to third parties only of site enhancement activities (this is the case for the "Early Christian Monuments of Ravenna": see below). In this case, it is not the management of the site as a whole which is outsourced (as in the case of Su Nuraxi), but rather, only certain aspects of enhancement.

## 3. The financial results of the management of UNESCO state sites: A jagged picture

The heterogeneity of the legal and organizational framework stands alongside equally heterogeneous financial results. From this point of view, if one analyzes the financial returns of the various Italian UNESCO sites that belong to the Italian State, whether exclusively or not, and are entrusted to MiBACT, one discovers a rather varied reality. Considering that at least 90% of state revenues derive from ticket sales[5], the diversity of returns allows us to analyze the geography of use and, therefore, the interest of visitors vis-à-vis individual sites. Data shows that the recognition of the site as a "world heritage site" does not lead to an overcoming of the notorious gap between sites of greater attraction and poorly visited sites. Yet, by presupposing an equal amount of dignity

[5] As analyzed in: A.L. Tarasco, *Diritto e gestione del patrimonio culturale*, Laterza, Bari – Roma 2019, *passim*. The financial data that I present later in the current article has been calculated by the writer on the basis of data which were provided by the SISTAN of the Italian Ministry of Culture Heritage and Activity and Tourism.

for all of them, also thanks to the UNESCO recognition, the different levels of tourism appeal highlight a persistent rigidity in the demands of cultural tourism. As all statistical surveys have long revealed,[6] cultural tourism remains focused on a narrow list of places, and this is true also for UNESCO sites.

The differences among sites is huge. The state UNESCO elements which are part of the site "City of Vicenza and the Palladian Villas of the Veneto" (namely the Villa Badoer of Fratta Polesine) only made €4,638.10 (in 2019) and €5,346.50 (in 2018) from the sale of tickets. The revenue of Tempietto sul Clitunno, in Perugia, as part of the serial site "The Langobards in Italy. Places of Power" ranges around €15,000 (€14,897.00 in 2019 and €15,668.00 in 2018). Similarly, revenue for the site "Etruscan Necropolises of Cerveteri and Tarquinia" reaches several thousand euros (€38,964.84 in 2018 and €57,127.00 in 2019). Even the state places that are part of the UNESCO site "Rock Drawings in Valcamonica", despite collecting larger sums (and, therefore, being proportionally visited by a larger number of people) still make modest profits, as can be indirectly deduced from ticket revenues (€161,415.00 in 2019 and €159,442.90 in 2018).

At the top of the list of Italian UNESCO state sites with the highest financial returns, there are the state-owned properties which are part of the site "Historic Centre of Rome, the Properties of the Holy See in that City enjoying Extraterritorial Rights, and San Paolo Fuori le Mura", namely the Colosseum, the Domus aurea, the Roman Forum and the Palatine, Meta sudans, the Arch of Constantine, the Crypta Balbi, Palazzo Massimo alle Terme, the Palazzo Altemps, and the Baths of Diocletian. Overall, all these sites made a total of €123,733,802.17 in 2018 and €79,943,047.64 in 2019;[7] in particular, the archaeological site of the Colosseum by itself collected €46,347,249.57 in 2018 and €48,465,096.71 in 2019. One must also add to such proceeds the revenue of the National Roman Museum, the Ancient Pinacoteca, the Roman state museums of the Lazio Regional Direction of Museums, and the sites of the Archaeological Superintendence of Rome, all included in the above-mentioned "Historic Centre of Rome" site.

As anticipated, measuring the financial proceeds of sites of exceptional universal value for all of humanity is important for at least two reasons. Firstly, having estimated that the sale of tickets constitutes more than 90% of the revenue of institutes and state-owned cultural sites in Italy, measuring total profits of the UNESCO world heritage sites also means measuring the attractiveness of those sites. The financial data shown coincide with that deriving from the ticket office. On top of this, there may be an additional source of returns, which on average is no higher than 10%. In summary, with reliable approximation, it can be said, at least in Italy, that financial profitability is a measure of the effective use of the sites (also of UNESCO sites), since the area of financial return deriving from marketing and fund raising activities is very small, despite the flood of publications on the most irrelevant issues in practice.

---

[6] Istat, *L'Italia dei musei*, Rome, 23 December 2019, www.istat.it/it/files/2019/12/LItalia-dei-musei_2018.pdf (accessed: 4.05.2021).

[7] Unlike data previously discussed, these also partially include sources of income other than the ticket office alone.

Secondly, if it is true that the recognition of the "outstanding value" of a UNESCO site is independent not only of the property ownership regime but also of its profitability, it is also true that any increase in its income potential constitutes a tool for the full realization of the aims of the UNESCO Convention 1972: the protection and enhancement of heritage. An increase in profitability, despite not being an end in and of itself, represents a rather significant means of ensuring the achievement of long-term objectives.

## 4. The financial dimension of cultural heritage in the Italian Constitution and in the 1972 Paris Convention

Financial profile is one of the dimensions that the 1972 treaty recognizes as essential to "ensure the identification, protection, conservation, preservation and transmission to future generations of cultural and natural heritage" (art. 4 sentence 1). These objectives must be achieved by each State which must "do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation"; the actions to be implemented concern the "financial, artistic, scientific and technical" fields (art. 4 sentence 2). For this purpose, Law no. 77 of 20 February 2006, containing "Special measures for the protection and enjoyment of Italian sites and elements of cultural, landscape and environmental interest inscribed in the 'World Heritage List' and placed under UNESCO protection", was issued. This provision provides for the creation of financial intervention to support the enhancement, communication, and use of the sites and of the elements themselves (art. 4).[8] An increase in profitability is, therefore, one of the useful ways to implement the Convention itself.[9]

[8] The interventions and the amount of state contributions towards UNESCO sites, regardless of the owner of the sites (whether it is the State or otherwise), are established by decree of the Ministry for Cultural Heritage and Activities and Tourism, in agreement with the Ministry for the Environment and of the Protection of the Territory and the Sea, with the Ministry of Agricultural, Food, Forestry and Tourism Policies and with the Permanent Conference for relations between the State, the Regions and the autonomous Provinces of Trento and Bolzano (art. 4 para. 2 Law no. 77/2006). Since its entry into force (2006) up to 2018, 335 projects have been funded by the MiBACT, for a total of €27,236,263.06. Over €4 million have been used by the sites to draw up and update their Management Plans. For a prompt reconstruction of experiences applying Law no. 77/2006, see: Ministry for Cultural Heritage and Activities and Tourism, *Il Libro Bianco: Legge n. 77/2006*, Rubbettino, Soveria Mannelli 2013. The implementation methods of accessing the support measures are defined by the notice of the Secretary General of MiBACT 28 May 2019, no. 24, which first identifies the possible recipients of the funding, as well as the contact persons of the sites and elements, to whom the task of submitting the funding applications is entrusted, and that of reporting on the implementation of the approved projects.

[9] The scope of the cultural heritage financial needs taken into consideration and acknowledged by UNESCO is analysed by P. Mastellone, "Tutela e promozione del patrimonio culturale nella disciplina internazionale ed europea: dall'insufficienza dei finanziamenti pubblici alla valorizzazione della leva fiscale per stimolare l'intervento dei privati", *Rivista di diritto tributario internazionale* 2018, no. 2, p. 137 ff., which also focuses on the "paradoxical applicability" of the European discipline on state aid for the public funding of culture.

Therefore, as the Italian Constitution affirms, there is no opposition between cultural promotion and the creation of for-profit commercial activities (see art. 97 of the Italian Constitution), nor is the existence of any such opposition suggested by the founding acts of the 1972 Paris Convention.

As true as this may be, it is also the case that the qualification of a site (or part of a site) as a mere instrumental office of the public body that owns the site (the San Leucio complex) and the absence of legal, financial, and accounting autonomy (Castel del Monte; Leonardo's Last Supper; the Etruscan Necropolises of Cerveteri and Tarquinia; the Early Christian monuments of Ravenna) represent an unjustifiable organizational arrangement. Indeed, the absence of such autonomy from the outset prevents such activity from being accountable and limits any possible dynamism in management. Similarly, the direct management of the site, even where there is legal, financial, and accounting autonomy, would still not lead to a full exploitation of the site's income potential.

Unfortunately, the Italian management tradition has always stood out for notoriously inverting the relationship between means and ends, wrongly believing that the maximization of the ends requires sacrificing the financial dimension.

Because of this way of thinking, also based on the erroneous assumption that the immeasurable humanistic value of heritage also implies the impossibility of attributing a material value to it, it was believed, erroneously, that – to achieve the "pure" objective of cultural promotion – management of cultural heritage should exclude any profitability-related strategy. In this perverse logic, although the enhancement function was affirmed in the second half of 2000, the concept of the profitability of cultural heritage is still debated in Italy,[10] regardless of the fact that in many European countries, as in neighbouring France, cultural heritage is ordinarily considered a fundamental asset for balancing public budgets.[11] There the *capacité d'autofinancement* (self-financing capacity) *des musée nationaux* is measured, and the related *taux d'autofinancement* is examined, appreciated, or criticized by the Court des comptes – an experience very far from the Italian one, both in terms of active administration and control.

In this distorting logic, in which cultural heritage is placed in an ideal protective category, its material component is spiritualized and considered detached from the entire public financial system (at least in terms of its instrumentality with respect to income). So, with respect to the regulatory obligations to optimize *sub specie* management of increasing revenues and reducing expenses, cultural heritage is constantly preserved. In this way, an idea slowly matures that the realization of the noble end (promotion of culture through the care of its assets: Article 9, first and second paragraphs, of the Constitution) would justify any financial means. In this way, the constitutional precepts

[10] Stemming from: A.L. Tarasco, *La redditività del patrimonio culturale. Efficienza aziendale e promozione culturale,* Giappichelli, Torino 2006.

[11] On top of what was already claimed in: A.L. Tarasco, *Diritto e gestione*…, p. 162 ff., let me draw the attention of the reader to Court des comptes, *La valorisation internationale de l'ingénierie et des marques culturelles. Le cas des musées nationaux. Communication à la commission des finances du Sénat,* Paris, mars 2019.

that should govern the actions of each public administration are considered inapplicable, especially to the cultural heritage sector.

Thinking of this issue with this mind-set, it is easy to forget that an increase in the profitability of cultural assets represents one of the management tools supposed as a prerogative by the Constituent Assembly (art. 97 paras. 1 and 2 of the Constitution) to achieve the ultimate aims of cultural promotion (stated, instead, in art. 9 of the Constitution).[12] While not wishing in any way to undermine the primacy of the *ultimate goal* (cultural promotion and, therefore, the inner growth of human beings as visitors to the site), the importance of the medium cannot be devalued, liquidating it as a "commoditizer". In fact, the means prefigured by the Constitution to achieve any public purpose are represented by the "good performance" (art. 97 para. 2 of the Constitution) of the administrative activity; this concept translates into the obligation of every administration, including the holder of cultural assets, to act according to effectiveness (the relationship between objectives set and achieved), cost-effectiveness (the ratio between resources used and resources available), and efficiency (the ratio between objectives achieved and means used). In turn, the obligation to ensure a "good performance" is linked to the precept of para. 1 of the art. 97 of the Constitution which commits all public administrations to compete to ensure the balance of budgets and the sustainability of public debt.[13]

These constitutional parameters, where no opposition can be drawn between the aim of cultural promotion and the realization of instrumental commercial activities (art. 97 of the Constitution), appear fully in line with the legal framework obtainable from the 1972 UNESCO Convention.[14]

The misunderstanding of the 1972 UNESCO Convention has accentuated this "means-ends" prejudice, perhaps giving excessive importance to the "symbolic value

---

[12] For the distinction between means and effects, see: A.L. Tarasco, *La redditività*…, more recently: *idem*, *Diritto e gestione*..., *passim*.

[13] On these issues, see, in general: A.L. Tarasco*, Diritto e gestione*..., *passim*; *idem*, "Sostenibilità del debito pubblico e gestione del patrimonio culturale (prima e dopo il coronavirus)" [in:] *Cura e tutela dei beni culturali*, eds. G. Esposito, F. Fasolino, Wolters Kluwer Cedam, Padova 2020, p. 297 ff.; *idem*, "Modelli giuridici per l'incremento della redditività del patrimonio culturale: Italia, Francia e Gran Bretagna a confronto" [in:] *Scritti in onore di Eugenio Picozza*, vol. II*,* Editoriale scientifica, Napoli 2019, p. 1601 ff. Recently, concerning the general constitutional law of art. 97, comma 1, Cost., see: S. Cimini, *"*Equilibrio di bilanci e principio di buon andamento" [in:] *Scritti di onore di Eugenio Picozza*, vol. I, Editoriale scientifica, Napoli 2019, p. 393 ff. In constitutional jurisprudence, on the principle of good performance and the balance of public budgets, see: C. cost. 29 November 2017, n. 247, www.cortecostituzionale.it, according to which "the new wording of the first paragraph of art. 97 of the Constitution concerns, in the first part, the balances of individual entities, while in the second part it relates to the necessary contribution of the latter to the common, macroeconomic objective of ensuring the sustainability of the national debt". From this concept, it follows that "the first precept is embodied in the prohibition – for each entity – of economic deficit forecasts and in the obligation of a continuous search for balance in financial management, in relation to the internal and external dynamics that characterize policies for the implementation of concrete financial statements. The second statement calls for the necessary contribution of each administration to the pursuit of national and European public finance objectives, thus ensuring specific financial resources and behavior ".

[14] See below, in this paragraph.

of sites and elements of cultural heritage" (art. 1 of Law no. 77/2006); this seems to have contributed to the "spiritualization" of the theme of site management, neglecting the concept of financial sustainability and, if anything, focusing attention on exclusively exploiting public resources.[15] This is naturally a misunderstanding that is fuelled by an ignorance of other normative sources: for example, the "management plans" provided for by art. 3 of Law no. 77/2006 also include "actions that can be carried out to find the necessary public and private resources, in addition" to the "support measures" referred to in art. 4 of Law no. 77/2006.[16] In turn, an adequate organizational architecture that ensures good management is perfectly instrumental in terms of achieving these purposes, which are perfectly in accord with the Italian constitutional framework. If it is true that the purpose of the 1972 UNESCO Convention is to prevent the "deterioration or disappearance of any item of the cultural or natural heritage" which would constitute a harmful impoverishment for all the peoples of the world, the value premise on which the Convention is based is "the importance (...) of safeguarding this unique and irreplaceable property to whatever people it may belong", and "the outstanding interest" of natural cultural heritage which requires them "to be preserved as part of the world heritage of mankind as a whole."

If this is the final shared objective pursued by the UNESCO Convention of 1972, it is true that nowhere does the treaty exclude the economic and income-related importance of the sites: this is also deduced from the theme of the "adequacy of resources", which seems to have been introduced when the Convention speaks of "insufficient

---

[15] Emblematic is the thought that the well-known archaeologist S. Settis expressed, in St. Petersburg as on many other occasions, during a debate on "The Future of Museums" held on 30 June 2006. In the speech, occasioned by the award of the Grinzane Ermitage (then entitled "Ma il museo ha un future", *La Repubblica*, 30 June 2006, p. 53), the archaeologist concluded saying that "the real, the great 'profitability' of cultural heritage doesn't stand in its commercialization, nor in tourism and in the related profit it generates, but in that deep sense of identification, belonging, citizenship, which stimulates the creativity of present and future generations with the presence and memory of the past ". This thought, as will be explained below, obviously confuses the end with the means and, to put it in constitutional terms, superimposes the values evoked in art. 9 of the Constitution (known to the archaeologist) with those contained in art. 97 of the Constitution (unknown to the author). The horizon drawn is, in itself, fully acceptable, but does not detract from the need to seek the means of survival, of support, and enhancement for that cultural heritage. In practice, precisely in order to reach that noble and desirable humanistic outcome, it is necessary to pose the problem of finding the means necessary to achieve the goal. Describing only the destination, without being interested in the way in which the journey to reach it must be conducted, embodies superficiality and, in some cases, even selfishness when that journey must be made by others.

[16] Over management strategies of UNESCO sites see: G. Garzia, "Tutela e valorizzazione dei beni culturali nel sistema dei piani di gestione dei siti" *UNESCO*, *Aedon* 2014, p. 1; F. Badia, "Contents and Aims of Management Plans for World Heritage Sites: A Managerial Analysis with a Special Focus on the Italian Scenario", *Encarc Journal of the Cultural Management and Policy*, December 2011, vol. 1, issue 1, p. 40 ff; F. Badia, E. Gilli, "Il piano di gestione come strumento di misurazione e valutazione delle performance per i siti UNESCO. Analisi dello stato dell'arte nazionale e prospettive di sviluppo", *Azienda pubblica* 2011, p. 275 ff; A. Cassatella, "Tutela e conservazione dei beni culturali nei Piani di gestione UNESCO: i casi di Vicenza e Verona", *Aedon* 2011, p. 1 ff; S. Marchetti, M. Orrei, "La gestione dei Siti UNESCO di Villa Adriana e di Villa D'Este a Tivoli", *Aedon* 2011, p. 1.

economic, scientific and technological resources of the country where the property to be protected is situated", with respect to which the Convention proposes to offer its own support, which is additional and not in replacement. Indeed, precisely in consideration of the priority of the financial commitment of the state and the merely subsidiary and possible financial support of an international organization.[17] the theme of the self-maintenance of the properties declared cultural or natural heritage of humanity assumes strategic importance: in fact, although it is true that the recognition of a UNESCO site is independent, and rightly so, of its income potential, it is also true that any increase in its self-maintenance capacity is instrumental with respect to the achievement of the aims of the UNESCO Convention (protection and enhancement).[18]

To sum up, having reconstructed the regulatory framework (constitutional, international, and ordinary), it appears evident that the measurement of the self-financing capacity of museums, as ordinarily occurs in France regardless of the site's classification as a UNESCO one, is originally prevented when there is even a lack of the possibility of reporting with accuracy of the results of the management of certain exhibition

[17] Pursuant to art. 25 of the Convention, "the financing of the necessary works must, in principle, be taken into charge only partially by the international community. The financial participation of the State benefiting from international assistance must constitute a substantial part of the resources allocated to each program or project unless its own resources allow the structure to be self-reliant".

[18] The topic of the economic profiles of the management of UNESCO sites in the world is not unknown to literature (see for example: G. Alexandrakis, C. Manasakis, N.A. Kampanis, "Economic and Social Impacts on Cultural Heritage Sites: Results of Natural Effects and of Climate Change", *Heritage* 2019, vol. 2, p. 279 ff.). This topic was particularly treated by corporate experts, with harmful consequences for the legal framework, which generally proposes or analyses rules, while ignoring the concrete reality of administration, of which the economic dimension cannot be denied. While correctly underlining the need that the "enhancement actions must (...) consider in joint terms both the cultural and identity profiles and the economic and managerial profiles, in an effort of dialogue and cooperation between scientific disciplines that are often distant from each other" (F. Badia, F. Donato, E. Gilli, "Profili economici e manageriali per la governance delle istituzioni culturali: il caso dei siti UNESCO", *Annali dell Università degli Studi di Ferrara Museologia Scientifica e Naturalistica*, January 2012, Special Volume, p. 6), generally the point of view stemming from entrepreneurs is not so much that of the financial self-maintenance of the structure declared by the UNESCO heritage of humanity, as much as of the development of an economy connected with the UNESCO site. Andrea Cenderello is another academic that discusses the need to have a marketing policy in the work *Marketing of Heritage Sites*, more specifically in *Heritage Interpretation for Senior Audiences Focuses on the Need for Marketing Action. A Handbook for Heritage Interpreters and Interpretation Managers*, eds. P. Seccombe, P. Lehnes, (http://www.interpret-europe.net/fileadmin/Documents/projects/HISA/HISA_handbook.pdf, accessed: 4.05.2021), July 2015, according to which "applying marketing strategies and techniques to heritage sites represents the opportunity to link cultural heritage, artistic expression and local economic, social development". Of course, this does not mean that there are no differences between the cultural heritage sector and other "profit-oriented" sectors which, in the cited text, are clearly highlighted. On marketing actions in Ireland, see: L. Fullerton, K. Mcgettigan, S. Simon, "Integrating Management and Marketing Strategy at Heritage Sites", *International Journal of Culture, Tourism and Hospitality Research* 2010, vol. 4, p. 108 ff.; S. Mourato, E. Ozdemiroglu, T. Hett, G. Atkinson, "Pricing Cultural Heritage: A New Approach to Resource Management", *World Economics* 2004, vol. 5, no. 3, p. 95 ff., focus on the pricing policies of UNESCO sites and on the various effects they can produce, both as regards their financial management and as regards the better conservation of the site. They focus, in particular, on the citadel of Machu Pichu.

sites of cultural heritage (as in the cases seen in the Etruscan tombs of Cerveteri and Tarquinia, or Castel del Monte). These general considerations are equally applied to UNESCO sites, without any possibility of differentiating their statutes, at least from this point of view.[19]

While this is a common limit for hundreds of Italian institutes and places of culture,[20] it appears more remarkable in the case of UNESCO sites that art. 1 of Law no. 77/2006 solemnly declares their importance to be "due to their uniqueness, points of excellence of Italian cultural, landscape and natural heritage and their representativity at an international level." This notation shows how, at least in these cases, the international qualification did not affect internal organization, unlike for the two UNESCO sites "Villa Adriana" and "Villa d'Este", which have been unified in a single site with special autonomy since 2014 (Prime Ministerial Decree no. 171/2014).

It can be deduced that despite the activism of the legislator in reforming, counter-reforming and re-reforming the organization of MiBACT, at least the UNESCO state sites have remained ignored, since they have not been the subject of any special attention (with the few exceptions described above).

## 5. UNESCO site management plans: Outsourcing

### 5.1. The case of "Su Nuraxi" in Barumini (Sardinia)

With the above in mind, in order to achieve these purposes ("finding the necessary public and private resources": art. 4 of Law no. 77/2006) the organizational prerequisites useful for understanding the direction taken and/or to be pursued appear fundamental. Whilst such UNESCO state-owned sites continue to be managed in the most traditional way possible (direct public management with no independent reporting of accounts), others offer evidence of different management plans, inspired by a healthy outsourcing of functions.

In some cases, as in the case of the archaeological site of "Su Nuraxi" in Barumini (Cagliari, Sardinia), the "Barumini Sistema Cultural Foundation" is entrusted with the task of protecting, preserving, managing, and enhancing the cultural heritage of the Municipality of Barumini, including an area which has been declared a world

[19] Among other things, it should be underlined that the Italian internal legal system does not have a different legal framework for UNESCO sites, unlike other legal systems, such as Australia or South Africa.

[20] State-owned places of culture number in total 740, if we consider the 134 state archives, the 46 state libraries, and the 560 museums and archaeological areas. In particular, if there are 159 sites that belong to the 39 institutes with special autonomy (also in financial and accounting terms), there are as many as 307 state sites that, belonging to the 18 Regional Museum Directories, lack any possibility of reporting practices and autonomous spending capacity; to these numbers, the 94 archaeological areas also have to be added, as they report to superintendencies.

heritage site (i.e. the Su Nuraxi Archaeological Area, the Casa Zapata Museum Center, and the Giovanni Lilliu Cultural Heritage Communication and Promotion Center).[21]

In particular, the area of "Su Nuraxi", assigned to the Regional Directorate of Museums of Sardinia and, therefore, with no financial or accounting autonomy, is granted for use to the Municipality of Barumini and entrusted by the Municipality to the "Barumini Sistema Cultural Foundation". It is interesting to highlight how the Foundation presents profits as the difference between revenues (€2,342,796.00 in 2019; €2,236,256.00 in 2018) and production costs (€2,159,510.00 in 2019; €2,101.753.00 in 2018). This produces a net operating profit of €180,519.00 in 2019 and €129,906.00 in 2018.

However, it should be noted that the Foundation receives public grants worth €1,055,937.00 (in 2019) and €1,051,232.00 (in 2018). The presence of these contributions, while it demonstrates the non-integral self-sufficiency of the Foundation, does not neutralize the high self-maintenance capacity of this private law entity in which various public actors participate  nor its capacity to constantly monitor costs and revenues.

### 5.2. The case of the "Early Christian Monuments of Ravenna"

In addition to the full management plans of an archaeological area declared world heritage, among the UNESCO sites belonging to the state, it is possible to identify a further kind, namely places for whose management the Public Administration has decided to establish *ad hoc* legal entities, pursuant to art. 112 of Legislative Decree no. 42 of 22 January 2004, to which enhancement activities can be exclusively entrusted.

This is what happened with regard to the "Early Christian Monuments of Ravenna". These include the Basilica of Sant'Apollinare in Classe, the Baptistery of the Aryans, and the Mausoleum of Theodoric. These sites also lack special autonomy (and, therefore, legal, financial, and accounting autonomy); as such, they do not have their own management functions, but belong to the Regional Directorate of Museums of Emilia Romagna (MiBACT), pursuant to the Ministerial Decree of 23 December 2014 on "Organisation and operation of state museums"; this leads to limitations of a financial nature (giving and receiving money), an accounting nature (reporting revenues and costs), and a legal nature (adopting measures and entering into contracts). Nonetheless, ticket

[21] The "Barumini sistema cultura" Foundation was established on 20 December 2006, on the exclusive initiative of the Municipality of Barumini, in order to "a) protect, conserve, enhance and manage the cultural and artistic-monumental assets of the Municipality of Barumini, in order to promote knowledge of this heritage and ensure the best conditions of use and public enjoyment; b) protect, conserve and enhance also other movable and immovable property that is not part of the municipal property but must be located in the Sardinia Region and must be part of cultural heritage assets pursuant to the Code of cultural heritage and landscape. Such places are normally owned by other subjects, with whom the Foundation requires a specific agreement to carry out its activities". It should be noted that neither in its deed of constitution of 2006 (from which the above is cited) nor in the statute (of 19 September 2018) and in its statutory amendment (31 January 2020), is the Ministry ever designated as the granting subject of the archaeological area „Su Nuraxi" by Barumini in respect of the Municipality.

revenues in 2018 (€1,108,685.00) decreased in 2019 to below €800,000 (€797,836.00); however, overall costs and, therefore, the quantification of losses are unknown.

The revenues of the "Archaeological Park of Classe RavennAntica" Foundation are more than double the above amount. This foundation was established with the purpose of enhancing, including for tourism purposes, the archaeological, architectural, and historical-artistic heritage consisting of the ancient city of Classe, the Basilica of Sant'Apollinare in Classe, the Domus of the "Stone Carpets" in Ravenna, the eighteenth-century Church of Sant'Eufemia, and the fourteenth-century Church of San Nicolò, and therefore, in part, also of the state-owned places included in the site declared by UNESCO as "world heritage".[22] The Foundation is the concessionaire of various additional assets alongside the Early Christian Monuments of Ravenna (directly managed by MiBACT). It also manages certain commercial services within the properties declared world heritage and brought back under the direct care of MiBACT (which, therefore, bears the entire maintenance costs).

The Foundation's total revenues in 2018 were €2,406,340.00 while in 2017 they were €1,818,056.00. Considering also costs (€2,363,570 in 2018 and €1,700,205 in 2017), the Foundation achieved a net profit of €1,248.00 in 2018 and €1,919.00 in 2017 (although this result was also achieved thanks to contributions from various public bodies, which amounted to €1,134,574.00 in 2018 and €992,239.00 in 2017). Therefore, whilst focusing on the same territory that boasts a recognition of the UNESCO brand, and even if the sites managed by the Directorate-General for MiBACT Museums are different from those managed by the Ravenn Antica Foundation, state revenues appear to be about half of those achieved by the foundation; it should also be noted that – even if they not accurately quantifiable – the costs of preserving UNESCO elements are borne exclusively by MiBACT (and not by the Foundation).

If the ultimate purpose of the Foundation is the conservation and public use of Ravenna's heritage as well as the promotion of further historical-archaeological research, these objectives are achieved thanks to intense commercial activity which, since 2000, has been exercised through the management of the museum of the Domus dei Tappeti di Pietra di Ravenna, the management of the archaeological site of the Ancient Port of Classe, the museum site at the ex-church of S. Nicolò in Ravenna

[22] The Foundation was established on 22 December 2000 in execution of the Protocol of Intent signed on 5 December 1997 by the Municipality of Ravenna, the University of Bologna, the Superintendence for Archaeological Heritage of Emilia-Romagna, the Superintendence for Environmental and Architectural Heritage for the provinces of Ravenna, Ferrara, Forlì-Cesena, and Rimini, by the Archdiocese of Ravenna-Cervia, and by the Cassa di Risparmio di Ravenna Foundation. Pursuant to art. 1 of the statute, the Foundation pursues the aim of "ensuring adequate conservation and public use of the cultural assets conferred and/or given in concession or in use; improving the public use of the cultural assets conferred, and/or given in concession or in use while ensuring their adequate conservation; implementing the integration of the management and enhancement activities of the cultural assets conferred and/or given in concession or in use, with those activities concerning the assets conferred by other participants to the Foundation, increasing the services offered to the public in the territory, improving their quality and making savings management; in order to realize forms of national and international valorisation of the cultural heritage, along with restoration of the assets".

entitled "TAMO All the adventure of mosaics", and the additional services of the Civic Archaeological Museum Tobia Aldini in Forlimpopoli, in agreement with the Municipality of Forlimpopoli (the owner). The intensification of the management of these sites and, therefore, of commercial activities has determined, starting from 2015, the modification of the (fiscal) nature of the entity, which has assumed the connotation of a "commercial entity" (if not for statutory purposes).[23]

This stage in the life of the RavennAntica Foundation confirms, in practice, how carrying out commercial activities, even on UNESCO sites, is completely possible and leads to beneficial financial effects which, on the contrary, are not recorded when the subject (MiBACT) presumes to carry out the traditional business of selling tickets only, without also pursuing an aim of financial equilibrium.

In other words, experience confirms that the values encapsulated in articles 9 and 97 of the Italian Constitution are fully compatible, and not conflicting. Focusing exclusively on maximising the ends (art. 9 of the Constitution) leaves unresolved the problem of finding adequate financial resources (art. 97 of the Constitution). This is the case even when cultural resources, all things being equal, would enable profits to rise.

The coexistence within one area declared a "world heritage site" of a publicly-managed structure and a private structure, albeit with non-profit ends and made up of (mostly) public persons, seems to confirm the argument put forward elsewhere on the possibility of achieving cultural promotion ends according to a method of company efficiency, which can be put in place by entities other than those that own the goods, and irrespective of the legal nature of that managing entity.[24]

Furthermore, entrusting a state archaeological area which has been declared a world heritage site (such as the one of Su Nuraxi) to a private Foundation demonstrates that its inalienability, pursuant to art. 54 comma 1 of Legislative Decree no. 42/2004, does not imply that its management cannot be entrusted to third parties. This legal route, despite not being entirely well-established,[25] has scarcely been experimented with on a large scale in administrative practice, but the few examples of such cases in the field of UNESCO sites have all been successful.

---

[23] Article 149 para. 1 Presidential Decree 22 December 1986, no. 917 (TUIR), states that regardless of the forecasts of the articles or memorandum of association, an entity loses the status of a "non-commercial entity" if it mainly carries out commercial activities for an entire tax period, particularly with regard to some elements connected to the activity effectively exercised which must be valued, such as the prevalence of revenues deriving from commercial activities when compared to the normal value of sales or services relating to institutional activities, and the prevalence of fixed assets relating to commercial activity, net of depreciation, with respect to the remaining activities.

[24] A.L. Tarasco, *La redditività...*, *passim*; *Diritto e gestione...*, *passim*.

[25] See, for example, the interview released to: M. Pirelli, "Tokenizzare la Gioconda? Vendere si può ma non si fa", *Il Sole 24 ore – Plus 24*, 16 maggio 2020, p. 18.

## 6. Conclusions: Timeless prejudices and timeless values

From the above discussion, it clearly emerges that, despite formal proclamations, solemn declarations of principle, and frequent international conferences, the Italian legislator (at least the state one) has not taken into consideration the qualification awarded by UNESCO for a particular site; the consideration of UNESCO sites, in terms of administrative organization (most recently, in seven years of uninterrupted reforms between 2014 and 2020), cannot be said to be special or differentiated from that of other institutes or places of culture referred to in art. 101 Decreto Legislativo n. 42/2004 (with the exception of Villa Adriana and Villa d'Este). The feared "adaptation of Italy to international standards in the field of museums" and the "improvement of promotion for the development of culture, also in terms of technological and digital innovation" (art. 14 comma 2 *bis* Decreto Legislativo 31 May 2014, n. 83) have passed by such sites as Castel del Monte, the Last Supper, and the Etruscan Necropolises of Cerveteri and Tarquinia, which are still run according to traditional methods of direct management by the institution's owner, with the exception of certain public services. This seriously compromises, at least in some cases, not only the quality of use but also financial profitability, which is certainly very modest compared to the sites' potential.

In other cases, the ownership fragmentation of sites has not been compensated for by management plans (art. 3, Law no. 77/2006) capable of overcoming different ownership and modes of use: an ownership regime continues to prevail over the needs of unitary and optimal use, considerably reducing the concept of "state property" understood as a service to the public on the part of public goods.

On the financial level, studies of the self-financing of UNESCO sites are very rare, and the only profiles investigated (by business experts) appear to be those of the positive externalities coming from public investments, as well as the positive externalities coming from loans obtained through the traditional lever of general taxation (by the tax authorities).

Coping with this backwardness, one of the few bright points is represented by the experience of outsourcing the entire management (and not only of certain services, such as the ticket office) of the state archaeological area of Su Nuraxi, in the Municipality of Barumini, in Sardinia: first, in favour of the local municipal administration and, subsequently, granted to the "Barumini Sistema Cultura" Foundation, owned by the Municipality itself. This is an example of how a state archaeological area, inalienable pursuant to art. 54 para. 1 Decreto Legislativo n. 42/2004, and, further, recognized by UNESCO as "universal heritage of humanity", can be managed by a private entity, moreover with more than satisfactory financial results.

If only timeless ideological prejudices were buried and the quality of the service provided to the public was to become the main goal to be attained, this model could be extended to many other exhibition places of cultural heritage, and not only for those with the UNESCO brand attached to them. Also, hitherto barely tolerated balances of financial statements should become a priority, for these are never to be ignored (art. 97 para. 1 of the Constitution).

## Literature

Alexandrakis G., Manasakis C., Kampanis N.A., "Economic and Social Impacts on Cultural Heritage Sites: Results of Natural Effects and of Climate Change", *Heritage* 2019, vol. 2.

Armao G., "Tutela e valorizzazione integrata del patrimonio culturale dei siti UNESCO. Il caso del sito seriale 'Palermo arabo-normanna e le Cattedrali di Cefalù e Monreale'", *Aedon* 2018, no. 1.

Badia F., "Contents and Aims of Management Plans for World Heritage Sites: A Managerial Analysis with a Special Focus on the Italian Scenario", *Encarc Journal of the Cultural Management and Policy*, December 2011, vol. 1, issue 1.

Badia F., Donato F., Gilli E., "Profili economici e manageriali per la governance delle istituzioni culturali: il caso dei siti UNESCO", *Annali dell "Università degli Studi di Ferrara Museologia Scientifica e Naturalistica*, January 2012, Special Volume.

Badia F., Gilli E., "Il piano di gestione come strumento di misurazione e valutazione delle performance per i siti UNESCO. Analisi dello stato dell'arte nazionale e prospettive di sviluppo", *Azienda pubblica* 2011.

Bonetti T., "Pianificazione urbanistica e regolazione delle attività commerciali nei centri storici", *Rivista Giuridica di Urbanistica* 2017.

Budziszewska A., "The Right to Culture in International Law", *Diritto umani e diritto internazionale* 2018, no. 2.

Camerini X., "L'attuale quadro normativo internazionale della tutela del patrimonio culturale mondiale", *Rivista di Diritto delle Arti e dello Spettacolo* 2018, no. 2.

Casini L. (ed.), *La globalizzazione dei beni culturali*, Bologna 2010.

Cassatella A., "Tutela e conservazione dei beni culturali nei Piani di gestione UNESCO: i casi di Vicenza e Verona", *Aedon* 2011.

Cimini S., "Equilibrio di bilanci e principio di buon andamento" [in:] *Scritti di onore di Eugenio Picozza*, vol. I, Editoriale scientifica, Napoli 2019.

Court des comptes, *La valorisation internationale de l'ingénierie et des marques culturelles. Le cas des musées nationaux. Communication à la commission des finances du Sénat,* Paris, mars 2019.

Fullerton L., Mcgettigan K., Simon S., "Integrating Management and Marketing Strategy at Heritage Sites", *International Journal of Culture, Tourism and Hospitality Research* 2010, vol. 4.

Garzia G., "La valorizzazione dei beni e degli spazi pubblici di interesse culturale attraverso la diffusione delle moderne tecnologie informatiche: il caso della c.d. 'Piazzetta degli Ariani' di Ravenna", *Aedon* 2013, no. 3.

Garzia G., "Tutela e valorizzazione dei beni culturali nel sistema dei piani di gestione dei siti UNESCO", *Aedon* 2014.

Guerrieri A., "La tutela dei siti UNESCO nell'ordinamento italiano, tra prospettiva interna e comparata", *Il Diritto dell'economia* 2019, no. 1.

Istat, *L'Italia dei musei*, Rome, 23 December 2019 (www.istat.it/it/files/2019/12/LItalia-dei-musei_2018.pdf).

Lamberti C., Campiani M.L. (eds.), *I centri storici tra norme e politiche*, Jovene, Napoli 2015.

Lumetti M.V., "Il centro storico, un «iperluogo» tra urbanistica, cultura, paesaggio e immaterialità", *Diritto e processo amm.* 2018, no. 2.

Macchia M., "La tutela del patrimonio culturale mondiale: strumenti, procedure, controlli" [in:] *La globalizzazione dei beni culturali*, ed. L. Casini, Bologna 2010.

Marchetti S., "La gestione dei Siti UNESCO di Villa Adriana e di Villa D'Este a Tivoli", *Aedon* 2011, no. 1.

Marchetti S., Orrei M., "La gestione dei Siti UNESCO di Villa Adriana e di Villa D'Este a Tivoli", *Aedon* 2011.

Mastellone P., "Tutela e promozione del patrimonio culturale nella disciplina internazionale ed europea: dall'insufficienza dei finanziamenti pubblici alla valorizzazione della leva fiscale per stimolare l'intervento dei privati", *Rivista di diritto tributario internazionale* 2018, no. 2.

Migliorati C., "Il sito archeologico di Pompei a rischio di cancellazione dalla lista del patrimonio mondiale", *Diritto comunitario e degli scambi internazionali* 2013, no. 4.

Ministry for Cultural Heritage and Activities and Tourism, *Il Libro Bianco: Legge n. 77/2006*, Rubbettino, Soveria Mannelli 2013.

Mourato S., Ozdemiroglu E., Hett T., Atkinson G., "Pricing Cultural Heritage: A New Approach to Resource Management", *World Economics* 2004, vol. 5, no. 3.

Pirelli M., "Tokenizzare la Gioconda? Vendere si può ma non si fa", *Il Sole 24 ore – Plus 24*, 16 maggio 2020.

Sau A., "La rivitalizzazione dei centri storici tra disciplina del paesaggio, tutela e valorizzazione del patrimonio culturale", *Le Regioni* 2016.

Seccombe P., Lehnes P. (eds.), *Marketing of Heritage Sites*, more specifically in *Heritage Interpretation for Senior Audiences Focuses on the Need for Marketing Action. A Handbook for Heritage Interpreters and Interpretation Managers,* July 2015, http://www.interpret-europe.net/fileadmin/Documents/projects/HISA/HISA_handbook.pdf.

Settis S., "Ma il museo ha un future", *La Repubblica*, 30 June 2006.

Tarasco A.L., *Diritto e gestione del patrimonio culturale*, Laterza, Bari – Roma 2019.

Tarasco A.L., *La redditività del patrimonio culturale. Efficienza aziendale e promozione culturale*, Giappichelli, Torino 2006.

Tarasco A.L., "Modelli giuridici per l'incremento della redditività del patrimonio culturale: Italia, Francia e Gran Bretagna a confronto" [in:] *Scritti in onore di Eugenio Picozza*, vol. II, Editoriale scientifica, Napoli 2019.

Tarasco A.L., "Sostenibilità del debito pubblico e gestione del patrimonio culturale (prima e dopo il coronavirus)" [in:] *Cura e tutela dei beni culturali*, eds. G. Esposito, F. Fasolino, Wolters Kluwer Cedam, Padova 2020.

Uccello Barretta L., "Quale tutela per i siti patrimonio dell'UNESCO?", *Osservatorio AIC*, 30 gennaio 2016.

## Summary

***Antonio Leo Tarasco***

**Proprietary fragmentation and public-private management of UNESCO sites owned by the Italian state**

The paper discusses the relationship between UNESCO sites belonging to the Italian State and profiles of profitability and sustainability. If it is true that the general characteristics of UNESCO's Italian (and not only Italian) sites is a heterogeneity of legal ownership, at the same time in the UNESCO sites belonging to the Italian State (twenty-five out of fifty-five: 45,55%) to the plurality of legal regimes is added a heterogeneity of management models. In this case, plurality of properties affects success, since it also affects the management of the site.

The negative effects of the fragmentation of State-owned UNESCO sites can be summarized as: 1) differences in staff recruitment; 2) differences in management models; 3) differences in the degree of available enjoyment; 4) differences in economic profitability; and 5) differences in accounting framework. If diversity is barely comprehensible when sites belong to different institutions, it is even less comprehensible when they are state-owned.

A consequence of the complete heterogeneity of legal and organizational frameworks is a heterogeneity of economic results. The gap is huge and unacceptable: Tarquinia and the Cerveteri Etruscan tombs – €38,964.84 (2018) and €57,127.00 (2019); the Coliseum archaeological park – €46,347,249.57 (2018) and €48,465,096.71 (2019). Not to mention that to such incomes, we should add the incomes from the Roman National Museum, the Ancient Art Gallery, and the State Roman museums appertaining to the Direzione Regionale musei Lazio, and sites of the Archaeological Superintendence of Rome.

If it is true that the award of UNESCO status to a site is independent, as it should be, of economic potential, it is also true that the increase of a site's economic potential is instrumental in achieving the purposes of the UNESCO Convention: protection and valorisation. The increase of a site's profitability is, therefore, a potential which is inherent to the UNESCO award and, at the same time, a requirement; it is, as it were, a means towards the ends of the UNESCO Convention. From this derives the obligation of autonomous financial reporting of UNESCO sites, something that is, at the moment, lacking in many State UNESCO sites, which currently do not have their own accounting and financial autonomy.

In conclusion, the theme of the fragmentation of ownership of the fifty-five Italian UNESCO sites and its effects on management and financial profitability makes it possible to investigate the actual consideration that the national legal system gives to UNESCO sites, i.e. an importance that, beyond official declarations, UNESCO sites have in the internal legal system.

**Keywords:** UNESCO management plans, 1972 Paris Convention, UNESCO ownership, management of UNESCO sites, law and management of cultural heritage

## Streszczenie

*Antonio Leo Tarasco*

**Pluralizm własnościowy i publiczno-prywatne zarządzanie obiektami wpisanymi na Listę Światowego Dziedzictwa UNESCO, należącymi do Republiki Włoskiej**

W artykule poddano analizie związki między obiektami światowego dziedzictwa UNESCO należącymi do Republiki Włoskiej a zagadnieniami dochodowości i ideą zrównoważonego rozwoju. Ponieważ cechą charakterystyczną statusu obiektów wpisanych na Listę UNESCO – nie tylko włoskich – jest heterogeniczność własności, w modelach zarządzania nimi pojawia się wielość reżimów prawnych. Spośród 55 włoskich obiektów własność państwową stanowi 25, co daje 45,55%. Pluralizm własnościowy przekłada się na praktykę; negatywne skutki stanu rozdrobnienia dają się zauważyć: 1) w rozbieżnych zasadach rekrutacji personelu, 2) w wielości modeli zarządzania, 3) w niejednakowym dostępie dla publiczności, 4) w różnicach w rentowności oraz 5) w różnych modelach finansowo-księgowych. Stan rozdrobnienia wywołuje niemałe trudności

w wypadku obiektów należących do różnych podmiotów, a staje się jeszcze mniej zrozumiały, gdy chodzi o obiekty państwowe.

Następstwem owej heterogeniczności jest zróżnicowanie rentowności poszczególnych obiektów. Luka jest znaczna i nie można jej zaakceptować. Przykładowo, Tarquinia i etruska nekropolia Cerveteri przynoszą €38.964,84 (rok 2018) oraz €57.127,00 (rok 2019), podczas gdy Koloseum w Rzymie — €46.347.249,57 (rok 2018) i €48.465.096,71 (rok 2019). Do przychodów tych należy dodać przychody Muzeum Narodowego w Rzymie (Museo Nazionale Romano) i Narodowej Galerii Sztuki Starożytnej (Galleria Nazionale d'Arte Antica), a także przychody muzeów państwowych należących do Regionalnej Dyrekcji Muzeów Lacjum oraz stanowisk podległych Zarządowi Archeologicznemu Rzymu. Jakkolwiek jest oczywiste, że wpisanie danego obiektu na Listę UNESCO jest i powinno pozostać niezależne od jego potencjału ekonomicznego, to sam fakt rentowności obiektu ma wpływ na realizację celów konwencji UNESCO z 1972 r., w tym na ochronę i promocję wartości kulturowych. Z tego powodu ustalenie potencjału ekonomicznego jest jednym z wymogów wpisu; pieniądze są środkiem do realizacji celów konwencji. Konsekwencją tego stanu rzeczy jest prawny obowiązek zapewnienia niezależnej sprawozdawczości finansowej, co jednakże stoi w prakseologicznej sprzeczności ze skutkami pluralizmu własnościowego: obiekty nie mają obecnie zapewnionej autonomii finansowej ani nie prowadzi się w stosunku do nich odrębnej księgowości.

Reasumując, zjawisko pluralizmu własnościowego 55 włoskich obiektów z Listy UNESCO oraz wpływ tego zjawiska na zarządzanie nimi i ich rentowność nasuwają pytanie o rzeczywistą, a nie tylko deklarowaną pozycję tych obiektów w porządku prawa krajowego.

**Słowa kluczowe**: plany zarządzania UNESCO, konwencja paryska z 1972 r., własność obiektów wpisanych na Listę UNESCO, zarządzanie obiektami wpisanymi na Listę UNESCO, prawo i zarządzanie dziedzictwem kultury

**Alessandra Lanciotti**
University of Perugia
alessandra.lanciotti@unipg.it
ORCID: 0000-0002-7746-292X

https://doi.org/10.26881/gsp.2021.2.04

# Claiming restitution of underwater cultural heritage: The Getty Bronze case

## 1. Introduction

An interesting example of the intrinsic divide that characterises the debate over restitution of cultural heritage to the country of origin[1] is given by the contention over the "Bronze Statue of a Victorious Youth", one of the few life-size Greek bronzes to have survived; it is presently on exhibition at the J.P. Getty Museum of Malibu (California). Better known as the "Getty Bronze", the unique archaeological piece attributed to Greek sculptor Lysippus (4th century BC) is the protagonist of a long lasting legal dispute between the Getty Museum and the government of Italy; the latter claims ownership of the statue as part of its own cultural heritage. This claim has been contested by the Museum, which has returned other archaeological property to Italy but refuses to repatriate the Bronze because of its convoluted history.[2]

The statue was accidentally found by some fishermen off the coast of the Mid-Adriatic Sea between Italy and Yugoslavia in 1964. It was brought ashore in the Italian port of Fano, then hidden for some time and subsequently smuggled abroad, in violation of Italian legislation on the protection of cultural heritage and in violation of custom regulations.[3] After various concealments in different states and subsequent

[1] For a general view on the debate see, among many authors: J.H. Merryman, "Two Ways of Thinking about Cultural Property", *American Journal of International Law* 1986, vol. 80, no. 4, p. 847; E. Jayme, "Globalization in Art Law: Clash of Interests and International Tendencies", *Vanderbilt Journal of Transnational Law* 2005, vol. 38, p. 927.

[2] A. Lanciotti, "The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the 'Getty Bronze'" [in:] *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, eds. S.H. Borelli, F. Lenzerini, Leiden 2012, p. 301; D. Fincham, "Transnational Forfeiture of the Getty Bronze", *Cardozo Arts & Entertainment Law Journal* 2014, vol. 32, p. 101; T. Scovazzi, "Un Atleta non ancora giunto a destinazione", *Rivista di Diritto internazionale* 2019, vol. 102, fasc. 2, p. 511.

[3] Namely, a violation of art. 510 of the Code of Navigation (which provides that the finder communicates to the maritime authority, within three days from the ship's landing, information concerning any objects he/she found at sea), and a violation of the customs law in force at the time (law of 25 September 1940, no. 1424), which for the crime of smuggling in the maritime movement of goods (art. 99) imposes the forfeiture of smuggled objects (art. 116). As for the Law on the protection of cultural heritage, see below.

changes of hands, in 1977 this precious piece was finally purchased by the curators of the Getty Museum for $3.98 million. The museum's curators have faced long criminal proceedings before Italian criminal courts because, according to Italian judges, they should have been more diligent in trying to ascertain the provenance of the bronze before purchasing it.

A first trial for the illicit export of the Getty Bronze began in 1966, when charges were brought against the alleged perpetrators of the smuggling and illicit transfer of the statue. Another case opened in 1973 before the criminal judge of Gubbio, the village where the object had been hidden before being exported. Both trials ended with a decision of acquittal for lack of evidence of all the accused: fishermen, middlemen, dealers, and others.[4] A new criminal investigation into the discovery and export of the bronze from Italy opened in 2007, under the initiative of a local citizens' group (Associazione le Cento Città*)* based in Fano, the hometown of the fishermen who had rescued the statue. During this proceeding, the Pre-Trial Judge of the Tribunal of Pesaro issued the first confiscation order relating to the statue.[5] This decision was appealed and another followed, until on 30 November 2018 the Italian Court of Cassation definitively ruled on the fate of this rare piece of antiquity – at least as far as Italian judges are concerned – issuing a final confiscation order (*confisca in executivis*) of the statue "wherever it is located".[6] With this ruling the Supreme Court upheld the confiscation order previously made by the Tribunal of Pesaro with an order of 8 June 2018, which confirmed a series of reiterated orders of forfeiture issued in 2012[7] and 2010.[8]

The Getty Museum appealed against all these judgments. At some point the case even involved the Italian Constitutional Court [9]. All these judicial decisions – issued more than thirty years after the bronze statue had left Italian soil and despite the fact

---

[4] Tribunal of Perugia on 18 May 1966; the Appeals Court of Perugia on 27 January 1967; this sentence was reversed by the Cassation Court with decision n. 1291/1968; then the Court of Appeals on 8 November 1970 acquitted all accused (these judgments are not reported but can be found in records). As regards the second case, Pretura di Gubbio, proc. n. 993/1973, this was closed on 12 March 1976 (proc. n. 1367/77) with the acquittal of all accused. For a summary in English of those trials see: D. Fincham, "Transnational Forfeiture…", p. 103.

[5] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, proc. n. 2042/07 R.G.N.R; n. 3357/07 R.G.I.P, pp. 16–17, published in *Rivista di diritto internazionale privato e processuale* 2010, p. 149. On this ruling see: A. Lanciotti, "The Dilemma of the Right…"

[6] Corte di Cassazione (III Sezione penale) 30 November 2018 n. 2779, published on 2 January 2019 n. 22 (hereinafter: Cass. n. 2779).

[7] Tribunale di Pesaro, Ordinanza of 3 May 2012**,** issued when the case was reassigned to the investigating judge of Pesaro by the Supreme Court, following a previous appeal to the Cassation Court lodged by the Getty Museum (Corte di Cassazione, Udienza in Camera di Consiglio*,* judgment n. 169/2011 of 18 January 2011, deposited on 22 February 2011).

[8] *Ibidem.*

[9] Constitutional Court, decision of 15 April 2015 n. 109 https://www.giurcost.org/decisioni/2015/0109s-15.html (accessed: 20.04.2021). In this respect, see: M. Montagna, "Il Getty Bronze: prima un giallo archeologico, poi un rebus giuridico. Profili processualistici", *Archivio penale* 2019, no. 1, p. 193; E. Mottese, "La confisca di beni culturali illecitamente esportati", *Rivista di diritto internazionale* 2019, vol. 102, no. 4, p. 1089.

that the charges against the alleged perpetrators of the smuggling had already been dismissed – demonstrate the seriousness of Italy's commitment to retaining by any possible means what it considers to be part of its national heritage. But will the attempt be successful?

## 2. Confiscation as a penalty for the crime of illicit export of cultural heritage

It is well known that Italy, as one of the major art-exporting nations, has enacted all-encompassing legislation on public ownership of cultural property. This provides that all discovered and undiscovered archaeological objects within Italian territory are considered to be part of the State's national cultural heritage and are *hors de commerce*. This regime was introduced by Law no. 1089 of 1939; at present the Code of Cultural Property and the Landscape of 2004 maintains absolute export and sale prohibitions on all archaeological troves.[10] In addition, the requirement of inalienability of State-owned property is also stated in articles 822-828 of the Civil Code of 1942.[11]

Confiscation for the benefit of the State is a sanction established by Italian law for the crime of smuggling cultural property. Article 174 para. 3 of the Code of Cultural Property penalizes the specific crime of "illegal exit or export of things of historical, artistic or archaeological interest", providing for a special possibility of confiscation of the pieces of property "unless they belong to a person not related to the crime".[12]

The case against the Getty Museum opened because the judges were not convinced that the museum's curators had acted in good faith in the acquisition of the statue. So they treated them as persons involved in the illicit trafficking for having knowingly acquired an illicitly exported archaeological property belonging to the State. The curators did not commit the crime of smuggling and illicit export of cultural property but, according to the Court, they are not unrelated to it because they relied on the assurances given by the seller's lawyer that the sale was lawful under Italian law without making further enquiries.

The Court of Cassation confirmed the confiscation specifying that such measure has no penalizing purpose but pursues a "primarily recovery purpose", being aimed at "materially restoring the situation of dominion of which, by law, the State boasts

[10] Under art. 23 of the Code of Cultural Property and the Landscape (Codice dei beni culturali e del paesaggio enacted by *Legislative Decree* n. 42 of 22 January 2004), State-owned cultural property is inalienable without a prior authorization by the Ministry of Culture, whilst art. 61 deems to be null and void all unauthorized sales and transactions of cultural property belonging to the State (see art. 65, art. 54 para. 2 letter a), art. 55, art. 10 para. 3 letter d), Code of Cultural Property).

[11] On this point, see: A. Lanciotti, "The Dilemma of the Right…", p. 306.

[12] Article 173 para. 3 of the Code of Cultural Property. Confiscation is a security measure according to which ownership is acquired by the State. An analogous measure was envisaged for the same crime by art. 66 of Law n. 1089 of 1939, the law in force at the time when the statue was found at sea.

on the illicitly expatriated property".[13] Given the peculiarity of the confiscation measure disposed independently of a contextual conviction for the crime of illegal export, the appellant denounced an erroneous application and interpretation of, *inter alia*, the rules of criminal law on forfeiture. However, the legal complexities of Italian criminal and criminal procedure law will not be tackled here, as they would warrant an article in themselves[14]. This comment will focus on the international law implications of the Cassation's decision, in particular on the arguments used in the judges' rationale to justify the application of substantive Italian law and, consequently, on the possibility for the Italian State to claim the return of such a valuable piece, which Italy contends is part of its "own" national cultural heritage.

## 3. Reflections on the determination of the law applicable to the ownership regime of illicitly exported cultural property

Among the many grounds for appeal to the Supreme Court, the claimant argued that "given the permanence of the work of art in the rooms of the Getty Museum for several decades, Californian law was the applicable law, as the law governing the material relationship between the statue and the Getty Museum" (Cass. n. 2779, para. 16.1). On the contrary, the Supreme Court decided that Italian substantive law is applicable despite the fact that "the statue was most likely found in non-territorial waters"[15] because the object was found by an Italian fishing boat and disembarked in an Italian port. Interestingly, both the Tribunal of first instance and the Cassation Court based their reasoning on a concept of national territory that includes not only the ship flying the flag of the State, but also the "extension" of the vessel consisting of the fishing net immersed on the seabed beyond the limit of territorial waters.[16] According to the judges, Italian statutory law vesting property rights in the State and declaring archaeological finds as *res extra commercium* is applicable to this case because of the mere circumstance that the boat that cast and collected the fishing net was an Italian one.[17] Conversely, it can

---

13 Cass. n. 2779, p. 34, para. 13.3.3, pp. 35, 36.

14 See: M. Montagna, "Il Getty Bronze..."; E. Mottese, "La confisca di beni culturali..."; A. Gaito, M. Antinucci, "Prescrizione, terzo estraneo e confisca *in executivis* di beni archeologici (a margine della vicenda dell'Atleta Vittorioso di Lisippo" [in:] *La giustizia patrimoniale penale*, eds. A. Bargi, A. Cisterna, vol. 2, Turin 2011, p. 1185; G. Buonomo, "La richiesta di pubblicità dell'udienza sull'appartenenza dell'Atleta di Fano", *Diritto penale e processo* 2015, no. 9, p. 1173.

15 Tribunal of Pesaro, *Ordinanza* of 12 June 2009 on jurisdiction (No. 2042/07 R.G.N.R.; No. 3357/07 R.G.I.P.) at p. 10 "In the present case, the investigations did not make it possible to identify with certainty the place where the discovery of the sculpture took place and on the basis of the investigations carried out, it can only be stated, also taking into account what was established by the Supreme Court in sentence n. 1291/1968, that the statue was most likely found in non-territorial waters". At the time of the discovery, the outer limit of the territorial sea was six nautical miles.

16 Under art. 4 of the Code of Navigation, Italian ships on the high seas are considered part of Italian territory.

17 The same interpretation was adopted before by the *Tribunal of Sciacca,* decision of 9 January 1963

be argued that, following the same line of reasoning, if it had been a vessel flying the flag of another country the discovery and the property regime of an object rescued from under water on the high seas could have been subjected to a different discipline, inspired by a different policy.[18]

## 4. The determination of the law governing the "relationship" between the statue and The Getty Museum

The Court assumed that the notion of "territory" can be expanded to include also a fishing net in the high seas, so as to rule on the issue of jurisdiction in favour of Italy. This argument, however, leaves open the question of which law governs the "material relationship between the statue and the Getty Museum", as the Cassation Court puts it (Cass. n. 2779, pp. 17–18, at paras. 6.2-6.4).

This issue needs to be broached from a conflict of law perspective. The conflict of laws in relation to property, including cultural property, is widely governed by the *lex rei sitae* principle. The Italian conflict-of-law provision follows this almost universally recognized rule. Article 51 of Law no. 218/95 on the Reform of the Private International Law System insists: "Possession, ownership and other rights *in rem* over movable and immovable property are governed by the law of the State *in which the property is situated*".[19] This provision has usually been interpreted in the sense that the *lex rei sitae* is the law in force in the State where the item was located at the time of the transfer.[20] As is typical of art cases, the Getty Bronze had passed through a number of jurisdic-

(published in *Il Foro Italiano* 1963, vol I, p. 1317) when it ruled on the acquisition to the national heritage of a Phoenician statue depicting the warrior god Melqart, casually rescued from the sea off the coast of Southern Sicily in 1955.

[18] E.g. the Admiralty Law, The law of salvage. On this point see: T. Scovazzi, "Dal Melqart di Sciacca all'Atleta di Lisippo", *Rivista di diritto internazionale privato e processuale* 2011, vol. 47(1), p. 5, 12; A. Chechi, R. Contel, M. Reinold, "Case Victorious Youth – Italy v. J. Paul Getty Museum", *Platform ArThemis, Art-Law Centre, University of Geneva*, May 2019, p. 7, https://plone.unige.ch/art-adr/cases-affaires/victorious-youth-2013-italy-v-j-paul-getty-museum (accessed: 20.04.2021). Provocatively, L. Li, A. Sargent, "The Getty Bronze and the Limits of Restitution", *Chapman Law Review* 2016, vol. 25, pp. 25, 45, wonder what would be the fate of a pre-Columbian art object rescued by an Italian ship in the Pacific Ocean.

[19] Article 51, Law n. 218/95 on the Reform of the Italian System of Private International Law of 31 May 1995 (emphasis added). This law was enacted in 1995, but at the time of the discovery of the statue in 1964 the same *lex rei sitae* rule was applicable under art. 22 of the Preliminary Dispositions to the Civil Code (Disposizioni Preliminari al codice civile).

[20] R. Clerici, "La protection des biens culturels vis-à-vis des règles italiennes de conflit", *Rivista di diritto internazionale privato e processuale* 1989, vol. 25, p. 799 ; M. Frigo, "Circulation des biens culturels, détermination del la loi applicable et méthodes de réglement des litiges", *Hague Collected Courses* 2015, vol. 375, p. 89. This approach is valid lacking any treaty-law uniform rule. For precedent case law: Tribunale di Torino, *Republic of Ecuador v. Danusso*, decision of 25 March 1982, *Rivista di diritto internazionale privato e processuale* 1982, 625; Court of Cassation, sez. I, *Ricorsi riuniti Stato francese- Ministero dei beni culturali v. De Contessini ed altri,* decision of 24 November 1995 n. 12166, *Rivista di diritto internazionale privato e processuale* 1997, p. 427.

tions before arriving in California. As acknowledged in the judgement, in the years following its discovery at sea, the statue had been the object of several transactions and border crossings (Cass. n. 2779, pp. 6–7).[21] Apparently, it was smuggled into Germany, then exported from Germany to England, perhaps passing through Brazil, then back to Germany until it ended up in the United States. From a strictly conflict-of-law perspective, all those movements across borders had an effect on the determination of the *lex rei sitae*, inevitably affecting the movable's ownership regime.[22] Therefore, if the transaction was concluded abroad, once the statue had been transferred (although illegally) into the territory of a foreign country, the "relationship between the statue and the museum" is ruled by that law. Italian substantive law on property, including the retentionist legislation governing cultural heritage, could be applied only if and to the extent to which the new *lex rei sitae,* which generally is the law of the forum, makes a specific reference to it.

## 5. Inapplicability of treaty law obligations on restitution of cultural property

The Italian retentionist legislation on cultural heritage would have been applied if the archaeological object in question was encompassed by specific uniform rules favouring the application of the *lex originis* (i.e. the law of the (cultural) origin of the disputed item). Rules of the kind are set forth by the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[23] and the European Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a EU Member State.[24] Unfortunately, the US is neither a party to the Convention, nor an EU Member State. Consequently, the case in question is not encompassed by those rules on restitution, although the "failure to apply the conventional private international law

[21] For a detailed description of all the movements of the Getty Bronze see: D. Fincham, "Transnational Forfeiture…", p. 106; L. Li, A. Sargent, "The Getty Bronze…", p. 30.

[22] On the functioning of the *lex situs rule* in cases of restitution of cultural property, see: L. Prott, "Problems of Private International Law for the Protection of the Cultural Heritage", *Hague Collected Courses* 1989, vol. 217, pp. 223, 262; K. Siehr, "International Art Trade and the Law", *Hague Collected Courses* 1993, vol. 243, p. 9; W. Kowalski, "Restitution of Works of Art Pursuant to Private and Public International Law", *Collected Courses of the Hague Academy of International Law* 2001, vol. 288, p. 17; Ch. Armbrüster, "La revendication de biens culturels du point de vue du droit international privé", *Revue critique de droit international privé* 2004, vol. 93, no. 4, p. 740; S. Symeonides, "A Choice-of-Law Rule for Conflicts involving Stolen Cultural Property", *Vanderbilt Journal of Transnational Law* 2005, vol. 38, p. 1177; E. Jayme, "Globalization in Art Law…", p. 927.

[23] The Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995, has been in force since 1 July 1998 and has been ratified by 31 states (www.unidroit.org.) including Italy, which implemented it by the Law of 7 June 1999 n. 213, but not the USA.

[24] Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast). It repealed Council Directive 93/7/EEC of 15 March 1993 on the same topic.

rules" was also raised by the defendant among the grounds for appeal (Cass. n. 2779, p. 39, para. 17.1). The case at issue does not fall within the scope of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Notwithstanding the fact that both Italy and the USA have ratified it, the disputed bronze was imported into the United States sometime between 1974 and 1978, that is before the entry into force of that Convention in both states concerned.[25] Moreover, the USA has made a reservation according to which it is committed to prohibit the importation onto American soil of cultural property coming from another contracting state only when such property has been both "documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution" and stolen from that institution "after entry into force of this Convention", in compliance with art. 7 letter b (i) of the Convention.[26] The case under examination also falls beyond the scope of the bilateral agreements concluded between the Italian government and American museums on the return of removed archaeological objects.[27]

In conclusion, given the inapplicability of treaty law rules on restitution of cultural property to the case at issue, the dispute over the return of the precious sculpture to the state that claims to be its country of origin is to be decided under the new *lex rei sitae,* i.e. the law in force in the state where the movable is presently located.

The forfeiture order issued by the Italian Court could be enforced in the United States through application of the bilateral Treaty on Mutual Assistance in Criminal Matters of 2006 (MLAT).[28] But even if so, the obligation to execute a request for "seizure, freezing and *confiscation of the proceeds or profit of crime*" set forth in art. 18 of MLAT

---

[25] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done in Paris, 14 November 1970. Italy deposited its instrument of ratification in 1978; the United States acceded in 1983, http://portal.unesco.org/en/ev (accessed: 20.04.2021).

[26] Convention on Cultural Property Implementation Act of 1983 (CPIA) Publ. L. No. 97–466, 96 Stat. 2329 (1983), current version at 19 U.S.C. §§ 2601–2613. For the text of the US reservation to the 1972 UNESCO Convention http:// portal.unesco.org/en/ev.phpRL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES (accessed: 15.03.2021).

[27] The Statue of the Victorious Youth was not included in the agreement concluded in 2007 between the Italian Ministry of Culture and the J.P. Getty Trust (the text is not public) whereby the Getty Museum agreed to return significant antiquities from its collection, see: *J. Paul Getty Museum return 26 Objects to Italy*, 21 November 21, www.getty.edu/news/press/center/statement06_getty_italy_meeting111706.html (accessed: 20.03.2021). Neither was it encompassed by the Agreement between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, done at Washington on 19 January 2001 (*I.L.M.* 2001, p. 1031). T. Scovazzi, "The Agreements between the Italian Ministry of Culture and American Museums on the Return of Removed Cultural Properties" [in:] *Cultural Heritage. Scenarios 2015–2017*, eds. S. Pinton, L. Zagato, Venice 2017.

[28] Article 1 letter g) contains the obligation to give mutual assistance "in the seizure and forfeiture of goods". See: Treaty on Mutual Assistance on Criminal Matters (MLAT) signed at Rome on 9 November 1982, S. Treaty Doc. No 25, 98th Congr. 2nd Sess. (1984), https://www.state.gov/85-1113/ (accessed: 14.03.2021).

will be accepted by the requested party, i.e. the USA, only "*to the extent permitted*" by "*its domestic law and administrative procedures*".[29] This means that, although the MLAT is considered self-executing, compliance with a request for confiscation ultimately relies on the domestic law of the requested State.

## 6. The territorial scope of the regime on public ownership of objects belonging to a national cultural heritage

The Getty strongly believes that it acquired the statue legally and insists that the bronze was imported legally into American territory after its acquisition had been highly publicized by the media, and that more than forty years have passed since this archaeological piece was placed on view at the Museum.[30] In response, the Supreme Court argues that the dispute "does not concern the legitimacy of the title that the Getty Museum can claim over the confiscated property, given that whatever the title it is obviously destined to give way in the face of the legitimate adoption of an authoritative act vesting ownership in the State (*provvedimento ablatorio*) issued by the Italian judicial authority" (Cass. n. 2779, p. 38, para. 16.2).

One may agree with the Cassation Court that the regime on public ownership of objects belonging to the cultural heritage contains overriding mandatory provisions (*lois de police* or *norme di applicazione necessaria*), respect for which is regarded as crucial by the country for safeguarding its public interests; one may also agree that these special domestic provisions are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the case following the conflict-of-law rule on property as described above.[31] But even assuming that the Italian statutory law vesting property rights in the State and declaring archaeological finds as *res extra commercium* is applicable to this case as *loi de police* and that, accordingly, an immediate right of ownership by the State arose, this law cannot *per se* have extraterritorial effect.[32] Alas, as it has been observed, "the interaction of *res extra commercium* and *lex situs* yields a regime under which the (in same cases fortuitous) physical location of the cultural property in question determines the validity of the title and under which

[29] Article 18 MLAT, *Seizure, Immobilization and Forfeiture of Assets:* "1. The Contracting Parties shall assist each other to the extent permitted by their respective laws in the seizure, immobilization and forfeiture of the fruits and instrumentalities of offenses. 2. Proceeds or property forfeited to a Contracting Party pursuant to this Article *shall be disposed of* by that Party *according to its domestic law and administrative procedures*. Either State may transfer all or part of such proceeds or property, or the proceeds of its sale, to the other State*, to the extent permitted by their respective laws, upon such terms as they may agree"* (emphases added).

[30] *Talking about the Getty Bronze. Conversation on the Court of Cassation's Recent Decision surrounding Victorious Youth*, 11 December 2018, https://blogs.getty.edu/iris/talking-about-the-getty-bronze/

[31] See: art. 17 of Law no. 218/95 on the Reform of the System of Private International Law.

[32] C. Staker, "Public International law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations", *British Yearbook of International Law* 1987, vol. 58, issue 1, pp. 151, 185; K. Siehr, "International Art Trade…", pp. 85–86.

legal protection for cultural property can be defeated by smuggling".[33] Without having the opportunity to further explore this aspect, it should be noted that in US courts the nature of *res extra commercium* of imported cultural property imposed by foreign law is generally not recognized as such.[34]

## 7. Considerations on a possible enforcement of the confiscation order abroad

In the absence of a treaty-based rule applicable to the case in question, imposing the return of the removed archaeological treasure, the only way for the Italian government to recuperate it is via the enforcement of the confiscation order in the USA. Indeed, this has been done via application of the MLAT.[35] However, success for such an action seems rather difficult.[36] An argument against enforcement is that the disputed statue was never in the actual possession of the Italian State and that there is no evidence that it was found within Italian "internationally recognized borders". Moreover, no one has been convicted for the crime of theft or illegal export.[37]

As a matter of fact, if we examine the few precedents in which US courts have enforced confiscation measures to comply with requests for repatriation made by foreign governments, we find that confiscation was ordered only when the requesting foreign state was able to prove that the present owner was aware of the fact that the requested antiquities had been stolen from its territory and imported into the USA

---

33 O. Metzger, "Making the Doctrine of *Res Extra Commercium* Visible in United States Law", *Texas Law Review* 1995–1996, vol. 74, pp. 615, 625, 626.

34 Generally, US courts do not embrace a solution that favours the application of the law of the state where the chattel was initially located. See, for instance, *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg*, 717 F. Supp.1374 (S.D. Ind. 1989) afff 'd, 917F.2nd 278 (7th Cir. 1990), where the court applied Indiana substantive law and not the law of the country of provenance to determine the ownership of Byzantine mosaics removed from a church in Cyprus. O. Metzger, "Making the Doctrine of *Res Extra Commercium*…", p. 625; D. Fincham, "How Adopting the *Lex Originis Rule* Can Impede the Flow of Illicit Cultural Property", *Columbia Journal of Law and the Arts* 2008, vol. 32, p. 111; A. Weinder, *Kulturgüter als* res extra commercium *im internationalen Sachenrecht*, Berlin – New York 2010, p. 93; J. Gordley, "The Enforcement of Foreign Law: Reclaiming One Nation's Cultural Heritage in Another Nation's Courts" [in:] *Enforcing Cultural Heritage Law*, eds. F. Francioni, J. Gordley, Oxford University Press, Oxford 2013, p. 110; P. Gerstenblith, "Enforcement by Domestic Courts, Criminal Law and Forfeiture in Recovery of Cultural Objects" [in:] *Enforcing Cultural Heritage Law*…; C. Roodt, "Restitution of Art and Cultural Objects and its Limits", *Comparative and International Law Journal of Southern Africa* 2013, vol. XLVI, p. 288.

35 See: A. Lanciotti, "The Dilemma of the Right to Ownership...", p. 322.

36 J.H. Merryman, "The Retention of Cultural Property", *U.C Davis Law Review* 1988, vol. 21, no. 3, pp. 477, 484; J. Fishman, "Locating the International Interest in International Cultural Property Disputes", *The Yale Law Journal of International Law* 2010, vol. 35, pp. 347, 355; N. Feldman, "The Getty Bronze shouldn't go back to Italy", *Bloomberg Opinion*, 5 December 2018.

37 P. Gerstenblith, "The Public Interest in the Restitution of Cultural Objects", *The Connecticut Journal of International Law* 2001, vol. 16, pp. 197, 216; D. Fincham, "Transnational Forfeiture…", p. 121. See: *Peru v. Johnson* 720 F. Supp. 810 (C.D. Calif. 1989), aff'd, 933 F.2d 1013 (9th Cir. 1991).

in breach of criminal law,[38] namely the National Stolen Property Act, 1988 (NSPA).[39] Confiscation was also awarded when the US court assessed a violation of custom regulations, in particular, when the holder of the requested object had made false statements about the origin of the imported property.[40] Naturally, restitution has been granted when the specific request fell within the scope of the domestic implementing legislation of the 1970 UNESCO Convention, as it was proved that the archaeological property had been stolen from a public institution of the requesting state after the entry into force of the Convention in the USA.[41]

Ultimately, in successful cases of restitution of removed cultural property, confiscation was granted via application of American domestic laws and not of the foreign law of the requesting state.[42] It can be further noted that US courts generally consider the requesting State's cultural heritage law as a mere "fact" of the case that proves that the possessor of the antiquity was aware of the factual circumstance that the object

---

[38] In *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), confiscation was awarded because it was proved that the accused knew that the imported goods were owned by the State of Mexico; the court recognized "the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures" (*McClain* I, 545 F.2d at 992). B. Rosecrance, "Harmonious Meeting: The McCain Decision and the Cultural Property Implementation Act", *Cornell International Law Journal* 1986, vol. 19, p. 311.

[39] Section 545 of NSPA (18 U.S.C. paras. 2311–2321 (1988) criminalizes the possession of property valued at $5,000 or more that crossed a federal or state border after the property was stolen, if the possessor knows that the property was obtained by theft. See: J. Anglim Kreder, "The Choice Between Civil and Criminal Remedies in Stolen Art Litigation", *Vanderbilt Journal of Transnational Law* 2005, vol. 38, pp. 1199, 1206; G. Nowell, "American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches", *Syracuse Journal of International Law and Commerce* 1978, vol. 6, no. 1, pp. 77, 89, 90.

[40] In *United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997) and 184 F.3d 131 (2nd Cir. 1999), the confiscation was ordered on the basis of a violation of US customs legislation, due to false declarations written in customs forms about the actual origin of an archaeological find and its actual value (Switzerland was indicated instead of Sicily and a value of only $250 was given). In *United States v. Hollinshead*, 495, F.2d 1154 (9th Circ. 1974), the accused was found guilty of "fraudulent custom declaration and of conspiracy to import stolen goods" for not declaring to customs that he imported a Mayan stele with bas-reliefs from Guatemala, while being aware that its removal was against the law of that country.

[41] As already noted, treaty-law obligations of cooperation in the fight against illicit trafficking in cultural property have a limited scope in the USA. In *United States v. A Roman Marble Torso of Artemis*, No. 96-CV-2929 (S.D.N.Y. 5 July 1996), the Federal District Court in the Southern District of New York applied the *Convention on Cultural Property Implementation Act*, 1983. It implemented articles 7 and 9 of the 1970 UNESCO Convention and ordered the forfeiture of a marble torso despite the fact that the defendant had purchased it in good faith. The torso from the 1st century CE, depicting Artemis, was stolen from a convent near Naples in Italy in 1988, that is, after the entry into force of the UNESCO Convention in the two countries involved.

[42] S.K. Urice, "Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act", *New Mexico Law Review* 2010, vol. 40, pp. 123, 127: "the possession of an *illegally* exported artwork that has been *legally* imported into the United States cannot be subject to legal action merely because the work had been transported in violation of the export rules of the foreign State"; see also: L. Kaye, "Art Wars: The Repatriation Battle", *New York University Journal of International Law and Politics* 1998, vol. 31, no. 1, pp. 79–80.

he/she imported into the USA had been "stolen" abroad, according to the definition of the term "stolen" given by the US National Stolen Property Act.[43] Conversely, American courts remain rather reluctant to apply the so called "blanket cultural patrimony statutes", i.e. foreign nations' export laws and vesting statutes that, like the Italian one, attribute to the State the exclusive ownership of archaeological troves,[44] In sum, foreign export prohibitions are enforced only when confirmed by domestic import barriers.

## 8. Conclusions

The Getty Bronze case clearly demonstrates the inadequacy of the *lex rei sitae* rule to regulate disputes relating to the return of antiquities claimed to belong to a national cultural heritage. Solutions favourable to the recognition of the constraints imposed on cultural heritage by the *lex originis* have been authoritatively suggested for many years.[45] However, even if so, in the specific case examined here, doubts may arise as to the identification of Italy as the real country of origin of the sculpture, considering that it was found accidentally by fishermen in an unknown location, presumptively on the high seas, where it is believed that a Roman ship carrying the statue from Greece was shipwrecked in the 1st century BC.

In this respect, the appellant lamented the "violation of the obligation to motivate the decision with regard to the demonstration of the existence of solid links between the national cultural environment and the artefact in question which, demonstrating it belongs to the Italian artistic heritage, justify the particular protection afforded" (Cass. n. 2779, p. 39, para. 18.1). The appellant argued that it seems simplistic to indicate Italy as the only country of origin of the disputed Greek archaeological trove. After all, the connections with Italian territory are not so "solid", consisting only of a fortuitous fishing up and a brief and clandestine stay on Italian soil during the twentieth century but probably never before.[46] In rejecting this specific ground for complaint, the Supreme Court has embarked on a broad digression aimed at reconstructing the existence of a historical *continuum* between ancient Greek civilization and the Italian peninsula, in

[43] K. Vitale, "The War on Antiquities: United States Law and Foreign Cultural Property", *Notre Dame Law Review* 2009, vol. 84, pp. 1835, 1854; M. Murali, "Black Beauty-How Schultz and the Trial of Marion True Changed Museums Acquisitions", *American University Criminal Law Brief* 2012, vol. 7, p. 55; J. Anglim, "Crossroads in the Great Race: Moving Beyond the International Race to Judgement in Disputes over Artwork and Other Chattels", *Harvard International Law Journal* 2004, vol. 45, p. 239.

[44] J. Hugues, "The Trend Toward Liberal Enforcement of Repatriation Claims, in Cultural Property Disputes", *George Washington International Law Review* 2000–2001, vol. 33, pp. 131, 152.

[45] Institut de droit international, Session de Bâle 1991, "International Sale of Work of Art from the Angle of the Protection of Cultural Heritage", *Annuaire de l'Institut de droit international* 1992, vol. II, p. 403; T. Pecoraro, "Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law", *Virginia Journal of International Law* 1990, vol. 31, issue 1, pp. 1, 11 ff.; K. Siehr, "International Art Trade…", p. 106; D. Fincham, "How Adopting the *Lex Originis Rule*…", p. 111.

[46] A. Chechi, R. Contel, M. Reinold, "Case Victorious Youth…", p. 7; L. Li, A. Sargent, "The Getty Bronze…", p. 44.

an attempt to legitimize the inclusion of the disputed masterpiece within Italy's national heritage from a historical point of view (Cass. n. 2779, pp. 39–40, para. 18.1 f.). In any case, one question remains open: who owns the past?

It is undeniable that the continuation of this long-lasting litigation is very costly for all the actors involved and risks jeopardizing cooperation in cultural matters between the United States and Italy with reference to other disputed works of art. As has been achieved before,[47] an agreement in the direction of settling through negotiations the litigation in order to reach an equitable solution would be the best option. In this regard, the appellant asked the judge to examine the possibility of applying a measure less burdensome than confiscation, which would have been more respectful of the relationship of proportionality between the legal measure adopted by the Court and the purposes it pursued (Cass. n. 2779, p. 31). The Court did not consider such an option.

Now, given the improbability of a successful enforcement of the confiscation order in the USA, an alternative solution should be envisaged. A possible settlement to overcome the *impasse* can be a long-term loan of the sculpture to the American museum[48]. This proposal can offer a mutual advantage: the Getty Museum could continue to exhibit the bronze in its collection in the Malibu Museum where the statue represents one of the main attractions, while the Italian government could receive a fee for the loan which it could invest in other cultural activities.[49] Nonetheless, such a compromise solution can only be based on the acknowledgment by all the parties to the dispute that the "Victorious Youth" definitively belongs to Italy.

## Literature

Anglim J., "Crossroads in the Great Race: Moving Beyond the International Race to Judgement in Disputes over Artwork and Other Chattels", *Harvard International Law Journal* 2004, vol. 45.

Anglim Kreder J., "The Choice Between Civil and Criminal Remedies in Stolen Art Litigation", *Vanderbilt Journal of Transnational Law* 2005, vol. 38.

Armbrüster Ch., "La revendication de biens culturels du point de vue du droit international privé", *Revue critique de droit international privé* 2004, vol. 93, no. 4.

Buonomo G., "La richiesta di pubblicità dell'udienza sull'appartenenza dell'Atleta di Fano", *Diritto penale e processo* 2015, no. 9.

Chechi A., Contel R., Reinold M., "Case Victorious Youth – Italy v. J. Paul Getty Museum", *Platform ArThemis, Art-Law Centre, University of Geneva*, May 2019, https://plone.unige.ch/art-adr/cases-affaires/victorious-youth-2013-italy-v-j-paul-getty-museum (accessed: 20.04.2021).

Clerici R., "La protection des biens culturels vis-à-vis des règles italiennes de conflit", *Rivista di diritto internazionale privato e processuale* 1989, vol. 25.

[47] Agreement concluded in 2007 between the Italian Ministry of Culture and the J.P. Getty Trust.

[48] A. Lanciotti, "Il Getty Bronze: prima un giallo archeologico, poi un rebus giuridico. Profili internazionalistici", *Archivio penale* 2019, no. 1, pp. 175, 192.

[49] J. Cuno, *Who Owns Antiquity?: Museums and the Battle over Our Ancient Heritage*, Princeton University Press, Princeton 2008, p. 39; S. Spagnoli, *Over Cultural Property: The Case of Italy v. J. Paul Getty Museum, Thesis Submitted to the Faculty of the Department of Arts Administration*, Savannah College of Art and Design, Georgia 2011, p. 86 see both authors endorse such a solution.

Cuno J., *Who Owns Antiquity?: Museums and the Battle over Our Ancient Heritage*, Princeton University Press, Princeton 2008.

Feldman N., "The Getty Bronze shouldn't go back to Italy", *Bloomberg Opinion*, 5 December 2018.

Fincham D., "How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property", *Columbia Journal of Law and the Arts* 2008, vol. 32.

Fincham D., "Transnational Forfeiture of the Getty Bronze", *Cardozo Arts & Entertainment Law Journal* 2014, vol. 32.

Fishman J., "Locating the International Interest in International Cultural Property Disputes", *The Yale Law Journal of International Law* 2010, vol. 35.

Frigo M., "Circulation des biens culturels, détermination del la loi applicable et méthodes de réglement des litiges", *Hague Collected Courses* 2015, vol. 375.

Gaito A., Antinucci M., "Prescrizione, terzo estraneo e confisca *in executivis* di beni archeologici (a margine della vicenda dell'Atleta Vittorioso di Lisippo)" [in:] *La giustizia patrimoniale penale*, eds. A. Bargi, A. Cisterna, vol. 2, Turin 2011.

Gerstenblith P., "Enforcement by Domestic Courts, Criminal Law and Forfeiture in Recovery of Cultural Objects" [in:] *Enforcing Cultural Heritage Law*, eds. F. Francioni, J. Gordley, Oxford University Press, Oxford 2013.

Gerstenblith P., "The Public Interest in the Restitution of Cultural Objects", *The Connecticut Journal of International Law* 2001, vol. 16.

Gordley J., "The Enforcement of Foreign Law: Reclaiming One Nation's Cultural Heritage in Another Nation's Courts" [in:] *Enforcing Cultural Heritage Law*, eds. F. Francioni, J. Gordley, Oxford University Press, Oxford 2013.

Hugues J., "The Trend Toward Liberal Enforcement of Repatriation Claims, in Cultural Property Disputes", *George Washington International Law Review* 2000–2001, vol. 33.

*Institut de droit international*, *Session de Bâle* 1991, "International Sale of Work of Art from the Angle of the Protection of Cultural Heritage", *Annuaire de l'Institut de droit international* 1992, vol. II.

*J. Paul Getty Museum return 26 Objects to Italy,* 21 November 21, www.getty.edu/news/press/center/statement06_getty_italy_meeting111706.html (accessed: 20.03.2021).

Jayme E., "Globalization in Art Law: Clash of Interests and International Tendencies", *Vanderbilt Journal of Transnational Law* 2005, vol. 38.

Kaye L., "Art Wars: The Repatriation Battle", *New York University Journal of International Law and Politics* 1998, vol. 31, no. 1.

Kowalski W., "Restitution of Works of Art Pursuant to Private and Public International Law", *Collected Courses of the Hague Academy of International Law* 2001, vol. 288.

Lanciotti A., "Il Getty Bronze: prima un giallo archeologico, poi un rebus giuridico. Profili internazionalistici", *Archivio penale* 2019, no. 1.

Lanciotti A., "The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the 'Getty Bronze'" [in:] *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, eds. S.H. Borelli, F. Lenzerini, Leiden 2012.

Li L., Sargent A., "The Getty Bronze and the Limits of Restitution", *Chapman Law Review* 2016, vol. 25.

Merryman J.H., "The Retention of Cultural Property", *U.C Davis Law Review* 1988, vol. 21, no. 3.

Merryman J.H., "Two Ways of Thinking about Cultural Property", *American Journal of International Law* 1986, vol. 80, no. 4.

Metzger O., "Making the Doctrine of *Res Extra Commercium* Visible in United States Law", *Texas Law Review* 1995–1996, vol. 74.

Montagna M., "Il Getty Bronze: prima un giallo archeologico, poi un rebus giuridico. Profili processualistici", *Archivio penale* 2019, no. 1.

Mottese E., "La confisca di beni culturali illecitamente esportati", *Rivista di diritto internazionale* 2019, vol. 102, no. 4.

Murali M., "Black Beauty-How Schultz and the Trial of Marion True Changed Museums Acquisitions", *American University Criminal Law Brief* 2012, vol. 7.

Nowell G., "American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches", *Syracuse Journal of International Law and Commerce* 1978, vol. 6, no. 1.

Pecoraro T., "Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law", *Virginia Journal of International Law* 1990, vol. 31, issue 1.

Prott L., "Problems of Private International Law for the Protection of the Cultural Heritage", *Hague Collected Courses* 1989, vol. 217.

Roodt C., "Restitution of Art and Cultural Objects and its Limits", *Comparative and International Law Journal of Southern Africa* 2013, vol. XLVI.

Rosecrance B., "Harmonious Meeting: The McCain Decision and the Cultural Property Implementation Act", *Cornell International Law Journal* 1986, vol. 19.

Scovazzi T., "Dal Melqart di Sciacca all'Atleta di Lisippo", *Rivista di diritto internazionale privato e processuale* 2011, vol. 47(1).

Scovazzi T., "The Agreements between the Italian Ministry of Culture and American Museums on the Return of Removed Cultural Properties" [in:] *Cultural Heritage. Scenarios 2015–2017*, eds. S. Pinton, L. Zagato, Venice 2017.

Scovazzi T., "Un Atleta non ancora giunto a destinazione", *Rivista di Diritto internazionale* 2019, vol. 102, fasc. 2.

Siehr K., "International Art Trade and the Law", *Hague Collected Courses* 1993, vol. 243.

Spagnoli S., *Over Cultural Property: The Case of Italy v. J. Paul Getty Museum, Thesis Submitted to the Faculty of the Department of Arts Administration*, Savannah College of Art and Design, Georgia 2011.

Staker C., "Public International law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations", *British Yearbook of International Law* 1987, vol. 58, issue 1.

Symeonides S., "A Choice-of-Law Rule for Conflicts involving Stolen Cultural Property", *Vanderbilt Journal of Transnational Law* 2005, vol. 38.

Urice S.K., "Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act", *New Mexico Law Review* 2010, vol. 40.

Vitale K., "The War on Antiquities: United States Law and Foreign Cultural Property", *Notre Dame Law Review* 2009, vol. 84.

Weinder A., *Kulturgüter als* res extra commercium *im internationalen Sachenrecht*, Berlin – New York 2010.

## Summary

*Alessandra Lanciotti*

**Claiming restitution of underwater cultural heritage: The Getty Bronze case**

This article focuses on the legal questions raised by the convoluted story of the statue known as the Getty Bronze, an ancient sculpture dating back to the 4th century BC found in the Adriatic Sea off the coast of Italy over fifty years ago and currently on exhibit at the Getty Museum in California. The dispute between the Museum and the Italian State has been going on for many years. With a recent decision, the Italian Supreme Court confirmed the confiscation order with respect to the statue "wherever it is located". But can such an order be enforced abroad and the antiquity returned to the claimant state? Taking its cue from this decision, the article discusses the law applicable to the regime of illegally exported archaeological properties demonstrating the inadequacy of the *lex rei sitae* rule to regulate disputes relating to the return of antiquities that are part of a state's cultural heritage. It also analyses the issue of enforcement of the confiscation order abroad, suggesting a possible alternative solution to solve this long drawn out judicial affair.

**Keywords:** underwater cultural heritage, restitution of cultural property, confiscation, *lex rei sitae* rule, return of antiquities

## Streszczenie

*Alessandra Lanciotti*

**Roszczenia restytucyjne z zakresu podwodnego dziedzictwa kultury – sprawa Brązu Getty'ego**

W artykule przytoczone skomplikowane dzieje antycznej rzeźby znanej jako Brąz Getty'ego (Atleta z Fano, Zwycięski Młodzieniec), datowanej na IV wiek p.n.e. i wydobytej przeszło 50 lat temu z dna Adriatyku u wybrzeży Włoch, a obecnie znajdującej się w Muzeum Getty'ego w Kalifornii. Spór Muzeum z Republiką Włoską trwa od lat; niedawny wyrok włoskiego Sądu Najwyższego utrzymał w mocy nakaz wydania rzeźby „gdziekolwiek się ona znajduje". Czy nakaz taki może być wykonany za granicą i czy zabytek powróci do Włoch? W artykule poddano analizie prawo właściwe dla nielegalnie wywiezionych dóbr kultury i wskazano przy tym na nieadekwatność zasady *lex rei sitae* do rozwiązywania sporów windykacyjnych, których przedmiotem są rzeczy będące częścią dziedzictwa kultury całego kraju. Poruszono także zagadnienia wykonania za granicą krajowych nakazów wydania rzeczy i zaproponowano alternatywne rozwiązanie zadawnionego sporu.

**Słowa kluczowe:** podwodne dziedzictwo kultury, restytucja dóbr kultury, nakaz wydania, zasada *lex rei sitae*, zwrot dzieł sztuki antycznej

**Anna Gerecka-Żołyńska**
Adam Mickiewicz University, Poznań
gerecka@amu.edu.pl
ORCID: 0000-0001-5897-4447

https://doi.org/10.26881/gsp.2021.2.05

# International and transnational conditions of penalization of illegal export of cultural property from the territory of a legitimate state

## 1. Introductory remarks

The experiences of the Second World War and the approval by the international community of the rules of cooperation resulting from the adoption of the United Nations Charter,[1] the announcement of the Universal Declaration of Human Rights,[2] and the development of the Geneva Conventions[3] created new conditions for the development of legal protection of cultural property.

In this context, the creation of UNESCO in 1946[4] was of key importance, as, since the 1950s, it has sought to coordinate various aspects of legal protection of cultural property, and more broadly of the world's cultural heritage,[5] through cooperation between states. In this regard, UNESCO also supports legislative initiatives undertaken by other organizations, primarily the European Union and the Council of Europe, but also those with lesser visibility, such as UNIDROIT.[6]

The intergovernmental agreements which intended to preserve the integrity of national cultural heritage and to restrict the possibilities of export of cultural property outside the territory of an authorized country were among the first focuses of UNESCO activities. The result of this cooperation was the adoption in 1970 of the Convention on measures aimed at the prohibition and prevention of the illegal transportation,

---

[1] UN Charter; 1 UNTS VXI.

[2] Text in: E.J. Osmańczyk, *Encyklopedia ONZ i stosunków międzynarodowych*, Warszawa 1986, pp. 117–118.

[3] In particular, the Convention Relative to the Protection of Civilian Persons in Time of War, signed at Geneva on 12 August 1949, *Journal of Laws* of 1956, No. 38, item 171, Annex.

[4] https://en.unesco.org/about-us/introducing-unesco (accessed: 14.04.2021).

[5] The concept of "world cultural heritage" was formulated in art. 1 of the Convention on the Protection of the World Cultural and Natural Heritage, adopted by the UNESCO General Conference in Paris on 16 November 1972, *Journal of Laws* of 1976, No. 32, item 190.

[6] https://www.unidroit.org/statute (accessed: 14.04.2021).

exportation, and transfer of cultural property.[7] The Convention recognizes as illegal import, export, and transfer of ownership of cultural property any action taken in this respect in breach of its provisions (art. 3 of the 1970 Convention). It is worth recalling that this group of illegal activities includes, *inter alia*, the forced transfer to another state of ownership of cultural property and its export in conditions of a lack of sovereignty (art. 11 of the Convention), which innovatively also signalled the problem of restitution of cultural property for newly created states – as a result of the abolition of colonial dependencies.[8]

When assessing the significance of the 1970 Convention in terms of the degree to which it obliges the implementation of protective measures in the internal systems of states in order to counteract the acquisition of cultural property illegally removed from the territory of another state, it is wrong to limit domestic activities only to transactions carried out by museums and similar institutions (art. 7 letter a) of the 1970 Convention), as this solution excludes the practical use of the control mechanisms proposed in the Convention for transactions between private persons. The prohibition of the importation of stolen goods into the territory of a state was also narrowly defined, as the Convention covered only cultural property stolen from a museum or from a religious or secular historic public building, or from another similar institution (art. 7 letter b) of the 1970 Convention). Considering the *ratio legis* of the Convention, the provisions contained in art. 8, which postulate that the unlawful behaviour indicated in the Convention be subject to penalties (criminal or administrative) imposed by state parties, should be considered as correct. Therefore, the issue of sanctions was resolved on the basis of the "minimum rule" used at the level of international cooperation, which leaves state parties complete freedom as to the choice of their type and level of sanctions.

The problem of the return of cultural property lost from the territory of a state as a result of the commission of a prohibited act, raised in the UNESCO Convention of 1970, returned in the international forum with the adoption in 1995 of the UNIDROIT Convention on the theft or illegal export of cultural objects.[9] Because it also applies to transactions made by private persons, it can be said that it complements the limitations of the 1970 Convention. In the Preamble to the UNIDROIT Convention, it is emphasized that one of the aims of the Convention is "(...) to facilitate the restitution and

---

[7] Convention concerning the Measures to Prohibit and Prevent the Illegal Importation, Export and Transfer of Ownership of Cultural Property, signed in Paris on 17 November 1970, *Journal of Laws* of 1974, No. 20, item 106.

[8] The establishment by UNESCO of the Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation proves the importance attached to the problem (Resolution 20/C4/7.6/5 adopted during the 20th Session of the UNESCO General Conference on 24 October – 28 November 1978). For more on this topic, see: A. Chechi, "Cooperation to Safeguard the Human Dimension of Cultural Heritage and to Secure the Return of Wrongfully Removed Cultural Objects" [in:] *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, eds. S. Borelli, F. Lenzrini, Leiden 2012, p. 352.

[9] UNIDROIT Convention on Stolen or Illegal Export of Cultural Objects, adopted in Rome on 24 June 1995.

return of cultural property and to provide remedial measures, such as compensation, needed to restore their possession and return" (recital 4). Among the possibilities of recovering lost cultural property, art. 5 of the Convention provides for the possibility of conducting a dispute before a competent court or other authority of the petitioned state in the territory of which the illegally exported property is located, in order to obtain an order to return such property to the petitioning state (para. 1). The solutions proposed in the Convention are mainly of a formal and legal nature; in particular they define the type, scope, and conditions of the parties' participation in activities that should be undertaken by participants in the dispute. The convention in general does not contain substantive regulations; however, justifying the need for their preparation, the Preamble generally mentions the dangers of illegal trade in cultural property, robbery of archaeological excavations, and finally the illegal export of cultural property. Against this background, art. 3 para. 2, which directly relates to the concept of "theft", requires that the obtaining of cultural goods as a result of illegal archaeological excavations be included within its scope, when the law of the country of origin of the cultural goods prohibits such behaviour.

On the other hand, the Convention on offenses related to cultural property, prepared by the Council of Europe in 2017,[10] is of a different character. This is because its main goal is to prevent and combat illegal trade in and destruction of cultural goods, also in cooperation with other international organizations, especially those whose activities include combating terrorism and organized crime. The spectrum of problems included in the 2017 Convention is wide, but the substantive criminal law regulations – Chapter II (articles 3–9) is devoted to these – are of key importance. Because of the scope of the regulations of a substantive criminal nature, the 2017 Convention is unique in this respect, as it does not use the "minimum rule" in the definition of penalized behaviour and the imposition of sanctions on it.

The Nicosia Convention criminalizes acts that directly threaten cultural property, such as theft, unlawful excavation, illegal acquisition, and behaviour consisting in forging documents, destroying, or damaging cultural property, if committed intentionally. All of the above-mentioned acts are, to a greater or lesser extent, related to the problem of exporting cultural property from the territory of a state; however, there is no doubt that this problem becomes particularly current in conjunction with the act of illegal trade in cultural property, including, in particular, its import, export, and placing on the market.

It follows from the justification attached to the Convention that the unification of the basic provisions of substantive criminal law in the field of the protection of cultural property strengthens the national systems of criminal law protection by establishing common standards. Because of the lack of universal models, legal loopholes or defective regulations existing in individual internal systems limit the possibilities of prosecuting and combating crimes against cultural property. In this context, in connection

[10] Council of Europe Convention on Offences relating to Cultural Property, done in Nicosia on 19 May 2017.

with the transnational nature of the crime of illegal export of an item of cultural property from the territory of an affected state and resulting from the obligation to return the illegally exported property to the affected state, problems can be seen, such as different limitation periods for prosecuting crimes in individual countries, different rules for protecting buyers in good faith, and differences in the type and effectiveness of legal measures at the disposal of customs and border protection units of countries not belonging to the European Union. As a result, the perpetrators' knowledge of defective or incomplete regulations defining the legal conditions for the importation and removal of cultural property from the territories of individual countries contributes to the impunity that perpetrators enjoy with regard to this type of crime.

In European Union law relating to the issue of the search for and recovery of cultural property lost as a result of committing a crime, the following instruments are crucial: the Council regulation on the export of cultural goods[11] and the Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State.[12] The need to introduce this type of legal instruments was directly related to the creation of a common market in the area of the then European Economic Community.[13] It was rightly assumed that the free movement of goods would favour various illegal activities, especially their illegal movement.[14]

Against this background, the jurisprudence of the Court of Justice of the European Union (CJEU) also plays an important role. Its intervention may turn out to be necessary, for example, in the event of doubts about the application of restrictions allowed by art. 36 TFEU[15] to the application of the principle of free movement of goods due to the "protection of national cultural goods of artistic, historical or archaeological value" (recital 2 of the preamble to the 2014 Directive). The need to take into account the position of the CJEU may also arise in the event of controversy when assessing the definitions of cultural goods adopted by individual nation states, for the creation of which they have been granted competence in art. 36 TFEU (recital 3 of the 2014 Directive Preamble).

---

[11] Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods, OJ L 39, 10.02.2009, p. 1.

[12] Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State, amending Regulation EU No 1024/2012, OJ L 159, 28.05.2014, p. 1.

[13] It is worth recalling that the above-mentioned legal instruments do not correspond to those that were originally adopted with the creation of the common market; the original basis was Council Directive 93/7/EEC of 15. 03. 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (OJ L 74, 27.03.1993, p. 74) and Council Regulation (EEC) No 3911/92 of 9.12.1992 on the export of cultural goods.

[14] For more on this topic, see: A. Mattera, "La libre circulation des œuvres d'art à l'intérieur de la Communauté et la protection des trésors nationaux ayant une valeur artistique, historique ou archéologique", *Revue du Marché Commun de l'Union Européenne* 1993, no. 2.

[15] Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47.

The Regulation of 2008 recognizes the requirement to present a permit issued by the relevant Member State as a measure guaranteeing a uniform level of protection to cultural goods in the event of an intention to export them outside the territory of the European Union. The effectiveness of such a measure was connected, firstly, with the need to clearly define it and, secondly, to define implementation procedures (recital 4 of the Preamble). At the same time, it was stipulated that the legal systems of the Member States must provide for sanctions for violating the rules for the export of cultural goods outside their territory. In this case, the Regulation, based on the aforementioned "minimum rule", similarly to the aforementioned acts of international law, does not contain any suggestions as to the choice of the criminal or administrative nature of sanctions, their type, and amount. However, it requires, unlike the aforementioned legal acts, that sanctions should be established taking into account such quantifiers as effectiveness, proportionality, and severity (art. 9).

Violation of the rules set out in the Regulation of 2008 makes the export of a cultural object from the territory of the authorized state unlawful, and the adopted solution is important as it directly affects the substantive scope of application of the Directive on the return of cultural objects unlawfully removed from the territory of a Member State. This state of affairs clearly results from art. 2 point 2 letters a) and b) of the Directive, which recognizes the following as "unlawful removal" of a cultural object from the territory of a Member State:

- the removal of a cultural object from the territory of a Member State in breach of its provisions on the protection of national cultural goods or in breach of the Regulation on the export of cultural goods (letter a);
- failure to return a national treasure before the end of the period of lawful temporary removal or any breach of another condition for such temporary removal (letter b).

## 2. A model approach to the criminalization of the act of illegal export of national cultural property from the territory of a Member State based on the law of the European Union

In European Union law, the basis for considering the penalisation of behaviour consisting in illegal export of a national cultural good outside the territory of a Member State, as already noted, is the Council Regulation on the export of cultural goods and the Directive of the European Parliament and of the Council on the return of cultural goods unlawfully removed from territory of a Member State. It follows from the above-mentioned definition of "unlawful removal of a cultural good from the territory of a Member State" contained in the Regulation that the export of a cultural object from the territory of a Member State may be considered illegal, not only if the illegality already existed at the time of exportation, but also when, after the goods have been legally removed, the conditions for the legality of exportation are violated. The latter

situation mainly concerns the temporary export of a cultural object and arises when the time limit set for the return of the cultural object to the territory of the Member State from which it was withdrawn is exceeded. The Regulation points out that in the event of exceeding the deadline for return, the Regulation does not make the illegal export of a national cultural object conditional on the distinction of the type of person responsible for its return. The export of a national cultural good will be illegal, irrespective of whether it was carried out by a private person or by a person professionally involved in the protection of, display of or trade in cultural goods. However, the scope of art. 2 point 2 letter b will not apply to cases where the exported object legally belongs to the person who exports it or who agrees to its export, and only after leaving the territory of the Member State, will it be classified as a cultural object which requires an export certificate to be legally exported. This situation corresponds to the principle of *lex retro non agit*.

In art. 2 point 2 of the Regulation, both in the paragraph marked with letter a) and in the paragraph marked with letter b), no reference is made to the future, so the possible return of the cultural object is irrelevant for the recognition of its removal as illegal, and, thus, does not affect the determination of the legal liability of the perpetrator due to illegal removal. It is also irrelevant for the initiation of the procedure whether the fact of illegal export was discovered by the customs authorities or other officials in connection with the crossing of a state border, or whether a notification of illegal export of cultural property was submitted by conservation supervisory authorities to the competent authorities.

When defining the illegality of removing an item of national cultural property from the territory of a member state, the illegality is not linked to necessary damage of national heritage resources. It is enough, therefore, that the national cultural good is removed from the territory of the state without the appropriate permit. With regard to art. 2 of the Regulation, it does not follow that the fact that an export license could have been issued in relation to a given good is relevant for the designation of illegal exportation. As a result, it is illegal to export a cultural object even if there were no obstacles to issuing a license for its export outside the territory of a member state, and the exporting party merely disregarded the obligation to obtain an export certificate.[16]

It should also be noted that the structure of an act consisting in illegal removal of a national cultural good outside the territory of a Member State, in the version resulting from the Regulation, is closely related to the regulation adopted in a given Member State on granting a permit for the export of a national cultural good outside its territory. This issue is significant because the rules and procedure for obtaining certificates authorizing the export of cultural goods are determined by administrative law; as a result, if illegal export in the domestic system is considered a crime, then

[16] J. de Ceuster, "Les règles communautaires en matière de restitution de biens culturels ayant quitté illicitement le teritoire d'un Etat member", *Revue du Marché commun de l'Union Européenne* 1993, no. 2, p. 55.

determining the features of the act in the form of illegal export will be related to the violation of the regulation determined by administrative law.

The definition of the term "cultural good" is also important for the penalisation of behaviour consisting in illegal removal of a cultural object from the territory of a member state. A synthetic definition of a national cultural good based on commonly recognized quantifiers, e.g., artistic, scientific, historical, archaeological, or ethnographic value, is not adopted in the Regulation. In the discussed case, the aggregate definition type was used – the definition of "cultural good" has been reduced to the specification of the categories of objects that have been granted protection.

With regard to art. 1 of the Regulation, it follows that, for the purposes of the Regulation, the term "cultural object" includes the categories of objects specified in Annex I to the Regulation. In addition to listing the categories of items for which freedom of movement has been restricted, the Annex considers two types of limits: age and economic value. This solution is practical because, since it is up to the Member States to consider an object as a cultural object, the quantifiers used in the cooperation between the Member States must be based on objective, unambiguous features that do not require additional interpretation. From a practical point of view, the adopted solution is conducive to the efficiency of border and customs services, while the efficiency of the above-mentioned units guarantees protection to the Member States against the undesirable phenomenon of smuggling.

When considering the model approach to penalizing the act of illegal removal of a cultural good from the territory of a Member State, it is also necessary to take into account the Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State. This need is already clear from the title of the Directive, which clearly indicates that the *sine qua non* condition for initiating restitution procedure is the unlawful removal of a cultural object from the territory of a Member State. In order to guarantee the coherence of the system, the Directive, when defining the phrase "illegal removal from the territory of a Member State", refers to the above-mentioned Council Regulation of 2008 (art. 2 (2) of the Directive). Therefore, it does not modify the conditions adopted in the Regulation that determine the illegal removal of a cultural object from the territory of a Member State.

It should be emphasized, however, that the Directive differs from the Regulation in that it defines the concept of "cultural property". According to art. 2 of the Directive, "cultural property" means an object "which, before or after its unlawful removal from the territory of a member state, has been classified or defined by a Member State, on the basis of national legislation or administrative procedures, as a national cultural object of artistic, historical or archaeological value within the meaning of art. 36 TFEU".[17]

[17] The current regulation concerning the definition of the term "cultural object" does not repeat the solution adopted in the former Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. The 1993 Directive, like the Directive currently in force, in its art. 1 gave Member States the right to define cultural objects, but in order for an object belonging to the national cultural heritage to fall within the scope of the 1993

For an unambiguous linguistic interpretation, also in relation to art. 2 of the Directive, it is worth emphasizing once again that the object removal from the territory of the state cannot be considered illegal if it was legal at the time of export, and only after its removal was the object classified as a "cultural good".

*De lege lata,* therefore, the only condition for applying the solutions adopted in the Directive is that a property should be recognized by a Member State as "belonging to the national artistic, historical or archaeological heritage". It should be noted that the concept of delineating the boundaries of the restitution proceedings developed in European Union law differs from both the system adopted in the UNIDROIT Convention and the UNESCO Convention of 1970, in which the boundaries of restitution proceedings are determined by the list of selected categories of cultural goods attached to them, along with an indication of thresholds of age limit and economic value.

While expressing appreciation for the system adopted in the 2008 Directive as an advantage, it should be pointed out that in the adopted system the Member State sovereignly decides not only about the scope of the national heritage, but also may seek to restore the content of its national heritage. In this context, it is necessary to recall the problems with the return of goods illegally removed from the territory of a Member State during the period of validity of the Directive of 1993, which, as already mentioned, used a different mechanism. This is because there were cases in which cultural goods were prohibited for export in the interest of the state, but they were below the threshold limits set out in "Annex A" to the 1993 Directive, which made it difficult to launch the procedure for their return provided for therein.

This problem was raised in particular by the Italian doctrine, which, approving the current solution, judges it to be lawful in the light of art. 36 TFEU, which recognizes and justifies the differentiation of national systems for the protection of national heritage.[18] It is true that when assessing the conditions of illegality, the rules set out in the Regulation of 1993 are still used, but in the event of applying for the return of a cultural good that does not meet the limits adopted in Annex I, the rule to solve this problem is contained in recital 8 of the Preamble to the Directive from 2008:

> (…) This Directive should therefore cover collections of historical, paleontological, ethnographic or numismatic interest or of scientific value, whether they form part of public collections, other collections, or whether they are individual objects and whether they come from legal or illegal excavations, provided that they are classified or defined as national treasures. In addition, cultural objects classified or defined as national cultural goods should be

---

Directive, it also had to be listed in Annex A, the list of objects that can be returned under it. The third recital states that the purpose of the list was to limit the scope of restitution proceedings. The list was also intended to facilitate cooperation in the recovery of cultural objects. For more on this topic, see: A. Gerecka-Żołyńska, "Restytucja dóbr kultury a wolny rynek sztuki", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1996, no. 2, pp. 50–51.

[18] For more on this topic, see: L. Pasquali, "Art. 74. Esportazione di beni culturali dal territorio del'Unione Europea" [in:] *Codice dei beni culturali e del paesaggio*, eds. G. Famiglietti, N. Pignatelli, Nel Diritto Editore 2015, p. 464.

eligible for return under this Directive regardless of whether they belong to certain categories or meet thresholds related to their age or their financial value.

Bearing in mind the above-mentioned recital of the Preamble of the Directive of 2008 and looking for additional regulations in it significant for the assessment of the illegal removal of a cultural object from the territory of a Member State, it must be ultimately said that its unquestionable merit is the mutual recognition between Member States of national regulations concerning the export of cultural goods from their territory.

## 3. Illegal export of a cultural good from the territory of a Member State from a national legal perspective

The Council Regulation on the export of cultural goods leaves the Member States the freedom to regulate several important issues, among which, from the criminal law point of view, the need to define the conditions of an offender's legal liability is in the foreground. The regulation indicates that the path of establishing the perpetrator's liability may be administrative or criminal, and each of these paths has both advantages and disadvantages.

In the administrative mode, the course of the proceedings is very efficient and the penalties imposed are usually high. The punishment imposed is of a financial nature; it is painful, but it has no possibility of fulfilling educational functions, and it is not modified in the course of executive proceedings. The adjudicating body also does not have the possibility of ordering additional measures, e.g., regarding compensation for damage; moreover, imposing an administrative penalty usually does not limit the social functioning of the perpetrator.

In the criminal responsibility mode, the course of the proceedings is longer, but the court has the option to choose a penalty, from the least painful (a fine) to the most severe, which is imprisonment. Apart from choosing the type of penalty, it also defines its severity within the limits indicated in the act, and may decide on the application of additional measures, which strengthens the individual prevention aim of the penalty. Moreover, conviction results in consequences directly related to the social functioning of the perpetrator, not only in the form of deprivation of liberty, but also, for example, deprivation of the possibility to practice a profession or forfeiture of property. On the other hand, the procedure of criminal liability makes it possible to apply to the perpetrator institutions that mitigate the penalty, such as waiving the penalty, imposing a lighter penalty due to the procedural agreements of the perpetrator with procedural authorities, or a conditional suspension of execution in the case of a sentence of imprisonment. Bonus treatment of the offender also takes place in executive proceedings, in which, due to the obligation to update the objectives of the execution of the sentence, a further modification of the penalty, e.g., remission of a fine, conditional

early release from serving a sentence of imprisonment, or shortening the period of expunging the sentence, is possible.[19]

In Poland, illegal export of cultural goods from the territory of the state is classified as a crime under art. 109 of the Act on the protection and preservation of monuments[20]. Imprisonment, ranging from three months to five years, is imposed on a person who, without permission, takes a cultural object abroad or, having taken it abroad, does not bring it back to the territory of Poland within the period of validity of the permission given to do so, or who, in the event of a decision to refuse another permit or leaving such an application unprocessed, does not bring the exported cultural object back to Poland within sixty days from the date when the decision became final or from the date the applicant received information that the application had been left unprocessed (art. 109 para. 1).

In the event that the perpetrator has acted unintentionally, the penal sanction is mitigated by the possibility of imposing milder penalties: restriction of liberty, fines or imprisonment, but on a lower scale – up to 2 years (art. 109 para. 2).

Moreover, the court may adjudge a payment in excess of three times the minimum remuneration for a social purpose related to the care of historical monuments and forfeiture of cultural property, even if it is not the property of the offender (art. 109 paras. 3 and 4).

The court's decision on the adjudication of an excess or forfeiture is optional in nature; so the grounds for taking such a decision are directly related to the assessment of a specific case. The legislator has not shown such an understanding in every national system. In the legislation of countries where the illegal export of cultural goods is one of the most frequently committed offenses, in order to deter future perpetrators, a solution is adopted in which forfeiture is imposed obligatorily, but with the exception of cases where the cultural object does not belong to a person or persons associated with the offense of illegal exportation.[21]

The issue of imposing a forfeiture as one of the sanctions attributed to the crime of illegal export of a cultural good from the territory of a state is also topical under the law of the European Union, particularly with regard to the possibility of imposing a forfeiture in a situation where the court is deprived of the conditions to decide the case on its *merits*.

In the law of the European Union, the possibility of forfeiture in a situation where the court does not adjudicate on the *merits* of a case is provided for in the Directive of the European Parliament and of the Council on the securing and confiscation of instrumentalities and proceeds of crime in the European Union.[22] The directive imposes an

---

[19] V. Manes, "La tutela penale" [in:] *Il diritto dei beni culturali*, eds. C. Barbati, M. Cammelli, G. Sciullo, Bologna 2003, p. 219.

[20] Act of 23 July 2003 on the protection and preservation of monuments, consolidated text: *Journal of Laws* of 2021, item 710.

[21] L. Pasquali, "Art. 74 Esportazione di beni culturali…", p. 465.

[22] Directive 2014/42/EU of the European Parliament and of the Council of 3.04.2014 on the securing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.04.2014, p. 39.

obligation on the Member States to introduce legal regulations into national systems that allow for the forfeiture of tools involved in and benefits derived from a crime, also when the court does not decide on the *merits* of a case, because there is an obstacle that prevents the issuance of a conviction despite the fact that the evidence collected in the case justifies it. However, the directive limits the decision on forfeiture under such conditions to situations where, firstly, the tools involved in and benefits obtained as a result of committing the crime were already secured in the course of the proceedings, and secondly, where they come from serious organized crime. From the point of view of the criminal law protection of cultural goods, the suggested solution may be relevant when the activities of an organized criminal group include illegal export of cultural goods and other crimes against cultural goods, such as theft of and illegal trade in works of art, especially fencing.

In Polish criminal law, the conditions of forfeiture without conviction of the perpetrator are specified in art. 45a paras. 1 and 2 of the Act of 6 June 1997 – Criminal Code (consolidated text: *Journal of Laws* of 2020, item 1444). Article 45a para. 1 of the Criminal Code indicates substantive legal circumstances, the occurrence of which leads to giving up conviction or to the inadmissibility of the conviction, but leaves open the possibility of forfeiture.[23] In art. 45a para. 2 of the Criminal Code, in turn, the circumstances of a procedural nature, which make it impossible to continue criminal proceedings, have been enumerated accordingly, with the reservation, however, that in this situation forfeiture may be ordered only when the evidence collected in the case indicates that if the perpetrator was convicted, forfeiture would be ordered.[24]

Commentary unanimously emphasizes that art. 45a of the Criminal Code, both in terms of material and procedural conditions, permits forfeiture not only of items derived directly from the commission of the crime, but also items that were used to commit the crime, or items prohibited from being manufactured, possessed, traded, transmitted, or transported (so-called prohibited items)[25]. Therefore, the regulation provided for in art. 45a of the Criminal Code can also be applied in the case of the crime of illegal export of a cultural good penalized in art. 109 of the Act on the protection and preservation of monuments.

Analysing the content of art. 45a paras. 1 and 2 of the Criminal Code, it may be stated that such a possibility may be realistically used when a circumstance excluding conviction of the perpetrator appears, i.e., expiration of the statute of limitations for the offence (art. 17 para. 1 point 6 of the Act of 6 June 1997 – Code of Criminal

[23] The material and legal circumstances include: the insignificant social harmfulness of the act, conditional discontinuance of criminal proceedings, the existence of a circumstance excluding the punishment of the perpetrator of the act, or the commission by the perpetrator of a prohibited act in a state of insanity (due to a mental illness, mental retardation, or other disturbance of mental functions, the perpetrator could not, at the time of the act, recognize its meaning or control his or her conduct).

[24] The circumstances excluding the possibility of conducting criminal proceedings include: death of the accused, failure to detect the perpetrator, failure to apprehend the accused, and lack of participation of the accused in the proceedings due to mental illness or serious somatic disease.

[25] V. Konarska-Wrzosek [in:] *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Wolters Kluwer Polska, Warszawa 2020, LexOmega, thesis to art. 45a.

Procedure[26] in connection with art. 101 of the Criminal Code), or when in the course of the proceedings the accused dies (art. 17 para. 1 point 5 of the Code of Criminal Procedure), or the proceedings have to be suspended because of a serious somatic disease which prevents the accused from participating in criminal proceedings (art. 22 of the Code of Criminal Procedure).

On the other hand, one should definitely oppose the adoption of this solution in the event of discontinuance of criminal proceedings due to the insignificant social harmfulness of an act, as this would be a decision in contradiction with the accepted legal assessment.[27]

From the point of view of the level of severity of punishment, in addition to the possibility of imposing a forfeiture in the case of the commission of an offence of illegal export of a cultural good from the territory of the state, the possibility of imposing a measure in the form of a ban on practicing a profession or carrying out an activity should be recognized as equally severe if the perpetrator of illegal export was a person professionally engaged in the sale or exhibition for sale of cultural goods.[28]

The *ratio legis* in this case is conducive to disciplining the activities of brokers who trade in cultural goods, and above all, it serves to maintain the integrity of the national cultural heritage. As regards criminal law protection, the cross-border elements of prohibited acts make the tightness of the system dependent on cooperation between states.

## 4. Conclusions

The above considerations convincingly suggest that the contemporary rational legislator, in order to develop optimal legal protection, cannot be limited only to taking into account the models functioning within the national legal order. As regards criminal law protection, the cross-border elements of prohibited acts make the tightness

[26] Consolidated text: *Journal of Laws* of 2021, item 534.

[27] In the context of the present discussion, it should be recalled that, in the Polish legal system, the possibility of imposing a forfeiture for the benefit of the State Treasury of cultural property illegally exported from the territory of Poland may also occur outside the criminal process. Such a solution, in the case of the return of cultural property illegally exported from the territory of Poland under art. 30 of the Customs Law, is provided for by the Act of 25 May 2017 on the restitution of national cultural property (consolidated text: *Journal of Laws* of 2019, item 1591) in art. 9 paras. 2–5, which implements into the system of Polish law the 2014 Directive on the return of cultural property unlawfully removed from the territory of a Member State. The purpose of the proceedings conducted under this procedure is to protect the state's interest in the form of recovery and preservation of any lost cultural property, which is not directly related to the determination of criminal liability of the perpetrator of illegal export; moreover, the perpetrator of illegal export may still remain unknown. For more on this topic, see: I. Gredka-Ligarska, "Uregulowanie własności narodowego dobra kultury zwróconego na terytorium Polski w ustawie o restytucji narodowych dóbr kultury", *Państwo i Prawo* 2019, no. 8, pp. 103–121.

[28] C. Barbati, M. Cammelli, L. Casini, G. Piperata, G. Sciullo, *Diritto del patrimonio culturale*, Bologna 2017, pp. 187–188.

of the system dependent on cooperation between states. The most effective form of cooperation is the common definition of the subject of protection, measures for its implementation, and sanctions resulting from violation of standards adopted in an international agreement or in other instruments undertaken at the level of transnational cooperation, such as, e.g., common positions, recommendations, and area programs.

In theoretical terms, the current problems of penalizing the act of illegal removal of a piece of cultural property from the territory of the state directly affect the methodology of research in this subject. In the current *status quo*, among research methods, comparative research is gaining importance, although in this case comparative legal studies may be limited to the analysis of specific solutions, without the need to thoroughly examine foreign legal orders.

Taking into account the functions assigned to comparative legal studies,[29] it can be stated that in the research area outlined in this way, a unification function comes to the fore among the functions of comparative studies. However, this should not be reduced to checking the differences between unified regulations in order to develop common regulations, but its aim should also be to ensure optimal protection of cultural goods against illegal removal from the territory of a state, which contributes to increasing the security of trade in cultural goods and makes it possible to maintain the integrity of a national cultural heritage. In addition, in order to achieve a satisfactory level of protection of cultural property in terms of the indicated threats, comparative research should be multilateral and conducted in a planned manner. As regards the comparison of the regulations adopted in the legal systems of the European Union Member States, research is facilitated by the fact that these systems prefer the model of criminal liability *vis-à-vis* perpetrators of prohibited acts against cultural property. This corresponds to a general tendency to introduce more rigorous systems of conduct in relation to perpetrators of this type of prohibited acts, especially by stricter penalties and distinguishing among the basic types of crimes, types qualified via the specific object of protection, which is cultural goods.

## Literature

Barbati C., Cammelli M., Casini L., Piperata G., Sciullo G., *Diritto del patrimonio culturale*, Bologna 2017.

Chechi A., "Cooperation to Safeguard the Human Dimension of Cultural Heritage and to Secure the Return of Wrongfully Removed Cultural Objects" [in:] *Cultural Heritage, Cultural rights, Cultural Diversity: New Developments in International Law*, eds. S. Borelli, F. Lenzrini, Leiden 2012.

[29] The functions of comparative legal studies are to identify sets of activities performed in accordance with the chosen comparative methods in order to achieve set goals. For more on this topic, see: R. Tokarczyk, *Komparatystyka prawnicza*, Warszawa 2008, p. 198.

Ceuster de J., "Les règles communautaires en matière de restitution de biens culturels ayant quitté illicitement le teritoire d'un Etat membre", *Revue du Marché Commun de l' Union Européenne* 1993, no. 2.
Gerecka-Żołyńska A., "Restytucja dóbr kultury a wolny rynek sztuki", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1996, no. 2.
Gredka-Ligarska I., "Uregulowanie własności narodowego dobra kultury zwróconego na terytorium Polski w ustawie o restytucji narodowych dóbr kultury", *Państwo i Prawo* 2019, no. 8.
Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer Polska, Warszawa 2020.
Manes V., "La tutela penale" [in:] *Il diritto dei beni culturali*, eds. C. Barbati, M. Cammelli, G. Sciullo, Bologna 2003.
Mattera A., "La libre circulation des œuvres d'art à l'intérieur de la Communauté et la protection des trésors nationaux ayant une valeur artistique, historique ou archéologique", *Revue du Marché Commun de l' Union Européenne* 1993, no. 2.
Osmańczyk E.J., *Encyklopedia ONZ i stosunków międzynarodowych*, Warszawa 1986.
Pasquali L., „Art. 74. Esportazione di beni culturali dal territorio del'Unione Europea" [in:] *Codice dei beni culturali e del paesaggio*, eds. G. Famiglietti, N. Pignatelli, Nel Diritto Editore 2015.
Tokarczyk R., *Komparatystyka prawnicza*, Warszawa 2008.

## Summary

***Anna Gerecka-Żołyńska***

**International and transnational conditions of penalization of illegal export of cultural property from the territory of a legitimate state**

This article discusses the issue of international and supranational conditions of criminalization of illegal export of a cultural object from the territory of an authorized state. The text is divided into four parts. The first is introductory in nature, indicating the acts of international law that have been developed in order to prohibit the illegal export of cultural goods abroad and to combat the functioning of the illegal art market. In particular, on the one hand, it is pointed out that it was necessary to introduce mechanisms into internal control systems to prevent illegal export of cultural goods. On the other hand, the importance of national protection measures adopted in order to counteract the acquisition of cultural goods illegally removed from the territory of another state is emphasized. Attention is paid to the crime of theft, falsification of documents, fencing, and illegal trade in cultural goods, especially their import, export, and marketing, related to the crime of illegal export of cultural goods. The instruments are indicated that have been adopted within the framework of cooperation between EU Member States in order to counteract the illegal export of cultural goods.

Detailed comments on counteracting the illegal export of cultural goods from the territory of the authorized state between the EU Member States are discussed in the second part of the article under the title: A model approach to penalizing the act of illegal export of national cultural goods from the territory of a Member State on the basis of European Union law.

The third part of the article covers the analysis of the problem of illegal export of a cultural object from the territory of a Member State from the perspective of national law. The discussion focuses primarily on the conditions for determining the individual legal liability of the perpetra-

tor of the illegal export of a cultural object and the type and amount of the penalty imposed as a result of such behavior.

The article ends with a fourth part, in which final conclusions are formulated. The key factor is the statement that the contemporary rational legislator, in order to work out optimal legal protection, cannot be limited only to taking into account the patterns functioning within the national legal order. In this context, the significance of the unification function of law increases. This allows the introduction of uniform standards of protection, thanks to which the protection of cultural goods against illegal export beyond the borders of the authorized state is strengthened on an international and supranational scale.

**Keywords:** cultural goods, illicit trafficking in works of art, ban on the export of cultural goods abroad, control mechanisms for the export of cultural goods across borders

## Streszczenie

*Anna Gerecka-Żołyńska*

**Międzynarodowe i ponadnarodowe uwarunkowania penalizacji nielegalnego wywozu dobra kultury z terytorium państwa uprawnionego**

W artykule omówiono międzynarodowe i ponadnarodowe uwarunkowania penalizacji nielegalnego wywozu dobra kultury z terytorium państwa uprawnionego. Tekst został podzielony na cztery części. W pierwszej, o charakterze wprowadzającym, wskazano akty prawa międzynarodowego, które zostały opracowane w celu ograniczenia nielegalnego wywozu dóbr kultury za granicę i ograniczenia funkcjonowania nielegalnego rynku dzieł sztuki. Z jednej strony wskazano na konieczność wprowadzania do systemów wewnętrznych mechanizmów kontrolnych uniemożliwiających nielegalny wywóz dóbr kultury poza granice państwa. Z drugiej podkreślono znaczenie krajowych środków ochronnych przyjmowanych w celu przeciwdziałania nabywaniu dóbr kultury nielegalnie wywiezionych z terytorium innego państwa. Zwrócono uwagę na związane z przestępstwem nielegalnego wywozu dobra kultury za granicę przestępstwa kradzieży, fałszowania dokumentów, paserstwa, nielegalnego handlu dobrami kultury, w tym zwłaszcza ich importu, eksportu oraz wprowadzania do obrotu. Wskazano instrumenty, jakie w celu przeciwdziałania nielegalnemu wywozowi dóbr kultury z terytorium państwa zostały przyjęte w ramach współpracy między państwami członkowskimi UE.

Szczegółowe uwagi dotyczące przeciwdziałania nielegalnemu wywozowi dóbr kultury z terytorium państwa uprawnionego między państwami członkowskim UE zostały omówione w punkcie drugim publikacji.

W punkcie trzecim problem nielegalnego wywozu dobra kultury z terytorium państwa członkowskiego poddano analizie z perspektywy prawa krajowego. Skoncentrowano się przede wszystkim na warunkach ustalenia indywidualnej odpowiedzialności prawnej sprawcy nielegalnego wywozu dobra kultury oraz rodzaju i wysokości kary wymierzanej w rezultacie takiego zachowania.

Punkt czwarty zawiera wnioski. Za kluczowe należy uznać stwierdzenie, że współczesny racjonalny prawodawca w celu wypracowania optymalnej ochrony prawnej nie może ograniczać się tylko do uwzględniania wzorców funkcjonujących w ramach krajowego porządku prawnego.

W tym kontekście wzrasta znaczenie funkcji unifikacyjnej prawa, która pozwala wprowadzić jednolite standardy ochrony, dzięki czemu w skali międzynarodowej i ponadnarodowej dochodzi do wzmocnienia ochrony dóbr kultury przed ich nielegalnym wywozem poza granice państwa uprawnionego.

**Słowa kluczowe:** dobra kultury, nielegalny handel dziełami sztuki, zakaz wywozu dóbr kultury za granicę, mechanizmy kontrolne wywozu dóbr kultury za granicę

**Katarzyna Zalasińska**
University of Warsaw
k.zalasinska@wpia.uw.edu.pl
ORCID: 0000-0003-2171-2560

https://doi.org/10.26881/gsp.2021.2.06

# Restrictions on the export of library materials from Poland

## 1. Introduction

Library materials constitute a major element of documentary heritage. Resources gathered in libraries are collections not only of material carriers with historical, artistic, or scientific/scholarly value, but also important sources of information. This resource is protected principally by libraries acting as memory institutions and specialising in the conservation of library materials. The protection and conservation involved include assurance of the integrity of the resource, in particular through control of permanent export of it. This is because, in such cases, the item usually leaves the territory of Poland never to return, which involves an obligation for the respective authorities in charge of export control to analyse the value of library materials exported. This involves answering the question about the materials' importance to the Polish cultural heritage. This article is intended to evaluate the regulations governing permanent export applicable to library materials, considering the definition of library materials in the Act of 27 June 1997 on libraries (consolidated text: *Journal of Laws* of 2019, item 1479; hereinafter: LA). This article does not cover the export of library materials other than those belonging to heritage, which is regulated by art. 6a LA, whereby it has been assumed that library materials may be qualified not only as heritage, but also as cultural goods other than heritage. Apart from presenting the applicable regulation and discussing practical problems related to the application of it, this article also discusses the administrative procedures undertaken by The National Library of Poland with respect to the permanent export of library materials in the period 2015–2019. Conclusions on the research presented here are also compared to the results of bibliophile market analysis done by Paweł Podniesiński. This analysis has made it possible to formulate conclusions *de lege lata* and *de lege ferenda*.

## 2. Library materials as exported items

### 2.1. The definition of library materials in the Act of 27 June 1997 on libraries

According to art. 5 LA, library materials include, in particular, documents containing recorded expression of human thought, intended for distribution irrespective of the physical carrier and method of recording, in particular: graphic (literary, cartographic, iconographic, and musical), audio, visual, audio-visual, and electronic documents. The regulations, however, do not define the term "document". The broad approach adopted in the Act of 1997 on libraries regulations requires reference to the definition of "document" adopted for the needs of the UNESCO Recommendation concerning the preservation of, and access to, documentary heritage including hat in digital form, 2015.[1] For the purposes of the Recommendation, the definition was adopted that a document is an object comprising analogue or digital informational content and the carrier on which it resides. Furthermore, it is can be preserved and is usually moveable, while the content may consist of signs or codes (such as text), images (still or moving), and sounds, which can be copied or transferred. The carrier may have important aesthetic, cultural, or technical qualities, while the relationship between content and carrier may range from incidental to integral.

The term "library materials" was used in the previous Act of 9 April 1968 on libraries (*Journal of Laws* of 1968 No. 12, item 63) without, however, defining the term. Earlier regulations, namely the Decree of 17 April 1946 on libraries and preservation of library collections (*Journal of Laws* of 1946 No. 26, item 163) and care of library collections, stated that library collections shall mean all sorts of prints (books, magazines, brochures, etc.), manuscripts, maps, music scores, and drawings, as reading (utility) or heritage (museum) material. Specific resources of such materials form book collections. Earlier regulations, i.e., the Regulation of the President of 24 February 1928 on the National Library of Poland (*Journal of Laws* of 1928 No. 21, item 183), in art. 2, stated that the task of the National Library of Poland is to gather and keep the entire intellectual produce of the Polish nation, expressed in writing, print, or by any other mechanical or chemical means if the reference is to graphics, literature in foreign languages referring to the Polish nation, and literature in foreign languages necessary for the development of Polish intellectual life.

Literature points out that the definition of library materials was built pursuant to imprecise terms, which causes problems when applying legal regulations[2]. Furthermore, there are claims that the legislator makes this definition even more imprecise by editing the regulation, whereby "library materials include, in particular, [underlined by the author: K.Z.] documents containing (…)". As Jan Ciechorski rightly inter-

[1] *UNESCO Recommendation concerning the preservation of, and access to, documentary heritage including in digital form (2015)*, eds. A. Czajka *et al*., Warszawa 2016, p. 7, https://www.archiwa.gov.pl/files/broszura_ZALECENIA_UNESCO.pdf (accessed: 10.05.2021).

[2] Cf. K. Sikora, „Materiały biblioteczne a muzealia i zabytki. Kilka uwag o definicjach legalnych i ochronie prawnej", *Toruńskie Studia Bibliologiczne* 2017, no. 1(18), p. 132.

prets this, the "formula applied in the regulation commented upon prevents precise separation of the designators of the term from other ones".[3] Ciechorski presents a thesis that art. 5 LA does not constitute a strict definition, but is rather an interpretational guideline.[4] This, however, means that pointing to what the term "library material" designates may prove exceedingly difficult in many cases.

### 2.2. Library materials and monuments

Establishing the meaning of the term "library materials" requires reference to other terms operating in the heritage conservation system.[5] The fundamental term here is "monument" because of the "blanket" nature of the Act of 23 July 2003 on the protection and preservation of monuments (consolidated text: *Journal of Laws* of 2021, item 710). The Act, as stated in art. 2, covers conservation of all the items corresponding to the legal definition of a monument, unless special regulations provide otherwise.[6]

A mobile monument, in the meaning of art. 3 of the Act, includes mobile items, parts of them, or assemblies of mobile items, made by humans or related to human activities, and constituting evidence of a past era or an event, which should be kept in the interest of society because of historical, artistic, or scientific/scholarly value. Such an approach to the definition, namely by listing properties of items, means that it should be included in the model of a descriptive definition.[7] This, thus, means that the term "monument" includes any items with specific properties. While referring exclusively to selected elements of the definition, something that is important to my discussion here, it is worth pointing to the indication that heritage must constitute evidence of a past era or a past event. As Alicja Jagielska-Burduk rightly points out, the term "past event" can be treated as a past event, but one that is not necessarily located in the distant past, whereas "past era" refers to a closed historical period[8]. Jan Pruszyński offers the interpretation that "art heritage is an item historically or culturally related through its style to a closed period or era"[9]. Also, interpretation of the term "interest of society" proves problematic. Heritage, in fact, can only include items that must be kept in the social interest. The indicated general clause must be understood as the interest of the entire society or selected groups in it, not as a sum of individual interests, which it often collides with[10].

---

[3] J. Ciechorski, *Ustawa o bibliotekach. Komentarz*, Warszawa 2012, p. 21.

[4] *Ibidem*, p. 21.

[5] K. Sikora, "Od archiwaliów do dziedzictwa dokumentacyjnego. Profil najważniejszych pojęć prawnych" [in:] *Ochrona dóbr kultury w rozwoju historycznym,* ed. M. Różański, Olsztyn 2017, pp. 193–204.

[6] K. Zalasińska, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*, Warszawa 2020, p. 8.

[7] A. Jagielska-Burduk, *Zabytek ruchomy*, Warszawa 2011, p. 69.

[8] *Ibidem*, p. 70.

[9] J. Pruszyński, *Ochrona zabytków w Polsce. Geneza – organizacja – prawo*, Warszawa 1989, p. 16.

[10] K. Zalasińska, *Ustawa o ochronie zabytków*…, p. 14; cf. also: *eadem*, "Interes indywidualny a interes publiczny", *Ochrona Zabytków* 2008, no. 2, pp. 83–87.

The definition was given detail in art. 6 para. 1 point 2e of the Act on the protection and preservation of monuments by adding a list, which states that mobile heritage may also include library materials referred to in art. 5 LA. It is worth pointing out that, in previous regulations of the Act of 15 February 1962 on the protection of monuments (consolidated text: *Journal of Laws* of 1999 No. 98, item 1150, as amended), in particular art. 5 para. 8 of this Act, the legislator provided a list of exemplary library materials. The regulation listed: manuscripts, autographs, illuminations, old prints, first prints, unique prints and other rarities, maps, plans, musical scores, drawings, other records of image or sound, instruments, and frames. Contrary to art. 6 para. 1 point 2e of the Act of 2003 on the protection and preservation of monuments, which only provides a reference to art. 5 LA, art. 5 of the Act of 1962 on the protection of monuments applicable until 2003 is more precise than art. 5 LA by providing an exemplary list of items to be qualified as library materials. It must, thus, be assumed that, in the present legal status, the legislator renders the definition of library materials much more imprecise as compared to earlier regulations. The avoidance of a precise definition of library materials by exemplary listing of the heritage categories that may be considered library materials, should undoubtedly be evaluated negatively.

## 3. The procedure related to obtaining a permit for the permanent export of library materials

When introducing a discussion of export regulations governing the permanent export of mobile heritage, it is worth pointing out that the legislator has divided such items into three categories: heritage covered by an export ban (art. 51 para. 4 Act of the protection and preservation of monuments ); heritage covered by the duty to obtain an export permit (art. 51 para. 1 of this Act); and heritage released from the duty to obtain an export permit (art. 59 of this Act). Heritage covered by an export ban includes the part of the National Library Resource that forms part of the Polish heritage (art. 51 para. 4 point 4 of the Act).

An export ban can also be a consequence of a refusal to grant a permit for permanent export. Pursuant to art. 52 para. 1a of the Act, the minister in charge of culture and national heritage conservation may refuse a one-off permit for the permanent export of an item of cultural property if the item is of special value to the country's cultural heritage. The regulation is applicable to the export of library materials. According to the practice adopted with respect to the export of items of heritage, an analysis of the special value of an item involves answering the following questions. Is the item specially related to the national heritage, whereby the very item, its authors, owners, or holders are related to the history of Poland and the life of its citizens? Does the item have special artistic value, and is it of special importance to a specific field of art, science/scholarship, or culture (an item of special value to the cultural heritage should have artistic, historical, and scientific/scholarly values making it globally or nationally

representative of a given period, genre, or an artistic group, or it is a global or national precursor in stylistic, typological, or technical terms)? Can the export result in a loss to Polish collections?[11]

The lifting of an export ban under the law results in a situation where the duty to obtain the permit depends on the age and value of the item exported. For example, in the case of single books or collections of books, the duty refers to books that are over 100 years old and with a value exceeding PLN 6,000 (art. 51 para. 1 point 10). Items exempted from the duty to obtain a permit include both items below the age and value threshold stated in art. 51 para.1 of the Act on the protection and preservation of monuments, as well as those listed in art. 59 of it. The catalogue of exemptions from a duty to obtain an export permit includes works by living authors that have not been inventoried by museums, or do not form part of the National Library Resource. The applicable regulations do not envisage exemptions related to library materials published after 9 May 1945, as referred to in art. 42 para. 1 point 4 of the Act on the protection and preservation of monuments. The regulations have, however, introduced a "rolling" time frame with respect to the categories of items referred to in art. 51 para. 1 of the act on heritage conservation and care of heritage. When evaluating current regulations as opposed to the legal status applicable until 2003, one must refer to the amendments introduced by the act of 18 March 2010 amending the Act on the protection and preservation of monuments , and changes in some other statutes. This is because library materials can be allocated to several categories listed in art. 51 para. 1 of the Act on heritage conservation and care of heritage. While referring to particular categories of items, considering the age and value of exported items, one must point at least to the possibility of allocating library materials to the category of "single manuscripts or collections of manuscripts" (items over fifty years old with a value higher than PLN 4,000 are exempt from the permit), "single books or collections of books" (items over 100 years old with a value higher than PLN 6,000 are exempt from the permit), or "single printed maps and music scores" (items over 150 years old with a value higher than PLN 6,000 are exempt from the permit). An analysis of the aforementioned regulations makes it possible to assume that regulations applicable until 2003 envisaged a broader catalogue of library materials not covered by export limitations. In particular, the regulations envisaged exemptions regardless of value, whereas, in most categories, the criterion of age seems to have been made more restrictive. It must be recalled that, at present, the two requirements must be met jointly; therefore, if a single book is 200 years old but its value remains below PLN 6,000, no export permit will be required.

While referring to an export ban, it must be pointed out that, pursuant to art. 58 of the Act on the protection and preservation of monuments, library materials are governed by limitations under art. 51 para. 4 of the Act, whereas the export ban related

[11] The aspects analysed in the proceedings related to a permanent export permit have been drafted pursuant to the VoH (*Value of Heritage)* test by W. Szafrański. For more on this subject, see: W. Szafrański, A. Jagielska-Burduk, "Jednorazowe pozwolenie na stały wywóz zabytku za granicę z perspektywy kategorii wieku i wartości – ochrona dziedzictwa kulturowego a rynek sztuki w Polsce", *Santander Art and Culture Law Review* 2019, no. 1, pp. 93–94.

to an item of library material may be caused by the fact that the item forms part of the National Library Resource or has been entered in the heritage register. It must be remembered that art. 11 of the Act instructs that the heritage register must not include items included in the World Heritage List, entered in a museum inventory, or forming part of the National Library Resource. If, therefore, an item of library material has not been covered by one of the aforementioned forms of conservation, it may be entered in the heritage register and, as a consequence, covered by an export ban. Entries to the mobile heritage register are made on the terms stipulated in art. 10 of the Act on the protection and preservation of monuments .[12]

Pursuant to art. 6 para. 1 LA, library collections of exceptional value and importance to the national heritage constitute, in whole or in part, the National Library Resource. At the same time, the legislator assumes that the National Library Resource is subject to special protection. The relevant literature indicates that library materials gathered within the National Library Resource include documents of special value. Dobrosława Platt assumes the resource to constitute a source of knowledge about the intellectual achievements of Poles, about the political history of the Polish nation, the history of the national culture and all its fields, as well as the development of national awareness, and Poles' participation in the growth of global civilisation[13]. Article 6 para. 2 LA, as referred to above, constitutes a certain axiological declaration without, however, any specific legal consequences[14]. The wording of such regulations indicates that only some library materials kept by libraries form part of the national heritage. This, thus, means that only a part of the activities pursued by such libraries can be qualified as national heritage conservation,[15] a conclusion that I disagree with. At the same time, except for the export ban for library materials listed in the National Library Resource, Act of 1997 on libraries regulations does not introduce either a general or even a specific legal protection regime for any of the aforementioned groups of library materials. There is only a provision about their "special protection" (art. 6 para. 2 LA), which refers to physical protection only.[16]

Matters related to the export of heritage items are decided upon by the regional heritage conservator and the minister in charge of culture and national heritage conservation, who have the competences to issue permanent export permits. Pursuant to art. 58 of the Act on the protection and preservation of monuments, permits for per-

---

[12] K. Sikora, "Materiały biblioteczne…", pp. 130–131.

[13] D. Platt, "Zbiory biblioteczne a dziedzictwo kulturowe Polski – Narodowy Zasób Biblioteczny", *Bibliotekarz* 2007, no. 1, p. 6.

[14] A similar provision functions in the regulations governing activities of museums: art. 13 of the Act of 21 November 1996 on museums (consolidated text: *Journal of Laws* of 2020, item 902) declares that "Register museums benefit from special protection", and art. 21(1) of the Act on museums insists that "museum collections constitute national goods".

[15] Cf. L. Biliński, "Narodowy Zasób Biblioteczny – od koncepcji do realizacji", *Bibliotekarz* 1999, no. 4, pp. 12–13.

[16] W. Kowalski, K. Zalasińska, „Prawo ochrony dziedzictwa kulturowego w Polsce – próba oceny i wnioski" [in:] *System ochrony zabytków w Polsce – analiza, diagnoza, propozycje*, ed. B. Szmygin, Lublin – Warszawa 2011, p. 26.

manent and temporary export of library materials, as referred to in art. 51 para. 1 and art. 51 para. 3, are issued by the Director of the National Library of Poland. The legislator has envisaged that the regulations of art. 51 para. 1, art. 51 para. 2, art. 51 para. 4, art. 52 para. 1a, and articles 53–57 apply accordingly. The Director of the National Library of Poland, within the terms of his/her statutory mandate, performs the tasks of the heritage conservation authorities. It can, therefore, be assumed that the legislator has made the Director of the National Library of Poland a functional authority of heritage conservation. Undoubtedly, decisions falling within the competences of the minister can be appealed and motions to repeat the procedure can be filed as stipulated in art. 127 para. 3 of the Act of 14 June 1960 – Code of Administrative Procedure (consolidated text: *Journal of Laws* of 2021, item 735).

It should be added that, in the aforementioned art. 58 of the Act on heritage conservation and care of heritage, for unknown reasons, the legislator makes reference to art. 51 para. 1, art. 51 para. 2, and art. 51 para. 4, while omitting art. 51 para. 3, which states that the items referred to in clauses 1 and 4 can be temporarily exported after obtaining a one-off permit for temporary export or a multiple individual permit for temporary export, or a multiple general permit for temporary export. At the same time, the regulation is decisive about the application of articles 53–57 of the Act, which govern the issue of the aforementioned temporary permits.

## 4. The practical application of permits for the export of library materials that constitute heritage

As indicated above, the Director of the National Library of Poland, within the terms of his/her statutory mandate as the authority in charge of heritage conservation, is the authority competent to decide about the permanent export of library materials. An examination of export files from administrative proceedings held in the period 2015–2019 indicates that the Director of the National Library of Poland issued just eight permits for permanent export in that period. The table below presents information on the number of permits for permanent export in particular years (additionally indicating when the export was outside the European Union), with additional information related to other export decisions issued in the same period for temporary export (a total of 54 permits for temporary export). Furthermore, one export proceeding was suspended in 2016 because of a justified suspicion that illegal export was being covered up by the permit application.

The analysis of the documentation regarding permanent export proceedings indicates that, while assessing whether library materials are of special value to cultural heritage, the Director of the National Library of Poland accounts for such aspects as: ownership marks testifying to the copy's belonging to any Polish collection of historical importance; the item's presence in public collections in Poland; and the importance and contents of the document from a scientific/scholarly perspective and in terms of

Table 1. List of 2015–2019 export licenses

| | 2015 | 2016 | 2017 | 2018 | 2019 |
|---|---|---|---|---|---|
| Permit for a one-off permanent export | 1 | (1 – suspended proceeding) | 4 | 1 – export outside the EU | 2 |
| Permit for one-off temporary export | 9 | 11 | 12 | 5 | 5 |
| General permit for multiple temporary exports | 0 | 0 | 0 | 1 | 10 |
| General open permit for temporary export | 0 | 0 | 0 | 1 – export outside the EU | 0 |
| | 10 | 11 | 16 | 8 | 17 |

Source: Own elaboration.

historical knowledge, which could be decisive in terms of the need to preserve the item in a Polish collection. It can, therefore, be assumed that, in the proceedings, the Director of the National Library of Poland applies the elements of inference that fall within the VoH (*Value of Heritage)* test referred to above. Here, I must point to one of the cases analysed, in which the justification of the export permit includes a statement that the analysed library material "constitutes heritage of high historical value, but it is not a unique item". This argumentation cannot be sustained because, in order to justify the attribution of special value to cultural heritage, it is sufficient to point to the high artistic value of an item. Any uniqueness of an item undoubtedly affects its value; yet the "threshold" to oblige the authority to consider refusing an export permit does not require the item to be characterised with this particular property (of uniqueness).

The statistics clearly show that permits for the permanent export of library materials are exceedingly rare. It would be worth referring the numbers to an analysis of the bibliophile market in the same period. A source of data here can be found in the analyses made by Paweł Podniesiński,[17] an expert to the minister in charge of culture and national heritage conservation, who is also an expert regarding antiquarian publications. The value of the bibliophile market in the period 2015–2019 was estimated at PLN 7–9.5 million per year. In the same period, on average, 9,500 items were sold per year at bibliophile auctions. Market observations point to items traded that are of interest to collectors and buyers of non-Polish citizenship. At the same time, applications for permanent export are exceedingly rare and usually originate from renowned bibliophile antiquarians. It is clearly hard to judge whether or not the items bought at auctions by foreigners are then exported, but with some caution one may assume

[17] Unpublished, courtesy of the Author.

that, if export regulations were truly effective, one could expect more such applications. Perhaps, Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods (OJ L 151, 7.06.2019, pp. 1–14), which posits greater control of the legality of the flow of cultural goods, will be a factor affecting the increase in the number of the applications.

## 5. Conclusions

Library materials constitute a major element of Poland's cultural heritage. Documentary heritage gathered in libraries makes those libraries memory institutions entrusted with guarding resources of special value. Legal protection of library materials must be achieved through National Library Resources, as a form of protecting library materials of special value, but also through regulations governing the control of the export of library materials. What is particularly important here is the functioning of regulations governing the permanent export of heritage, because exported items constitute an irreversible loss to the heritage resources gathered on Polish territory. An analysis of export regulations related to library materials, as well as their application, makes it possible to entertain significant doubts as to the effectiveness of the adopted solutions. The imprecise object of protection raises doubt because of the formulation of the term "library materials". Another problem refers to the imprecise criteria that impose the duty to obtain a permit, and cover specific categories of items with an export ban. The applicable regulations, thus, require ordering and, principally, greater cohesion. In this respect, one should also reconsider a delimitation of legal orders: heritage – library materials – museum collections – archive materials – cultural goods. It is hard to justify creating a different export regime of, for example, manuscripts or old prints, depending on whether in any particular case they are treated as belonging to museum collections, archive materials, or library materials. It must, therefore, be assumed that the present legal status requires intervention from the legislator. Any changes should go towards overcoming the problem of fragmented legal orders related to heritage conservation by developing a coherent and holistic export regulation in the spirit of the UNESCO Recommendation from 2015.

## Literature

Biliński L., "Narodowy Zasób Biblioteczny – od koncepcji do realizacji", *Bibliotekarz* 1999, no. 4.

Ciechorski J., *Ustawa o bibliotekach. Komentarz*, Warszawa 2012.

Czajka A., Kiliszek K., Komorowski T., Mrożek T., Woźniak W. (eds.), *UNESCO Recommendation concerning the preservation of, and access to, documentary heritage including in digital form (2015)*, Warszawa 2016.

Jagielska-Burduk A., *Zabytek ruchomy*, Warszawa 2011.

Kowalski W., Zalasińska K., „Prawo ochrony dziedzictwa kulturowego w Polsce – próba oceny i wnioski" [in:] *System ochrony zabytków w Polsce – analiza, diagnoza, propozycje*, ed. B. Szmygin, Lublin – Warszawa 2011.

Platt D., "Zbiory biblioteczne a dziedzictwo kulturowe Polski – Narodowy Zasób Biblioteczny", *Bibliotekarz* 2007, no. 1.

Pruszyński J., *Ochrona zabytków w Polsce. Geneza – organizacja – prawo*, Warszawa 1989.

Sikora K.,„Materiały biblioteczne a muzealia i zabytki. Kilka uwag o definicjach legalnych i ochronie prawnej", *Toruńskie Studia Bibliologiczne* 2017, no. 1(18).

Sikora K., "Od archiwaliów do dziedzictwa dokumentacyjnego. Profil najważniejszych pojęć prawnych" [in:] *Ochrona dóbr kultury w rozwoju historycznym,* ed. M. Różański, Olsztyn 2017.

Szafrański W., Jagielska-Burduk A., "Jednorazowe pozwolenie na stały wywóz zabytku za granicę z perspektywy kategorii wieku i wartości – ochrona dziedzictwa kulturowego a rynek sztuki w Polsce", *Santander Art and Culture Law Review* 2019, no. 1.

Zalasińska K., "Interes indywidualny a interes publiczny", *Ochrona Zabytków* 2008, no. 2.

Zalasińska K., *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*, Warszawa 2020.

## Summary

*Katarzyna Zalasińska*

**Restrictions on the export of library materials from Poland**

Library materials constitute a major element of Poland's cultural heritage. Documentary heritage gathered in libraries makes libraries memory institutions entrusted with guarding resources of special value. This article is intended to evaluate the regulations governing permanent export that are applicable to library materials, considering the definition of library materials in the Act of 27 June 1997 on libraries (consolidated text: *Journal of Laws* of 2019, item 1479). Statistics clearly show that permits for the permanent export of library materials are exceedingly rare. This article discuss the effectiveness of the adopted solutions concerning export regulations related to library materials.

**Keywords:** library materials, cultural heritage, export of cultural goods

## Streszczenie

*Katarzyna Zalasińska*

**Ograniczenia w wywozie materiałów bibliotecznych z Polski**

Materiały biblioteczne stanowią ważny element polskiego dziedzictwa kulturowego. Ze względu na zgromadzone w bibliotekach dziedzictwo dokumentalne biblioteki są instytucjami pamięci, którym powierzono ochronę zasobów o szczególnej wartości. Celem artykułu jest ocena przepisów dotyczących stałego wywozu materiałów bibliotecznych, ze szczególnym uwzględnieniem definicji materiałów bibliotecznych zawartej w ustawie z dnia 27 czerwca 1997 r. o bibliotekach (tekst jedn.: Dz. U. z 2019 r., poz. 1479). Statystyki wyraźnie pokazują, że zezwolenia

na stały wywóz materiałów bibliotecznych są niezwykle rzadkie. W artykule omówiono skuteczność przyjętych rozwiązań w zakresie regulacji wywozowych dotyczących materiałów bibliotecznych.

**Słowa kluczowe:** materiały biblioteczne, dziedzictwo kultury, wywóz dóbr kultury

**Geo Magri**
University of Insubria, Como
geo.magri@uninsubria.it
ORCID: 0000-0003-3724-6592

https://doi.org/10.26881/gsp.2021.2.07

# A survey of the 1970 UNESCO and 1995 UNIDROIT Conventions and their effects on Italian and European private law

## 1. The subject of our survey: Duelling between obligation to return cultural property and protection of the bona fide purchaser

In 2020, we celebrated the fiftieth anniversary of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter: the 1970 UNESCO Convention) and the twenty--fifth anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter: the 1995 UNIDROIT Convention). The two conventions are of significant historical importance because they mark the introduction of a previously unknown legal principle: the obligation to return stolen, illegally exported or illegally excavated cultural goods to their country of origin.

Such a necessity was originally confined to goods stolen during armed conflicts; already at the end of the Napoleonic era,[1] the restitution of works of art looted by the French army was organised, and this practice continued with successive conflicts. Today attempts are even being made to introduce provisions to prevent armed conflict from being an opportunity to facilitate the dispersion of cultural goods or to finance the belligerent parties (e.g. Regulation EU 2019/880). Nowadays the duty to return cultural property is considered especially needed to limit the damage caused by theft and removal of cultural property which occurred during the lockdown caused by the pandemic.[2]

Starting from the 1970 UNESCO Convention, the obligation to return works of art extends to works illegally transferred from a state, even in the absence of armed con-

[1] See: E. Steinmann, *Der Kunstraub Napoleons*, Rome 2007; E. Jayme, *Antonio Canova (1757–1822) als Künstler und Diplomat: Zur Rückkehr von Teilen der Bibliotheca Palatina nach Heidelberg in den Jahren 1815 und 1816*, Heidelberg 1994.

[2] See: "Le trafic de biens culturels a explosé pendant la pandémie de Covid-19", *Le Monde*, 9.11.2020, https://www.lemonde.fr/culture/article/2020/11/09/plus-de-pillages-moins-de-controles-des-tresors-culturels-victimes-collaterales-de-la-pandemie_6059098_3246.html (accessed: 20.02.2021).

flict, with the introduction of the general principle that the removal of a cultural good from its state of origin must be considered illegal. The principle was then also accepted by the EU, which issued a directive on this matter in 1993 (later replaced by Directive 2014/60), and it was subsequently reaffirmed by the 1995 UNIDROIT Convention.

The aim of this study is to investigate how these international rules have produced effects on national private law and on provisions concerning the circulation of cultural goods, contributing to the creation of a special status for these goods, which differentiates them from ordinary goods. The analysis will focus, in particular, on the consequences of the obligation to return cultural property with regard to bona fide purchase regulation. Indeed, as it will be seen, international rules to allow broad protection of the cultural heritage of Contracting States limit the protection of the owner, even if he/she has purchased the good in question in a diligent manner.

## 2. The introduction of the obligation to return cultural property: The 1970 UNESCO Convention

As we have already noted, the general principle that illicitly exported cultural goods must be returned to the country of origin finds its origin in the 1970 UNESCO Convention and was subsequently reaffirmed and strengthened by the 1995 UNIDROIT Convention and Directive 93/7/EEC (later replaced by Directive 2014/60/EU).

The purpose of the international conventions is to protect the cultural heritage of each Contracting State. This aspect must be underlined, as it marks a substantial difference between conventional law and EC/EU legislation, the main purpose of which is to reconcile the principle of free movement of goods with conservation of the cultural heritage of the individual Member States.

Analysing the international conventions (and the EC/EU directives) through the lens of private law, it should be stressed that one of the main results of the adoption of these international rules has been to exclude the applicability of the *possession vaut titre* rule in force in all the main continental legal systems. The inapplicability of this rule to stolen goods, which was already part of the legal acquis of almost all European legal systems, has been extended by the conventions also to cultural goods illegally exported or originating from illegal archaeological excavations.

The legal effect of the 1970 UNESCO Convention emerges from the reading of the provisions stating the obligation for Contracting States to recognise that the illicit import, export, and transfer of ownership of cultural goods are one of the main causes of the impoverishment of the cultural heritage of the countries of origin of these goods (art. 2) and that efforts must be made to combat such practices by undertaking the necessary remedies. The Convention, in its art. 3, defines as illegal the import, export, and transfer of ownership of cultural goods carried out in violation of the provisions adopted by the participating States, and in its art. 7 requires the State Parties not only to prevent the purchase of such cultural goods by museums and similar institutions,

but also to recover and return, at the request of the State of origin, any stolen and illegally imported cultural goods.

The 1970 UNESCO Convention provides that any "innocent purchaser", or anyone who can claim a valid title to the stolen cultural property, is entitled to fair compensation. In this respect, it should be noted that the report of the Special Committee of Experts, which drafted the text, referred to a "fair compensation" to be paid to the buyer in good faith, so that it seems that this should be interpreted as an "innocent" purchaser (it is phrased thus in the English text of the Convention), i.e. a buyer who did not know of the unlawfulness of the provenance of the goods due to the theft or illicit export and who acted with necessary diligence.

The 1970 UNESCO Convention does not provide for a detailed regulation of the restitution action carried out by the state of origin, but merely imposes a general obligation to return the property to the state of origin, subject to compensation to the bona fide purchaser. However, it introduces a profile of extreme importance with regard to civil law, although still formulated generically: in the face of theft or illicit export, the application of the protection of the bona fide purchaser provided for by national law conflicts with conventional obligations and, therefore, cannot be applied. From the civil law perspective, the questions that remain unresolved under the Convention are mainly related to the identification of the concept of the good faith of the purchaser and the conditions necessary to be considered an innocent purchaser within the meaning of the Convention in order to receive the compensation provided. On this specific aspect the 1970 UNESCO Convention remains silent, while further details are contained in the subsequent the 1995 UNIDROIT Convention.

## 3. The need to make the 1970 UNESCO Convention more effective: The 1995 UNIDROIT Convention

The 1995 UNIDROIT Convention was the result of a twofold need deriving from the inadequacies of the 1970 UNESCO Convention: firstly, the need to harmonise some issues of private law and, secondly, the need to overcome certain limits linked to the generic nature of the conditions and modalities for the exercise of the action for restitution and the payment of fair compensation to the bona fide possessor.

Among the private law issues raised by the 1970 UNESCO Convention, the central one was certainly its impact on the existing rules of national law on the protection of the bona fide purchaser. Although the provision of art. 7(b)(ii) was drafted taking into account the rules of domestic private law, the final text, which was amended as a result of subsequent revisions, has required further clarification to allow it to be adapted to national legal systems.

The limited results achieved by the 1970 UNESCO Convention led the UNIDROIT Institute, in collaboration with UNESCO itself, to study new uniform rules on the return and restitution of cultural property. The Institute, assisted by renowned experts

and influenced by Directive 93/7/EC, after more than a decade of work, adopted in 1995 the Convention on Stolen or Illegally Exported Cultural Property, signed in Rome on 24 June 1995. This Convention aims to provide a uniform core of detailed rules on procedures for the return and restitution of cultural goods, improving the regulatory framework designed to prevent illegal practices in the cultural heritage trade, which, by taking advantage of the different national provisions on the acquisition of ownership, make it possible to trade in stolen, illegally exported, or illicitly excavated goods. In order to trade these goods easily, in fact, it is sufficient to transfer them to a country that allows the purchase of property in good faith, and, thus, through the *lex rei sitae*, the purchaser could refuse to return them, invoking his/her title of purchase.[3]

Article 1 of the Convention clarifies that it applies to international claims for: (a) the return of stolen cultural property; (b) the restitution of cultural property removed from the territory of a Contracting State in violation of its internal rules governing its export.[4] The claim for restitution concerns profiles of private international law, while the claim for return satisfies public law interests of the requesting state.[5] It should be noted that, in order to facilitate the recovery of archaeological finds from unauthorized excavations, both the rules governing the return of stolen cultural property and the rules governing the restitution of illegally exported cultural property may be applied. In this way, the Convention is suitable for the particular protection needs for cultural and scientific purposes that characterise archaeological finds, since, in principle, it is more difficult to prove that a cultural object has been excavated illegally than to prove that it has been illegally exported, for example, because it does not have a valid export certificate.

For the purposes of the Convention, any object or objects may be considered cultural if they "on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science" and belong to one of the categories listed in the Annex to the Convention (art. 2). It may seem unusual that, unlike Directive 93/7, the Convention does not provide the definition of the terms adopted. This choice was made because the solution adopted by the Directive was contested by some delegations during the Convention's drafting stage. The omission, however, seems to be

---

[3] A particularly significant example is the case *Winkworth v Christie, Manson & Woods Ltd* [*Winkworth v. Christie, Manson & Woods Ltd.*, [1980] ch. 496, [1980] 1 All E.R. 1121], in which there was a dispute about the ownership of certain artworks that had been stolen from an English collector and transferred to Italy, where they had been sold to a bona fide purchaser. Subsequently the Italian buyer presented the artworks to an auction house in London for sale. The English collector, seeing the items in the auction catalogue, brought a legal action in England for their restitution. Under English law, a thief cannot transfer ownership, and if English law had been applied Mr Winkworth would have won the case and the items would have been returned to him. However, the court decided (properly) that the question of whether the seller had obtained good title to the objects when he purchased them in Italy was governed by Italian (not English) law. Under the Italian Civil Code (art. 1153 c.c.), a good faith purchaser can obtain a good title even to stolen objects.

[4] Regarding the difference between return and restitution see: G. Volpe, "La Convenzione UNIDROIT sul ritorno dei beni culturali rubati o illecitamente esportati", *Notiziario del Ministero dei beni culturali e ambientali* 1996, no. 50, p. 37 ff.

[5] *Ibidem*.

open to criticism, although it is partly justified by the intention to leave national courts more freedom to interpret the provisions.

One of the main problems has been to balance the interests of the bona fide purchaser of the stolen goods with those of the previous owner. The rules on good faith purchases are not uniform in all jurisdictions. There are countries like Italy that offer extensive protection to the bona fide purchaser at the detriment of the owner, even in the case of stolen goods (see: art. 1153 of the Italian Civil Code), while other legal systems (e.g. France and Germany) limit protection to goods possession of which has not been lost unintentionally, and others that do not provide any kind of protection. This is the case, for example, in the Portuguese and English legal systems, where, by virtue of the *nemo dat quod non habet* rule, the expropriated owner normally prevails over the bona fide purchaser.[6]

The Convention adopts a compromise solution by stipulating (art. 3 para. 1) that: "the possessor of a cultural object which has been stolen shall return it". If the possessor is able to prove his/her due diligence at the time of purchase, he/she must be compensated through fair compensation (art. 4 para. 1).[7] It is important to underline the fact that the 1995 UNIDROIT Convention (unlike the UNESCO one) does not consider good faith sufficient, but requires due diligence, which seems more difficult to demonstrate. Article 4 para. 4 of the Convention states the circumstances which must be taken into account in order to ascertain whether the purchaser has exercised due diligence. The provision provides that factors include: "all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances".

In order to verify the presence of a right *in rem* in respect of the goods subject to the request for restitution, reference should be made to the *lex originis*,[8] i.e. the law of

---

[6] See: C. von Bar, *Gemeineuropäisches Sachenrecht*, Bd. 2, *Besitz, Erwerb und Schutz subjektiver Sachenrechte*, Munich 2019, p. 452.

[7] See the so called *Goldberg case* (*Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus vs. Goldberg and Feldman Fine Arts Inc*., 917 F.2d 278, United States Court of Appeals, 7th Cir. 1990, decision of the 24 October 1990), commented on by: Q. Byrne-Sutton, "The Goldberg Case: A Confirmation of the Difficulty in Acquiring Good Title to Valuable Stolen Cultural Objects", *International Journal of Cultural Property* 1992, vol. 1, issue 1, pp. 151–168; O. Muir Watt, "La revendication internationale des biens culturels: à propos de la décision américaine Eglise Autocéphale", *Revue critique de droit international privé* 1992, vol. 81, p. 1 ff.

[8] See: S.C. Symeonides, "Choice of Law Rule for Conflicts Involving Stolen Cultural Property", *Vanderbilt Journal of Transnational Law* 2005, vol. 38, p. 1183, where the author proposes to determine the applicable law through the following general rule: "Except as otherwise provided by an applicable treaty or international or interstate agreement, or statute, the rights of parties with regard to a corporeal thing of significant cultural value (hereinafter: 'thing') are determined as specified below. A person who is considered the owner of the thing under the law of the state in which the thing was situated at the time of its removal to another state shall be entitled to the protection of the law of the former state (state of origin), except as specified below. The owner's rights may not be subject to the less

the state of origin of the cultural good, and not to the *lex rei sitae*, which is generally adopted as a connecting factor in private international law.[9] The solution follows the one already adopted by art. 2 of the 1991 Basel Resolution of the Institut de Droit International on the International Sale of Works of Art, which had largely addressed the problems arising from the application of the general connecting factor of the *lex rei sitae* also in the field of rights *in rem* relating to cultural goods.[10]

The reason behind the decision to use the *lex originis* instead of *the lex loci rei sitae*[11] is linked to the difficulties in applying art. 7 of the 1970 UNESCO Convention within legal systems protecting the purchase in good faith of movable property. It could be argued that the reference to the *lex originis* raises difficulties of coordination with the law applicable to the contract under which the goods were purchased after their illegal export and to which the *lex loci rei sitae* applies. However, under the Convention, this law cannot be taken into account because, if the purchase was made after the theft or the illicit exportation, a duly diligent purchaser is only entitled to demand fair compensation and will not be able to invoke the suitability of the contract to transfer ownership.

The request for return of the goods must be made within three years after the applicant has discovered the location of the goods and identified the owner. The return cannot be requested after fifty years (which may be extended by the laws of the individual States, e.g. art. 3 para. 5) from the date of the theft (art. 3 para. 3).

The limitation period for bringing an action does not apply to the most important cultural objects belonging to the cultural heritage of the Contracting States, for which there is no limitation period (art. 3 para. 4). Given the generality of the rule, both the Contracting State and the private individual physically dispossessed of the property

---

protective law of a state other than the state of origin, (a) unless: (i) the other state has a materially closer connection to the case than the state of origin; and (ii) application of that law is necessary in order to protect a party who dealt with the thing in good faith after its removal to that state; and (b) until the owner knew or should have known of facts that would enable a diligent owner to take effective legal action to protect those rights."

[9] M. Salvadori, "Utilizzazione e circolazione dei beni artistici, storici, archeologici. Profili internazionalistici" [in:] *I nuovi contratti nella prassi civile e commerciale. VII. Beni culturali*, ed. P. Cendon, Turin 2003, p. 411.

[10] *Ibidem*.

[11] With regard to the debate on *lex rei sitae* and *lex originis* with regard to cultural heritage see: T. Szabados, "In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications", *International Journal of Cultural Property* 2019, vol. 27, issue 3, p. 323 ff.; E. Jayme, "Internationaler Kulturgüterschutz: Lex originis oder lex rei sitae. Tagung in Heidelberg", *Praxis des Internationalen Privat- und Verfahrensrechts* 1990, no. 10, p. 347 ff.; *idem*, *Kunstwerk und Nation: Zuordnungsprobleme im internationalen Kulturgüterschutz*, Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philosophisch-historische Klasse, Jg. 1991, Bericht 3, p. 7 ff.; *idem*, "Die Nationalität des Kunstwerks als Rechtsfrage" [in:] *Internationaler Kulturgüterschutz (Akten des Wiener Symposion, 18./19. Oktober 1990)*, ed. G. Reichelt, Vienna 1992, p. 7 ff.; *idem*, "Antonio Canova: la Repubblica delle arti ed il diritto internazionale", *Rivista di diritto internazionale* 1992, vol. 75, p. 889 ff.; *idem*, "Kulturgüterschutz in ausgewählten europäischen Ländern", *Zeitschrift für vergleichende Rechtswissenschaft* 1996, no. 95, p. 158 ff.; *idem*, *Die politische Dimension der Kunst: Antonio Canova*, Frankfurt am Main 2000.

have the right to bring an action for restitution. This is a fundamental difference between the Convention and EU law (see EU Directives 1993/7 and 2014/60), which, by contrast, allows only a Member State to take legal action.

The second part of the Convention is dedicated to the regulation of illegally exported cultural goods, i.e. the regulation of the return of goods that have unlawfully left the state of origin or which, despite having left it lawfully, are not returned to that state on time and in the manner provided for. In order to be able to invoke these provisions, it is, therefore, necessary that all Contracting States adopt internal regulations on the export and protection of cultural goods. The right to request the return of illegally exported goods, unlike in the case of stolen goods, lies exclusively with the Member States (art. 5 para. 1). As in the case of stolen goods, if the illegally exported goods have been acquired by a duly diligent third party purchaser, he/she shall be entitled to fair compensation.

The UNIDROIT Convention entered into force on 1 July 1998 and has been signed or ratified by forty-eight States. These are mainly so-called "exporting" states, i.e. countries whose cultural heritage is continually threatened by illicit trafficking and which, therefore, in general, already have advanced legislation on the protection and conservation of cultural goods. The fact that "importing" countries – where trade in cultural goods is free and which have traditionally shown resistance to regulating this market – have not signed or ratified the Convention is a clear sign of its effectiveness in protecting cultural heritage, but is also the reason for its limited diffusion.

## 4. The relationship between the 1995 UNIDROIT Convention and European Union law

The EU legislator has regulated the return of cultural goods illegally exported from one EU Member State to another with two Directives 93/7 and 2014/60. Unlike the UNIDROIT Convention, the European legislation does not expressly take into account stolen goods and goods resulting from illicitly excavated archaeological finds. However, from reading the recitals (Recitals 5 Dir. 93/7 and Recitals 5 and 16 Dir. 2014/60) and the texts of the two Directives (art. 5 and 10 Dir. 2014/60), it is possible to assume that the provisions contained in the two Directives can also be extended to such goods. The content of the Directives and the Convention constitutes therefore, to a certain extent, overlapping *ratione materiae*.

Moreover, when the 1995 UNIDROIT Convention was drafted, Directive 93/7 was the model to which it looked and by which it was inspired, given that it was only two years older; at the same time, preparatory work carried out on the Convention had inspired the drafting of the Directive itself. It is, therefore, not surprising that there is much in common between the two texts and that the potential overlap between them has been taken into account by the Convention itself, which in art. 13 provides that "this Convention does not affect any international instrument by which any Contracting State is legally bound and which contains provisions on matters governed by this

Convention, unless a contrary declaration is made by the States bound by such instrument". Paragraph 3 of art. 13 is even more precise providing that "In their relations with each other, Contracting States which are Members of organisations of economic integration or regional bodies may declare that they will apply the internal rules of these organisations or bodies and will not therefore apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules".[12] According to the so-called "disconnection clause" contained in para. 3, EU Member States, which are also members of the Convention, will be allowed to apply the provisions of the Directive which overlap with those of the Convention; whereas in matters not covered by the Directive, the rules of the Convention will apply.[13]

The "disconnection clause" has only been invoked by six of the fourteen EU Member States that have signed the Convention.[14] The question, therefore, arises as to what would happen if these states were called to choose between the Directive (the problem, as we shall see, arises to a lesser extent with regard to Directive 2014/60) and the Convention.

The clause made it possible to invoke the rules of the Convention to fill certain gaps in the Directive.[15] For example, the UNIDROIT Convention could have been used to require the restitution or the return of goods not covered by Directive 93/7 or to allow the exercise of actions which, under the Directive, were to be regarded as time-barred.[16] With the introduction of the 2014 Directive, however, the application of the two rules,[17] *ratione temporis* and *ratione materiae*, has essentially coincided, reducing the cases where the Convention could have been used to fill gaps in EU legislation.

Although there are many similarities between the UNIDROIT Convention and the Directives, it is important to note that there are also many differences, which can be traced back to two distinct profiles, one formal, linked to the different nature of the two acts, the other of content.[18] As regards the differences in content, it should be

---

[12] See: J.A. Winter, "The Application of the Unidroit Convention on Stolen or Illegally Exported cultural Objects in Relations between Member States of the European Union" [in:] *Reflections on International law from the Low Countries: In Honour of Paul de Waart*, eds. E.M.G. Denters, N.J. Schrijver, The Hague 1998, p. 347 ff.

[13] According to the *Rapport explicatif* (p. 557) "A la demande de la délégation de l'État détenant alors la présidence du Conseil de l'Union européenne, une clause dite 'de déconnexion' a été insérée pour permettre aux États membres d'organisations d'intégration économique ou d'entités régionales de déclarer qu'ils appliquent les règles internes de cette organisation ou entité au lieu de celles de la Convention dont le champ d'application coïncide avec celui de ces règles".

[14] The "disconnection clause" has been invoked by: Finland, Greece, Italy, Netherlands, Spain, and Sweden; see: UNIDROIT Convention on stolen or illegally exported cultural objects (Rome 1995) – Status, last updated: 2.12.2019, https://www.unidroit.org/status-cp (accessed: 20.02.2021).

[15] See: *Il Codice dei beni culturali e del paesaggio tra teoria e prassi*, eds. A.L. Maccari,V. Piergigli, Milan 2006, p. 357.

[16] See: G. Magri, *La circolazione dei beni culturali nel diritto europeo: limiti e obblighi di restituzione*, Naples 2011, p. 71.

[17] See: *Il Codice dei beni culturali*…, p. 357.

[18] See: M. Marletta, *La restituzione dei beni culturali: normativa comunitaria e Convenzione Unidroit*, Padua 1997, p. 203.

noted that the scope of the Convention is broader than that of the Directive. The Convention aims to regulate both the restitution of stolen cultural goods and the return of those illegally exported. Moreover, in the case of stolen goods, the Convention also recognises the legitimacy of private individuals to take action to obtain the restitution. It follows that, while the Directives only protect the public interest of Member States, the Convention also aims to satisfy the private interest of the owner, allowing him/her to recover the ownership of the stolen good.

The correct and uniform interpretation of the Directives by the Member States is subject to the supervision of the Court of Justice, to which national courts are entitled to refer the matter using a preliminary ruling procedure, while the Convention lacks an organ entrusted with a nomophilactic function. Finally, compliance with the Directive is guaranteed by the effective system of control and sanctions provided for in the Treaties, while compliance with the Convention remains entrusted to the weakest guarantee mechanisms offered by international law.[19]

The Convention is more rigorous in demanding that the requesting state demonstrate to the state requested which the primary interests are to be satisfied by the restitution of the cultural object involved, by providing proof of the damage caused by the loss of the object (see: art. 5).

Another difference between the two texts results from the limitation period for bringing an action, which in Directive 93/7 is only one year. The limitation period, which was considered too short to allow states to implement the measures necessary to bring an action, has been extended by art. 8 of Directive 2014/60 and is now aligned with that laid down in the UNIDROIT Convention. This shows that there is still a dialogue between the UNIDROIT Convention and EU law.

Both the Convention and the EU legislation make use of the purchaser's due diligence criterion in order to recognise the right to fair compensation; the rules of the Convention are, however, more elaborate than those set out in Directive 93/7. The latter, in fact, limits itself to providing, in art. 9, that the competent court of the state in which restitution is requested shall award fair compensation to the possessor of the good on the basis of the circumstances of the case, provided that due diligence at the time of purchase is proved. The Convention, on the other hand, following the proposal of 1993 Directive, sets out more specifically the criteria to be examined in determining whether or not there has been due diligence on the part of the purchaser. The Convention also makes a distinction according to whether the goods are stolen or exported illegally. In the first case, art. 4 provides that the possessor is entitled to fair compensation when the goods are returned, provided that he/she can prove that he/she "neither knew nor ought reasonably to have known that the object was stolen". In the case of illegally exported goods, on the other hand, art. 6 requires the possessor to prove that he/she "neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported". This difference has been partially eliminated by art. 10 of the 2014 Directive, which, transposing the wording

[19] *Ibidem*, p. 205.

of the Convention, provides that in determining whether the purchase was made with the required (due) diligence, consideration must be given to "all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances". The Directive takes over almost word-for-word art. 4. para. 4 of the Convention, but by adding "the authorisations for removal required under the law of the requesting Member State", it has become even more rigorous in regulating due diligence than the Convention.[20]

The burden of proof of having purchased with due diligence shall be carried by the possessor (art. 10 para. 1 of Directive 2014/60). The Directive, in this way, seeks, on the one hand, to standardize the interpretation of the notion of due diligence, providing a guide to judges in the concrete evaluation of the concept, and, on the other hand, always with harmonizing intent, it has removed the regulation of the burden of proof from the *lex fori*, and, therefore, from any differences between civil and common law systems, in order to attribute it in a general way to the possessor/purchaser.

Article 6 para. 3 of the Convention provides, in lieu of compensation, and in agreement with the requesting state, that the possessor obliged to return the cultural property to that state may decide to retain ownership of the good or to transfer ownership to a person of his choice residing in that state. The Directive does not foresee such choice for the possessor; neither does it address the question of attribution of ownership of the returned good (art. 12 Dec. 93/7 and 13 Dec. 2014/60). It merely states that the acceptance of the action entails the restitution of the property in the territory of the requesting state and that the requesting state will regulate the attribution of ownership.

## 5. Closing remarks

According to some scholars the question should be asked whether "cultural property is distinctive or special, and therefore different from ordinary property".[21] According to Eric Posner, "[t]here is no good argument for international legal regulation of cultural property, during peacetime or wartime", and it might even be assumed that

[20] M. Schneider, "The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive", *Santander Art and Culture Law Review* 2016, no. 2, p. 161.

[21] E.A. Posner, "The International Protection of Cultural Property: Some Skeptical Observations", *Chicago Journal of International Law* 2007, vol. 8, no. 1, pp. 214–215.

"the treatment of cultural property would improve, even during wartime, if the current regime of international regulation were abolished".[22]

In reality, at a national, European and international level, the rules on cultural property are different from those governing other types of ownership and this seems more than understandable: with regard to cultural property, in fact, in addition to the owner's interest, there is also a collective interest in its conservation and preservation. For this reason, in Italy, it has been observed that the ownership of cultural goods is a *sui generis* property ownership,[23] in which both the state's interest in the preservation of the national cultural heritage and that of the private owner (if any) coexist. Therefore, in Italy, it has been proposed that cultural heritage should be considered as a "common" property.[24] Given that the category of commons is not yet transposed by Italian law, but it is just a thought within a part of academic literature,[25] even working with traditional categories and supported by the *ius condito*, it is evident that cultural goods, even when they are privately owned, never completely belong to their private owner.

They are one of the most typical expressions of the social function of private property which, since the Weimar Constitution, characterises European private law, allowing limitations to the right to property of individuals in accordance with the (public) need to protect an interest of the state and the community.[26] The UNESCO and UNIDROIT Conventions and, although to a lesser extent, given that by express declaration they do not affect the ownership regime, Directives 93/7 and 2014/60 are a further manifestation of the presence of a public interest in cultural property, an interest which may go so far as to limit and exclude the private owner's dominical rights.

The rules we have examined, in fact, derogate from the normal rules of private law and contribute to creating a particular private *status* for cultural property, which is largely influenced by the public interest. The 1995 UNIDROIT Convention and the directives issued by the EU deserve special attention in this analysis. These rules have had an impact on the concept of cultural property, contributing to the creation, at

---

22 *Ibidem*, note 63 and pp. 214, 215, 225, 228.

23 See: L. Biamonti, "Natura del diritto dei privati sulle cose di pregio artistico e storico", *Foro italiano* 1913, part I, sec. 1, column 1011; R. Balzani, *Per le antichità e le belle arti. La legge n. 364 del 20 giugno 1909 e l'Italia giolittiana. Dibattiti storici in Parlamento*, Bologna 2003, p. 404; G. Severini, "L'immateriale economico nei beni culturali", *Aedon* 2015, no. 3, http://www.aedon.mulino.it/archivio/2015/3/severini.htm#nota12 (accessed: 20.02.2021).

24 See: S. Marotta, "Per una lettura sociologico-giuridica dei beni culturali come ‚beni comuni'" [in:] *Patrimonio culturale. Profili giuridici e tecniche di tutela*, eds. E. Battelli *et al.*, Rome 2017, p. 37 ff.

25 Indeed, the creation of a new ownership system that lies between public and private ownership is rightly criticised also on a philosophical level. See, in this regard, the convincing arguments of P.P. Portinaro, *Le mani su Machiavelli. Una critica dell'«Italian Theory»*, Rome 2018, *passim*; S. Mabellini, "I beni culturali e lo status di 'beni comuni': un'assimilazione indispensabile?", *Economia della cultura* 2017, no. 1, pp. 81–94, which stresses that the constitutional status of the property – both public and private – has not run out of the ability to protect the collective interest, as evidenced paradigmatically by the development of the status of cultural heritage.

26 See: F. Longobucco, "Beni culturali e conformazione dei rapporti tra privati: quando la proprietà «obbliga»", *Politica del diritto* 2016, vol. IV, p. 547 ff.

least with regard to circulation, of that particular status of cultural property mentioned above. The international rules, in fact, intervene to limit the circulation of cultural goods and to protect the interest of the requesting state (and also of the owner in the case of the UNIDROIT Convention) to have returned goods that have been stolen or illegally exported. The provision clearly affects the regulation of good faith purchases by derogating from the rules normally adopted by European legislation. Moreover, the investigations that the purchaser must carry out in order to be considered diligent appear to be so in-depth that it is difficult to compare the circulation of cultural goods with that of other movable goods for which, on the contrary, no particular precautions are generally prescribed. The general rule, accepted by European private law, is that whoever buys in good faith from the apparent owner becomes the owner if he/she buys under a suitable title and comes into possession of the good.

This rule has different variations at a national level and operates in some jurisdictions in a more extensive way, while in others it does so in a more restrictive manner; in Italy, for example, the protection of the bona fide purchaser is particularly wide and also includes stolen goods, which in the rest of Europe, by contrast, are generally excluded from its scope of application.

The UNIDROIT Convention (and on its model EU legislation), on the other hand, limits the effects of the protection of the bona fide purchaser by requiring not only the return of stolen goods, which would be natural in almost all European jurisdictions, but also the restitution of illegally exported goods. With reference to the subjective requirement, the international regulation adopts an even stricter criterion than the good faith already known to the national legal systems, imposing a particularly high degree of diligence on the purchaser in order to claim fair compensation in the event of return or restitution. Such a regulation ends up by limiting the field of application of the rules of private law, harmonising legal systems so as to exclude the possibility that, through the application of the *lex rei sitae* and an extensive protection of the bona fide purchaser, markets are created in which trade in cultural goods of illicit origin can be concentrated.

From the international and European Union rules, there derives, therefore, a reformulation of the discipline of the bona fide purchase, according to which the purchaser, instead of keeping the ownership of the purchased goods, has the right to fair compensation, provided, however, that he/she has acquired the property with due diligence, i.e. with a deeper diligence than that adopted by a bona fide purchaser. Italian jurisprudence seems to have been influenced by these innovations: in fact, when it is called upon to rule on the applicability of art. 1153 of the Italian Civil Code to cultural goods, the judgment appears to be particularly rigorous in imposing on the purchaser the burden of proving his/her good faith.[27]

The rules on the international circulation of cultural goods have struck an even greater echo in Italian literature, where some scholars have begun to reflect on the compatibility of the protection of bona fide purchasers provided for in art. 1153 of

[27] See: Cass. 14. 9. 1999, Nr. 9782, in *Giust. civ. Mass*. 1999, p. 1968; M. Cenini, *Gli acquisti a non domino*, Milan 2009, p. 166 ff.

the Italian Criminal Code with reference to cultural goods, stressing how the moment has arrived to rethink the discipline of good faith purchasing, to bring it into line with that provided for in other European legal systems.[28]

The Draft Common Frame of Reference of European private law (DCFR) itself, in identifying the common frame of reference of European private law on the bona fide purchase of movable property, in art. VIII-3:101 (2), excludes stolen cultural goods, demonstrating a particular sensitivity to the subject, which is further proof of how much international and European law has affected European private law.

It might be questioned why the rules on the protection of cultural heritage affect private law and whether such an influence of public law on private law is desirable. The reason why rules on the protection of cultural heritage restrict the freedom of private individuals and affect private law is clearly linked to the need to ensure the overriding general interest in the preservation of cultural heritage, which can be jeopardised by inadequate market regulation and the absence of provisions restricting the free movement of cultural goods and thereby making the rules on general goods inapplicable to them. A delimiting intervention of public law over private law is therefore essential. The UNESCO and UNIDROIT Conventions, as well as the European directives, fulfil precisely the function of connecting public and private law, avoiding that the freedom of movement provided for goods also extends to goods that are an expression of the cultural interest of the individual states. They also demonstrate that in the struggle between cultural nationalism and internationalism,[29] the idea that cultural goods are the expression of the cultural community that produced them and that, therefore, they must be returned to that community is currently prevalent.

## Literature

Balzani R., *Per le antichità e le belle arti. La legge n. 364 del 20 giugno 1909 e l'Italia giolittiana. Dibattiti storici in Parlamento*, Bologna 2003.

Bar C. von, *Gemeineuropäisches Sachenrecht*, Bd. 2, *Besitz, Erwerb und Schutz subjektiver Sachenrechte*, Munich 2019.

Biamonti L., "Natura del diritto dei privati sulle cose di pregio artistico e storico", *Foro italiano* 1913, part I, sec. 1.

Byrne-Sutton Q., "The Goldberg Case: A Confirmation of the Difficulty in Acquiring Good Title to Valuable Stolen Cultural Objects", *International Journal of Cultural Property*, 1992, vol. 1, issue 1.

Cenini M., *Gli acquisti a non domino*, Milan 2009.

Francioni F., "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity", *Michigan Journal of International Law* 2004, vol. 55, no. 4.

[28] R. Sacco, R. Caterina, *Il possesso*, 4rd ed., Milano 2014, p. 445; G. Magri, "Beni culturali e acquisto *a non domino*", *Rivista di diritto civile* 2013, no. 3, pp. 741–766, *idem*, "Directive 2014/60/EU and Good Faith Acquisition of Cultural Goods in Italy" [in:] *Cultural Heritage. Scenarios 2015–2017*, eds. S. Pinton, L. Zagato, Venice 2017, p. 227 ff.

[29] See: J.H. Merryman, "Cultural Property Internationalism", *International Journal of Cultural Property* 2005, vol. 12, no. 1, p. 11 ff.; F. Francioni, "Beyond State Sovereignty: the Protection of Cultural Heritage as a Shared Interest of Humanity", *Michigan Journal of International Law* 2004, vol. 55, no. 4, p. 1209 ff.

Jayme E., *Antonio Canova (1757–1822) als Künstler und Diplomat: Zur Rückkehr von Teilen der Bibliotheca Palatina nach Heidelberg in den Jahren 1815 und 1816*, Heidelberg 1994.

Jayme E., "Antonio Canova: la Repubblica delle arti ed il diritto internazionale", *Rivista di diritto internazionale* 1992, vol. 75.

Jayme E., "Die Nationalität des Kunstwerks als Rechtsfrage" [in:] *Internationaler Kulturgüterschutz (Akten des Wiener Symposion, 18./19. Oktober 1990)*, ed. G. Reichelt, Vienna 1992.

Jayme E., *Die politische Dimension der Kunst: Antonio Canova*, Frankfurt am Main 2000.

Jayme E., „Internationaler Kulturgüterschutz: Lex originis oder lex rei sitae. Tagung in Heidelberg", *Praxis des Internationalen Privat- und Verfahrensrechts* 1990, no. 10.

Jayme E.,„Kulturgüterschutz in ausgewählten europäischen Ländern", *Zeitschrift für vergleichende Rechtswissenschaft* 1996, no. 95.

Jayme E., *Kunstwerk und Nation: Zuordnungsprobleme im internationalen Kulturgüterschutz*, Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philosophisch-historische Klasse, Jg. 1991, Bericht 3.

"Le trafic de biens culturels a explosé pendant la pandémie de Covid-19", *Le Monde*, 9.11.2020.

Longobucco F., "Beni culturali e conformazione dei rapporti tra privati: quando la proprietà «obbliga»", *Politica del diritto* 2016, vol. IV.

Mabellini S., "I beni culturali e lo status di 'beni comuni': un'assimilazione indispensabile?", *Economia della cultura* 2017, no. 1.

Maccari A.L., Piergigli V. (eds.), *Il Codice dei beni culturali e del paesaggio tra teoria e prassi*, Milan 2006.

Magri G., "Beni cultuali e acquisto *a non domino*", *Rivista di diritto civile* 2013, no. 3.

Magri G., "Directive 2014/60/EU and Good Faith Acquisition of Cultural Goods in Italy" [in:] *Cultural Heritage. Scenarios 2015–2017*, eds. S. Pinton, L. Zagato, Venice 2017.

Magri G., *La circolazione dei beni culturali nel diritto europeo: limiti e obblighi di restituzione*, Naples 2011.

Marletta M., *La restituzione dei beni culturali: normativa comunitaria e Convenzione Unidroit*, Padua 1997.

Marotta S., "Per una lettura sociologico-giuridica dei beni culturali come ‚beni comuni'" [in:] *Patrimonio culturale. Profili giuridici e tecniche di tutela*, eds. E. Battelli, B. Cortese, A. Gemma, A. Massaro, Rome 2017.

Merryman J.H., "Cultural Property Internationalism", *International Journal of Cultural Property* 2005, vol. 12, no. 1.

Muir Watt O., "La revendication internationale des biens culturels: à propos de la décision américaine Eglise Autocéphale, *Revue critique de droit international privé* 1992, vol. 81.

Portinaro P.P., *Le mani su Machiavelli. Una critica dell'«Italian Theory»*, Rome 2018.

Posner E.A., "The International Protection of Cultural Property: Some Skeptical Observations" *Chicago Journal of International Law* 2007, vol. 8, no. 1.

Sacco R., Caterina R., *Il possesso*, 4rd ed., Milano 2014.

Salvadori M., "Utilizzazione e circolazione dei beni artistici, storici, archeologici. Profili internazionalistici" [in:] *I nuovi contratti nella prassi civile e commerciale. VII. Beni culturali*, ed. P. Cendon, Turin 2003.

Schneider M., "The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive", *Santander Art and Culture Law Review* 2016, no. 2.

Severini S., "L'immateriale economico nei beni culturali", *Aedon* 2015, no. 3.

Steinmann E., *Der Kunstraub Napoleons*, Rome 2007.
Symeonides S.C., "Choice of Law Rule for Conflicts Involving Stolen Cultural Property", *Vanderbilt Journal of Transnational Law* 2005, vol. 38.
Szabados T., "In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications", *International Journal of Cultural Property* 2019, vol. 27, issue 3.
Volpe G., "La Convenzione UNIDROIT sul ritorno dei beni culturali rubati o illecitamente esportati", *Notiziario del Ministero dei beni culturali e ambientali* 1996, no. 50.
Winter J.A., "The Application of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects in Relations between Member States of the European Union" [in:] *Reflections on international law from the low countries: In honour of Paul de Waart*, eds. E.M.G. Denters, N.J. Schrijver, The Hague 1998.

## Summary

*Geo Magri*

**A survey of the 1970 UNESCO and 1995 UNIDROIT Conventions and their effects on Italian and European private law**

This article analyses the influence on Italian and European private law of the UNESCO and UNIDROIT Conventions and European directives on the return of stolen and illicitly exported cultural goods. In effect, international rules have influenced the application of rules on the bona fide purchase of movable property, amending the provisions in force in most European countries and contributing to the constitution of a particular statute for cultural property.

**Keywords**: cultural heritage, good faith, restitution, return

## Streszczenie

*Geo Magri*

**Przegląd konwencji UNESCO (1970) i konwencji UNIDROIT (1995) oraz analiza ich wpływu na włoskie i europejskie prawo cywilne**

W artykule omówiono wpływ konwencji UNESCO i konwencji UNIDROIT na włoskie i europejskie porządki prawa cywilnego, a także na unijne dyrektywy dotyczące zwrotu dóbr kultury wyprowadzonych niezgodnie z prawem z terytorium państw członkowskich. Porządek prawa ponadnarodowego wpływa na zastosowanie norm rządzących nabyciem rzeczy ruchomej w dobrej wierze, *de facto* wypierając obowiązujące w państwach członkowskich przepisy i tworząc autonomiczny reżim prawny dla ruchomych dóbr kultury.

**Słowa kluczowe**: dziedzictwo kultury, dobra wiara, restytucja, zwrot

**Magdalena Łągiewska**
University of Gdańsk
magdalena.lagiewska@ug.edu.pl
ORCID: 0000-0001-9482-2651

https://doi.org/10.26881/gsp.2021.2.08

# Ratification of the 1995 UNIDROIT Convention in Poland: Pipe dream or realistic prospect?

## 1. Introduction

Cultural objects have had a crucial meaning for mankind throughout history. Even nowadays, each nation is aware of the need to safeguard cultural property that is part of a common heritage. Cultural artefacts are widely considered not only to be a kind of manifestation of intellectual creativity, but also as having some specific attributes. Furthermore, those cultural goods have a certain aesthetic and spiritual value. Historically, spoliation of cultural objects and destruction of cultural property by enemies have been widespread in times of war. Such actions had several purposes; for instance spoliation meant taking property as trophies and had the aim of humiliating an enemy.[1] Even nowadays, we have to deal with the theft and illicit export of cultural goods. The 1995 UNIDROIT Convention on Stolen or Illicitly Exported Cultural Objects (hereinafter: the 1995 UNIDROIT Convention) provides some legal measures that are significant in relation to the restitution or return of cultural objects. This legal act is widely considered to be supplementary to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter: the 1970 UNESCO Convention). Poland ratified the latter convention on 31 January 1974. The aim of this article is, thus, to consider whether a ratification of the 1995 UNIDROIT Convention in Poland is a pipe dream or a realistic prospect. In order to give an answer to this question, the article focuses primarily on the significance of the 1995 UNIDROIT Convention in cultural heritage law. Further, it considers its scope of application (*ratione materiae*). Finally, it draws conclusions about the perspectives for the ratification of the 1995 UNIDROIT Convention in Poland.

[1] A. Taşdelen, *The Return of Cultural Artefacts*, Cham 2016, p. 1.

## 2. The significance of the 1995 UNIDROIT Convention for cultural heritage law

It is noteworthy that the 1995 UNIDROIT Convention entered into force on 1 July 1998. This was the first time that the International Institute for the Unification of Private Law (UNIDROIT) adopted a convention regarding cultural heritage issues.[2] The 1995 UNIDROIT Convention had the aim of harmonising the whole range of private law topics that had been already touched upon in the 1970 UNESCO Convention. The 1995 UNIDROIT Convention was also approved by UNESCO. Overall, the 1995 UNIDROIT Convention is widely considered to be a uniform law that was adopted in order to challenge weaknesses in the 1970 UNESCO Convention. Hence, the key issue concerns the need to simplify both the restitution of stolen cultural objects and the return of those cultural objects that have been found in the hands of private owners.[3]

The 1995 UNIDROIT Convention is widely considered to be complementary to the 1970 UNESCO Convention. The latter is recognised as the first international instrument setting forth provisions concerning the protection of cultural heritage. The 1970 UNESCO Convention includes measures that are indispensable in order to prevent and prohibit both the illicit import, export, and transfer of ownership of cultural goods. One could even outline the "three pillars" of the 1970 UNESCO Convention. Hence, the first pillar is based upon preventive measures pertaining to national legislation. Those measures have the aim of combatting illegal trafficking in cultural goods. The second pillar refers to the restitution of cultural properties and the third concerns cooperation in this field between state parties.[4] Although the 1970 UNESCO Convention was the first such international instrument providing measures against illicit trafficking in cultural property, the international community realised the need to complement those provisions. Because of shortcomings in the 1970 UNESCO Convention, in particular the lack of solutions applicable to private law issues concerning the ownership of cultural property, UNESCO addressed a request to the International Institute for the Unification of Private Law (UNIDROIT) to prepare a draft of a parallel convention. As a result of this action, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was drafted and then opened for signature on 24 June 1995. The Convention came into force on 1 July 1998 and to date there are forty-eight contracting states.[5]

---

[2] L. Prott, "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On", *Revue de droit uniforme* 2009, vol. 14, issue 1–2, p. 215.

[3] S. Vigneron, "Protecting Cultural Objects: Enforcing the Illicit Export of Foreign Cultural Objects" [in:] *Art, Cultural Heritage and the Market*, eds. V. Vadi, H. Schneider, Berlin – Heildelberg 2014, p. 127.

[4] M. Schneider, "The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive", *Santander Art and Culture Law Review* 2016, no. 2, pp. 150–151.

[5] C. Forrest, "Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage", *Melbourne Journal of International Law* 2003, vol. 4, p. 592 ff.; cf. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome 1995) – Status, https://www.unidroit.org/status-cp (accessed: 28.11.2020).

It is noteworthy that both the 1970 UNESCO Convention and the 1995 UNIDROIT Convention have the aim to curb the illicit trade in cultural goods. Both of these conventions are non-retroactive; thus, they are applicable only between State Parties. Furthermore, both conventions consist of regulations regarding objects of illicit provenance, that is, as a result of theft or illicit export.[6]

The 1995 UNIDROIT Convention, as a new instrument, not only underpins the provisions included in the 1970 UNESCO Convention, but also supplements them. Therefore, this convention contains some minimum legal rules and measures applicable in relation to the restitution or return of cultural goods. Both – the 1970 Convention and the 1995 UNIDROIT Convention are, simultaneously, compatible with and complementary to each other.[7] Hence, the 1995 UNIDROIT Convention has the aim of dealing with the weaknesses of the 1970 UNESCO Convention in relation to the restitution of cultural objects. In both its scope and provisions, the 1995 UNIDROIT Convention is clear and transparent. It consists of rules and principles applicable in relation to the restitution or return of cultural objects that have been stolen or illegally exported. Overall, this convention was adopted in order to reduce illegal trafficking in cultural objects in the future. All these international instruments aim to influence the conduct of all participants in the art market.[8] In comparison with the 1970 UNESCO Convention, the 1995 UNIDROIT Convention pays substantial attention to the recovery phase, providing some uniform rules and conditions concerning both restitution claims relating to stolen cultural objects and return claims relating to illegally exported cultural objects.[9]

One must note that the 1995 UNIDROIT Convention contains two essential principles that are of some significance from the perspective of cultural heritage law. The first is the principle of restitution of stolen cultural objects, and the second is the principle of the return of cultural objects that have been illicitly exported. Nonetheless, it should be stressed that both principles are controversial and, consequently, constitute challenging legal issues.[10] The restitution of cultural objects should be understood as a process of handing back cultural objects in the event of spoliation during wartime or of theft. The restitution of cultural goods is a result of an unlawful situation. Return, however, may relate to a piece of cultural property removed by a colonial power or to something that has been illicitly exported.[11]

---

[6] UNESCO and UNIDROIT – Cooperation in the Fight Against Illicit Traffic in Cultural Property, Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 2005, UNESCO Headquarters, Paris, p. 1, http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/information%20note.pdf (accessed: 26.11.2020).

[7] The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – an overview, https://www.unidroit.org/overviecp/english (accessed: 28.11.2020).

[8] M. Schneider, "The 1995 UNIDROIT Convention…", p. 154.

[9] UNESCO and UNIDROIT – Cooperation…, p. 3.

[10] W.W. Kowalski, "Droga do Konwencji UNIDROIT z 1995 roku oraz jej podstawowe rozwiązania", *Santander Art and Culture Law Review* 2015, no. 1, p. 68.

[11] M. Cornu, M.A. Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution", *International Journal of Cultural Property* 2010, vol. 17, p. 2.

## 3. The 1995 UNIDROIT Convention: Scope of application

It is noteworthy that both the 1970 UNESCO Convention and the 1995 UNIDROIT Convention contains the same definition of cultural property, including the categories of cultural objects that they seek to protect. Hence, these two conventions can work together. This means that each country can ratify both conventions to guarantee better and more complex protection of cultural objects against unlawful actions. In fact, the 1995 UNIDROIT Convention is complementary to the 1970 UNESCO Convention. However, even if these two international treaties adopt the same categories of cultural objects, there is a significant difference in the way in which they apply them. Pursuant to the provisions of the 1970 UNESCO Convention, the state is required to "designate" which cultural objects should be returned. In other words, the 1970 UNESCO Convention provides some legal measures applicable in the event of cultural objects being stolen from a museum, a religious or secular public monument, or any other institution having documentation of such objects in their inventories.

On the other hand, the 1970 UNESCO Convention does not contain any provisions applicable in the event of cultural objects that are not included in public inventories being the subject of unlawful actions. In other words, the procedure of restitution or return of cultural objects belonging to private owners is much more complicated, because they are not "designated" by the State. This loophole has been filled by the 1995 UNIDROIT Convention. As a result, private owners also have a right to take legal measures in order to retrieve cultural objects. Despite the fact that those cultural objects are neither registered nor "designated" as such by the State, but are part of private collections, are held in private homes, or any kind of religious building, or are held in private collections or by traditional communities, the 1995 UNIDROIT Convention provides some legal measures in order to claim back those cultural objects.[12] Furthermore, cultural goods that have been excavated, either unlawfully or even lawfully, but retained contrary to law, are assumed to be stolen (art. 3(2) of the 1995 UNIDROIT Convention). In comparison with the 1970 UNESCO Convention, the 1995 UNIDROIT Convention applies equally to archaeological artefacts that have been taken from excavations. Hence, the 1995 UNIDROIT Convention makes up for the shortcomings of the earlier Convention.[13]

In relation to restitution or return, a claim "may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States", according to art. 8(1) of the 1995 UNIDROIT Convention; furthermore "the parties may agree to submit the dispute to

[12] L.V. Prott, "UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects", *Uniform Law Review* 1996, vol. 1, p. 62; cf. P.L. d'Epinay, "Une avancée du droit international: la Convention de Rome d'Unidroit sur les biens culturels volés ou illicitement exportés", *Uniform Law Review* 1996, vol. 1, pp. 40–58.

[13] M. Schneider, "The 1995 UNIDROIT Convention…", pp. 154–155.

any court or other competent authority or to arbitration". In other words, compared to the 1970 UNESCO Convention, the 1995 UNIDROIT Convention stipulates that restitution or return claims should be heard by the court or any other authority competent in view of the location of such a cultural object. It is worth stressing that if both parties agree and come to a consensus, there is also a possibility of submitting such a dispute to another court or, even, instead of a court of choosing arbitration.[14]

Moreover, it is noteworthy that, according to the 1995 UNIDROIT Convention, either a State Party or an individual or a legal entity that is an owner of stolen cultural objects can claim restitution. A State Party is entitled to claim restitution, however, in the case of those cultural goods that have been illicitly exported.[15]

Finally, it should be stressed that the 1995 UNIDROIT Convention is a much more recent and articulated instrument compared to the 1970 UNESCO Convention. Therefore, this convention should be considered as a tool to prevent possible abuse in relation to what is called the presumed good faith acquisition of cultural objects. Taking this notion into account, the 1995 UNIDROIT Convention stipulates that the possessor of a stolen cultural object is entitled to receive "a fair and reasonable compensation". There are, however, two conditions that must be met in order to obtain such compensation. The first condition requires that "the possessor neither knew nor ought reasonably to have known that the object was stolen". The second refers to the proof confirming what is called "due diligence when acquiring the object" (art. 4(1) of the 1995 UNIDROIT Convention).

While assessing the due diligence of the possessor, attention should be paid to the whole range of the circumstances related to the acquisition of the cultural objects involved. This means that there is a need to examine "the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances" (art. 4(4) of the 1995 UNIDROIT Convention).

Moreover, according to art. 6(1) of the 1995 UNIDROIT Convention, a fair and reasonable compensation should be also paid to the possessor in the case of illicitly exported cultural goods. This provision stipulates the same conditions as mentioned above to receive such compensation. Nonetheless, while assessing whether "the possessor knew or ought to have known about the illicit export of cultural good", attention should be paid to the circumstances of the acquisition, that is, for example, "the absence of an export certificate required under the law of the requesting State" (art. 6(2) of the 1995 UNIDROIT Convention). Apart from compensation, the 1995 UNIDROIT Convention contains some other alternative solutions provided in art. 6(3). Hence, "instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may decide: (a) to retain ownership

[14] UNESCO and UNIDROIT – Cooperation…, p. 4.
[15] *Ibidem*, p. 4.

of the object; or (b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees".

Finally, it is worth mentioning the time limit specified by the 1995 UNIDROIT Convention to claim restitution of cultural goods. Pursuant to art. 3, "any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft". A statutory time limitation of three years seems to be a relatively short time.[16]

To sum up, "in light of the foregoing, there can be no doubt that the 1995 UNIDROIT Convention can be an effective instrument for protecting the national cultural heritage of states against the loss of movable components through illegal exports. However, in order for it to be effective, the Convention needs to be ratified by the greatest possible number of countries"[17].

## 4. Perspectives on ratification of the 1995 UNIDROIT Convention in Poland

It is worth stressing that Poland has recently taken measures in order to ratify another convention, namely the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. As of now, both the Sejm (the lower house of the Polish Parliament) and the Senate (the upper house of the Polish Parliament) have expressed their consent and will to ratify this Convention. Certainly, such an event will be a cornerstone in the protection of cultural heritage located underwater. Taking this into account, Poland should also consider the ratification of the 1995 UNIDROIT Convention. Polish experts and researchers on cultural heritage have already repeatedly expressed their view that this Convention should be ratified. From this perspective, it is worth referring to two International Conferences on Cultural Heritage Protection, "Ratification and Implementation of the 1995 UNIDROIT Convention in Poland" and "Private Collections: Historical and Legal Perspective", both held at the University of Gdańsk on 6–7 June 2019.[18] Nonetheless, despite the supportive attitude of academic experts, the Polish Government has not taken decisive measures to achieve such a goal. However, there

[16] Z. Veres, "The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention", *Santa Clara Journal of International Law* 2014, vol. 12, issue 2, p. 106.

[17] W.W. Kowalski, "Ratification of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, in Light of Directive 2014/60/UE on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State: The Perspective of Poland", *Santander Art and Culture Law Review* 2016, no. 2, p. 174.

[18] K. Zeidler, J. Stepnowska, "International Conferences on Cultural Heritage Protection: 'Ratification and Implementation of the 1995 UNIDROIT Convention in Poland' and 'Private Collections: Historical and Legal Perspective', 6-7 June 2019, Faculty of Law and Administration, University of Gdańsk, Poland", *International Journal of Cultural Property* 2020, vol. 27, pp. 151–155.

is certainly a consensus among the majority of scholars concerning the necessity to ratify this Convention. Besides, such a ratification would ensure a holistic approach to protecting cultural heritage in Poland. Unfortunately, no actions have been taken thus far to make ratification possible.

The fact that Poland is on its way to ratifying the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage should be seen as a good prognosis for the future. Bearing in mind this new trend, we look forward to the ratification of the 1995 UNIDROIT Convention as a final step in building a complex system of cultural heritage protection in Poland.

## 5. Conclusions

The 1995 UNIDROIT Convention supplements the provisions of the 1970 UNESCO Convention. It should be stressed that this convention was adopted in order to compensate for weaknesses and shortcomings of the UNESCO Convention. Twenty-five years after its adoption, there is still a relatively small and, thus, unsatisfactory number of State Parties to this Convention. In the light of the foregoing, it is noteworthy that Poland has not ratified the 1995 UNIDROIT Convention thus far. With a view to having a complex cultural heritage protection system, Poland should increase its efforts to ratify the 1995 UNIDROIT Convention in the future. Bearing in mind recent achievements, I believe that the voice of experts on cultural heritage law will be heard by the authorities and that Poland will become a State Party to the 1995 UNIDROIT Convention soon.

## Literature

Cornu M., Renold M.-A., "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution", *International Journal of Cultural Property* 2010, vol. 17.

d'Epinay P.L., "Une avancée du droit international: la Convention de Rome d'Unidroit sur les biens culturels volés ou illicitement exportés", *Uniform Law Review* 1996, vol. 1.

Forrest C., "Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage", *Melbourne Journal of International Law* 2003, vol. 4.

Kowalski W.W., "Droga do Konwencji UNIDROIT z 1995 roku oraz jej podstawowe rozwiązania", *Santander Art and Culture Law Review* 2015, no. 1.

Kowalski W.W., "Ratification of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, in Light of Directive 2014/60/UE on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State: The Perspective of Poland", *Santander Art and Culture Law Review* 2016, no. 2.

Prott L.V., "UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects", *Uniform Law Review* 1996, vol. 1.

Prott L., "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On", *Revue de droit uniforme* 2009, vol. 14, issue 1–2.

Schneider M., "The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive", *Santander Art and Culture Law Review* 2016, no. 2.

Taşdelen A., *The Return of Cultural Artefacts*, Cham 2016.

UNESCO and UNIDROIT – Cooperation in the Fight Against Illicit Traffic in Cultural Property, Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 2005, UNESCO Headquarters, Paris, p. 1, http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/information%20note.pdf (accessed: 26.11.2020).

Veres Z., "The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention", *Santa Clara Journal of International Law* 2014, vol. 12, issue 2.

Vigneron S., "Protecting Cultural Objects: Enforcing the Illicit Export of Foreign Cultural Objects" [in:] *Art, Cultural Heritage and the Market*, eds. V. Vadi, H. Schneider, Berlin – Heildelberg 2014.

Zeidler K., Stepnowska J., "International Conferences on Cultural Heritage Protection: 'Ratification and Implementation of the 1995 UNIDROIT Convention in Poland' and 'Private Collections: Historical and Legal Perspective', 6–7 June 2019, Faculty of Law and Administration, University of Gdańsk, Poland", *International Journal of Cultural Property*" 2020, vol. 27.

## Summary

***Magdalena Łągiewska***

**Ratification of the 1995 UNIDROIT Convention in Poland: Pipe dream or realistic prospect?**

The 1995 UNIDROIT Convention on Stolen or Illicitly Exported Cultural Objects complements the provisions included in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Although the 1995 UNIDROIT Convention was adopted twenty-five years ago, Poland has not ratified it thus far. Hence, the aim of this article is to answer the question as to whether a ratification of the 1995 UNIDROIT Convention in Poland is a pipe dream or a realistic prospect. In the light of the foregoing, this article outlines the significance of the 1995 UNIDROIT Convention for cultural heritage law and presents its scope of application. Finally, it draws conclusions about the perspectives for the ratification of the 1995 UNIDROIT Convention in Poland.

**Keywords:** cultural object, illicit export, theft, ratification, 1995 UNIDROIT Convention

## Streszczenie

***Magdalena Łągiewska***

**Ratyfikacja konwencji UNIDROIT z 1995 r. – mrzonka czy realna perspektywa?**

Konwencja UNIDROIT w sprawie skradzionych lub nielegalnie wywiezionych dóbr kultury z 1995 r. uzupełnia postanowienia zawarte w Konwencji UNESCO dotyczącej środków zmierzają-

cych do zakazu i zapobiegania nielegalnemu przywozowi, wywozowi i przenoszeniu własności dóbr kultury z 1970 r. Pomimo że Konwencja UNIDROIT z 1995 r. została uchwalona dwadzieścia pięć lat temu, Polska nie ratyfikowała jej do tej pory. Celem niniejszego artykułu jest zatem odpowiedź na pytanie, czy ratyfikacja przez Polskę konwencji UNIDROIT z 1995 r. jest mrzonką czy realną perspektywą. Tym samym w niniejszym artykule przedstawiono znaczenie oraz zakres stosowania konwencji UNIDROIT z 1995 r. z punktu widzenia prawa dziedzictwa kultury. W konkluzji sformułowano wnioski dotyczące perspektyw ratyfikacji wspomnianej konwencji przez Polskę.

**Słowa kluczowe:** dobro kultury, nielegalny eksport, kradzież, ratyfikacja, konwencja UNIDROIT z 1995 r.

**Milica Arsic**
University of Belgrade
arsic.milica@yahoo.com
ORCID: 0000-0002-2772-0724

https://doi.org/10.26881/gsp.2021.2.09

# Mediation in cultural heritage disputes – *pro et contra*

## 1. Introduction

Imagine finding out that a painting that adorned the walls of your ancestral home has been stolen, and somehow finds its way to a world-famous museum, adorning its central exhibition. Alternatively, you may work for the ministry of culture of a country demanding the return of a statue fished from its territorial waters and illegally transported to another continent. In both cases, the other party is rejecting the request for restitution. If these scenarios seem somewhat familiar, it is because they are based on two exceptionally famous cases: *Altmann vs Austria* and *Italy vs Getty*. Books have been written and movies made about Mrs Altmann's struggle to get back the Gustav Klimt portrait of her aunt, Adele Bloch-Bauer, known as *The Woman in Gold*, looted by the Nazis from her family home in Vienna and exhibited in the Belvedere Museum. No less attention was given to the case of the *Atleta di Fano*, or Victorious Youth, a Greek bronze statue made between 300 and 100 BC and found in the sea off the Adriatic coast of Italy in 1964, which controversially found its way to the Getty Museum in California. While these cases were not resolved in mediation, both can serve as textbook examples of the elements present in a cultural heritage dispute: different types of parties pitted against each other, a cultural object with a dubious provenance, and a tiresome legal battle of a very public nature. As such, the two cases form a vivid background for analysing why mediation was not employed and what the possible benefits and limitations are of this alternative dispute resolution (ADR) in cultural heritage disputes.

This paper follows our two claimants on a journey through the mediation process, evaluating the aspects that speak in favour of it and those that impede its progress. The first part lists the institutions that provide mediation services, followed by a review of the approach taken in these proceedings and the role of the mediator. The next section discusses how the parties' nature and interests are connected with their choices. Part four analyses the barrier created by the absence of mediation clauses and how an imbalance of power is linked to such a state. Finally, the author explores the applicability of the United Nations Convention on International Settlement Agreements

resulting from Mediation, 20 December 2018 (hereinafter: Singapore Convention),[1] concluding with the appropriate steps mediation should take to improve its standing within cultural heritage concerns.

## 2. Mediating cultural heritage disputes: Available fora

Mediation is not unheard of in cultural heritage disputes; it is not even novel. International organizations and private institutions have been working over the years on developing appropriate ADR mechanisms, resulting in a broad range of possibilities offered to the parties in cultural heritage disputes.

Our discontented owners belong to a common category of cases involving illegal trafficking of art, or so-called 'artnapping'. On a global scale, the issue of illegal misappropriation of cultural objects was addressed in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, including its First (1954) and Second (1999) Protocol, albeit its provisions were limited to the wartime situations. From this point on, instruments have been developed to encompass the protection of heritage regardless of the immediate circumstances, the primary instruments being the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. Notably, UNIDROIT builds upon the ideas of the UNESCO Convention by introducing the duty to return the stolen cultural objects, outlining the prerequisites for potential compensation claimed by the *bona fide* possessor.[2]

Article 8(2) of the UNIDROIT Convention explicitly allows parties to submit a dispute to any court or other competent authority or to arbitration. According to art. 17(5) of the UNESCO Convention, the parties may call upon the institution to extend its good offices to facilitate a settlement. In the spirit of negotiation, a special intergovernmental committee was later formed to foster the implementation of UNESCO instruments,[3] its Statute explicitly relying on mediation and conciliation.[4] In line with the UNESCO – ICPRCP Rules of Procedure, this Committee has the role of an intermediary that facilitates the negotiations between the parties. Any mediation and other ADR proceedings are further conducted on an *ad hoc* basis. Therefore, the true nature of this body is advisory and its recommendations on dispute resolution are not legally binding.

---

[1] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf (accessed: 15.02.2021).

[2] It also remedies some of the problems in implementation of its predecessor, e.g. cultural property is no longer required to be defined as such by the state.

[3] The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, created in 1978 by resolution 20 C4/7.6/5 at the 20th Session of the UNESCO General Conference (hereinafter: ICPRCP).

[4] See: art. 4(1) ICPRCP Statute, http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/ (accessed: 15.02.2021).

Additionally, there are procedures created by cooperation of highly specialized institutions such as the ICOM-WIPO partnership.[5] Covering various types of disputes and offering its services to individuals and states alike, this forum draws on the considerable experience of the two partner institutions. General arbitration and mediation rules of arbitral institutions may also be adapted to cultural heritage. For instance, Camera Arbitrale di Milano distinctly recommends using its Fast Track Mediation Rules for art disputes. From 2015 to 2019, the number of art and cultural heritage mediations before this institution increased by up to 55%, while an agreement was reached in 75% of cases that moved forward from the first session.[6] As a welcome advancement, the Court of Arbitration for Art (CAfA) was recently established as a unique institution for art disputes, offering both mediation and arbitration.

All the effort put into the advancement of mediation in cultural heritage is admirable, leaving our parties with many options to choose from. However, making the right choice is dependent upon adapting mediation to better fit cultural heritage cases.

## 3. The amicable approach and the role of a mediator in heritage disputes

It may seem far-fetched at first glance, but the parties in cultural heritage disputes need not be natural enemies. On many occasions, a museum, state, and previous owner can find themselves tricked by the same criminal who has vanished. The art world is largely based on trust and the personal connections of the parties; mediation can be recommended as a method that would take into account the emotions involved.[7] Without any intention to label other disputes as lacking in sentiment, this observation does go to the heart of the problem – the particular sensibility of the parties in cultural heritage issues. Unlike court proceedings and arbitration, the guiding principle of mediation is to achieve a win-win outcome. This ADR is based upon the idea of concessions, where each party forgoes some of its interests in order to receive a concession from the other. From a psychological perspective, after mediation is concluded, each party leaves without the aura of being a loser, and, at the very least, with a feeling that the other party did not prevail. While it may be bold to claim that mediation is the only method in cultural property disputes where different sides may reach a consensus,[8] it certainly cultivates a congenial atmosphere usually not present

[5] This body has adopted special rules of procedure for mediation with regard to cultural heritage – ICOM-WIPO Mediation Rules, which directly incorporate the ICOM Code Ethics for Museums.

[6] ADR Art & Cultural Heritage Statistics 2018 (1.01.2018–31.12.2018), Camera di Commercio Milano, https://www.camera-arbitrale.it/upload/documenti/statistiche/adr-art-facts-figures-2018.pdf (accessed: 1.02.2021).

[7] N. Pitkowitz, A. Fremuth-Wolf, A.K. Radschek, "The Vienna Innovation Propositions: Venturing into New Fields and New Ways of Arbitration – Revisiting Traditional Ways of Arbitration" [in:] *Austrian Yearbook on International Arbitration*, eds. Ch. Klausegger *et al.*, Vien 2019, p. 563.

[8] N. Mealy, "Mediation's Potential Role in International Cultural Property Disputes", *Ohio State Journal on Dispute Resolution* 2011, vol. 26, issue 1, p. 200.

in adversarial proceedings. In cases where the parties have not even had any contact before an object resurfaced, such an approach is not only recommended, but should also come as something natural. Prioritizing amicable solutions in cultural heritage matters is present even in its legislative history. According to the Explanatory Report of the UNIDROIT Convention, this instrument is a compromise itself.[9] Hence, one should not hastily disregard mediation when there is no ill will between the parties, as its primary aim is to reach an agreement with and not a victory over the other party.

The question of certain concessions, such as admitting the ownership of the heir in return for permission publicly to display an object or in return for a partial restitution, are compromises that may lead to the resolution of a dispute. An excellent example for this is the partage process, where a source nation permits market-nation archaeologists to excavate archaeological sites and share their finds with source-nation museums in exchange for the right to keep a portion of what they find for museums and private collectors in their home countries.[10] Furthermore, mediation can be of particular use in disputes involving indigenous and traditional communities, as this ADR does not encounter legal obstacles when determining their identity and standing in general.[11] In the Victorious Youth case, negotiations between the parties did lead to the return of some artefacts in the Getty Museum's possession, although the core problem was left unresolved. The Altmann case saw the (unfortunately rejected) early proposition of Mrs Altmann, who suggested that Belvedere keep *The Woman in Gold*, if it conceded her ownership. Regardless of the final outcome, what should be taken from these examples is the fact that concessions were offered and considered, with a partial success in the first case.

It is undeniable that the complexity of cultural heritage cases, delineated by history and art, requires unique knowledge. In court proceedings, judges are often accused of relying too heavily on expert opinions or of having insufficient knowledge to grasp technical aspects of the case. The rise of arbitration can be to some extent attributed to this flaw in judicial proceedings, as the arbitrator is called an informed decision-maker.[12] Much in the same way, a mediator is nominated as an individual with knowledge relevant for a complete understanding of the case at hand. Still, the task of a mediator differs from that of an arbitrator, as he/she is barred from making any kind of decision on the outcome of the dispute. The mediator, as suggested by the name, only helps parties in the process of resolving the dispute themselves. This does not mean that mediator's expertise is irrelevant or unused, as having comprehensive

---

[9] M. Schneider, "UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report" (prepared by M. Schneider on behalf of UNIDROIT Secretariat), *Uniform Law Review* 2001, vol. 6, issue 3, p. 484.

[10] N. Mealy, "Mediation's Potential Role…", p. 201.

[11] C. Wichard, W.B. Wendland, "Mediation as an Option for Resolving Disputes Concerning Traditional Knowledge" [in:] *Art and Cultural Heritage: Law, Policy and Practice*, ed. B. Hoffman, Cambridge University Press, New York 2006, p. 480. Interesting case law that supports the authors' position is provided in "Annex A", p. 481.

[12] N. Blackaby *et al.*, "An Overview of International Arbitration" [in:] *Redfern and Hunter on International Arbitration*, 6th ed., Oxford University Press, Oxford 2015, p. 22.

knowledge is a *conditio sine qua non* for successful assistance in mediation procedure. The higher degree of specialization of a mediator in cultural heritage disputes and an adequate level of understanding of the non-legal issues involved, means that the individual is more likely to be successful in this role. This is reflected in the work of mediation providers such as ICOM-WIPO, which keeps a list of persons that can mediate in art cases, and their qualifications are subject to a detailed examination (articles 6 and 9 ICOM-WIPO Rules).

## 4. The parties and their interests

Disputes involving cultural heritage are heterogenic, which means that parties can be individuals, institutions, and countries. The Altmann case saw the heir of the Bloch-Bauer family facing the Belvedere Museum and the Government of Austria, while Italy was pitted against the Getty Museum in the Victorious Youth case. It is not unusual to find states, museums, cultural institutions, representatives of traditional communities, and individuals mixed up in the same case. Diversity of the parties is at least partially caused by the terminology woven around "cultural heritage". UNIDROIT has adopted a flexible approach, linking cultural objects to the significance they have for states, sub-national groups, or art and science in general (art. 2 UNIDROIT Convention). Christa Roodt suggests that the term "cultural objects" can be understood to mean the physical remains of the past, man-made objects that are of archaeological, historical, pre-historical, artistic, scientific, literary or technical interest.[13] Therefore, a dispute involving cultural heritage can revolve around a myriad of scenarios: the consequence of a theft, a failure of a museum to return or guarantee the security of an exhibit, or whether an object truly represents the cultural heritage of a community.

However, some common ground does exist, and that is the remarkably high attention given to these cases by a wider public. As is rightly observed by scholars, the art market is well-known to be an opaque world where reputational factors play a key role.[14] The feeling that prevails once proceedings have ended can be decisive for the reputation of a museum, a government, and states that were involved. In both of our examples, the two museums faced unpleasant questions regarding the provenance of their exhibits; in the Altmann case these questions were even more serious, as they involved Nazi plunder. Therefore, a certain amount of discretion may be desired by the parties in cultural heritage disputes. At this point, mediation, the rules of which regularly contain a provision on confidentiality,[15] can become useful. A relaxed atmosphere,

[13] C. Roodt, *Private International Law, Art and Cultural Heritage*, Edward Elgar Publishing Limited (Kobo Edition), Cheltenham, UK – Northampton, MA 2015, p. 5.

[14] A. Trioschi, "Art-Related Disputes and ADR Methods: A Good Fit?", Kluwer Arbitration Blog, 8.07.2018, p. 3, http://arbitrationblog.kluwerarbitration.com/2018/07/08/adr-art-cultural-heritage/ (accessed: 12.03.2021).

[15] For example, see: art. 10 CAfA Mediation Rules, art. 6 CAM Fast Track Mediation Rules, articles 17–21 ICOM-WIPO Mediation Rules.

which is not under the eyes of the media, can keep the minds of the parties open for all available possibilities. However, it is important to stress that mediation should in no way serve as an escape route for offenders, nor become a mechanism for misuse of entrusted powers. It is conceivable that confidentiality in mediation can be viewed as disrupting public access to information. Therefore, it is vital to maintain a certain level of transparency, especially in cases involving the return of national cultural heritage.[16] The request for transparency is not a straightforward one, as multiple parties may have an interest in the proceedings. In our example, Victorious Youth obviously sparked legitimate concern within the Italian public; still, it may be argued that the USA as the country of the Getty Museum's legal headquarters should also have access to certain elements of the mediation. In the Altmann case, the final decision confirms that the Bloch-Bauer heirs had the law on their side, but in terms of transparency, the Austrian public also had a right to know what was happening with the nationally celebrated Klimt portrait. Furthermore, there is always a certain level of international concern of a more abstract nature, tied to the notion that heritage is a right that transcends customary borders and divisions. In addition, mediation can touch upon many issues connected to theft or war crimes, both of which demand an appropriate response from the national and international authorities in a different kind of proceedings.

While this suggests cultural heritage cases deserve a cautious evaluation, significant hurdles still lie ahead and the primary problem revolves around the agreement of the parties to submit their dispute to mediation.

## 5. Concluding an agreement to mediate

The refusal of artefact holders to even enter into an ADR process is viewed as one of the main drawbacks in the relevant literature.[17] While seeking justice before a court is a basic human right, ADR methods rely heavily on the agreement of the parties involved. However, in disputes involving cultural objects, often no prior agreement exists, as happened in both the Altmann and the Victorious Youth cases. Being unable to find a dispute resolution clause is symptomatic for most disputes that do not involve inter-museum loans or securities against theft or damage. No prior agreement is the consequence of there being no previous contacts between the parties, automatically excluding the possibility of a dispute resolution clause. Even in inter-museum loans, parties rarely conclude detailed contracts, in this way cutting the expenses of their drafting. It is noted that the art community mainly avoids dealing with legal issues; so the contracts are often concluded without any dispute resolution clauses, even

[16] A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford University Press, Oxford 2014, p. 183.

[17] M. Shehade, K. Fouseki, K. Walker Tubb, "Editorial: Alternative Dispute Resolution in Cultural Property Disputes: Merging Theory and Practice", *International Journal of Cultural Property* 2016, vol. 23, issue 4, p. 344.

omitting negotiations.[18] Once a dispute emerges, parties find themselves in the unpleasant legal situation of choosing between court proceedings and attempting to agree on a mediation compromise. The setup is similar to arbitration compromises, as the commencement of any proceedings depends on the ability of the parties to agree on anything after the atmosphere turns hostile. Each party must weigh up which type of proceedings speaks in its favour now that the subject of the dispute is known. For instance, when gaps become apparent in the provenance of an artwork, a party may prefer to pursue court action to determine ownership, and an ADR agreement may be rescinded for this reason.[19] This matter goes beyond procedural considerations, as choosing a forum in an international dispute ultimately means choosing the applicable law, where differences in the law itself can influence the outcome drastically. The absolute co-dependency of mediation on the agreement of the parties leaves its fate to other concerns, in which whether the parties will be able to agree to submit the dispute depends greatly on their comparative strength.

The already quoted CAM statistics show that in half of the cases related to art and cultural heritage one party had failed to attend the first session.[20] The equality of the parties is a fundamental principle of every legal mechanism, and here it arises before the dispute even gets to the mediator, and the main cause again stems from the diversity of the parties in art disputes. Different entities on the side of claimant and respondent generate an inherent inequality in bargaining power. Some institutions in possession of artworks, especially when backed up by their native country, can hire expensive and capable legal teams.[21] If the other party is an individual, the obvious corollary is a financial gap, and this problem particularly resonates for cases similar to the Altmann case. Mr Randol Schoenberg, counsel for the Bloch-Bauer heirs, remarked that an "international arbitration court for art claims would be a good idea. (…) it would be a great idea, which is why it will never happen. The defendants would rather waste their money litigating procedural battles in the hope that they can wear down the plaintiffs and settle the matter without handing over their looted art".[22] While this observation may seem bleak, the fact remains that the US 9th Circuit Court of Appeals ordered both parties in the Altmann case to attend a court-supervised mediation, which yielded no apparent results. It was only after the unfavourable decision of the American Supreme Court, which created a separate incentive for Austria to turn to other venues, that alternative dispute resolution was accepted.

On the other hand, the Victorious Youth case embodies a dispute with an average balance of strength. In cases involving a museum and a country seeking restitution, power is on a relatively equal footing, as countries usually back up their prominent cultural institutions. This means that the international community may take on a more active role. A fine example is the ICPRCP which had significant success in Turkey

18 A. Chechi, *The Settlement*…, pp. 181–182.
19 C. Roodt, *Private International Law*…, p. 185.
20 ADR Art & Cultural Heritage Statistics 2018…, p. 1.
21 A. Chechi, *The Settlement*…, p. 185.
22 Answers given to the author, in: *Art and Cultural Heritage*…, p. 463.

v. Germany cases. In 1915, two sphinxes were transported by a group of German archaeologists to Germany for a restoration. While one was returned, it has taken almost a hundred years and two ICPRCP resolutions[23] for a bilateral agreement on restitution of the other to be reached. Following the 1987 restitution of 7,000 cuneiform tablets by the German Democratic Republic to Turkey, the Boğazköy Sphinx was also returned in 2011. The Committee also notably provided support in the 1986 USA vs Jordan dispute, which was favourably resolved following mediation,[24] while it is still working on the Parthenon Marbles case.[25] Unfortunately, the UK Government sternly responded to the Greek request for mediation in the following manner: We have seen nothing to suggest that Greece's purpose in seeking mediation on this issue is anything other than to achieve the permanent transfer of the Parthenon sculptures now in the British Museum to Greece and on terms that would deny the British Museum's right of ownership, either in law or as a practical reality. Given our equally clear position, this leads us to conclude that mediation would not carry this debate substantially forward. [26]

Such a turn of events sheds a negative light on the limits of international intervention in cultural heritage disputes. Regrettably, this was followed by another blow when the United States decided to withdraw from UNESCO for the second time,[27] effective 31 December 2018, and Israel followed suit, both citing alleged anti-Israel resolutions. Thus, there is little room for doubt that the weakest aspect of ICPRCP is that states too often perceive the UN as a battleground for political agendas, and the protection of cultural heritage gets lost in the process.

Thus, regardless of the type and support behind the parties, it is crucial not to lose track of their relative power when evaluating chances of success of mediation compromise in cultural heritage cases.

---

[23] See the Final Report by the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin Or Its Restitution In Case Of Illicit Appropriation, Sixth Session UNESCO Headquarters, Paris 1989, https://unesdoc.unesco.org/ark:/48223/pf0000083117.page=10 (accessed: 20.02.2021) and Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Sixteenth session Paris, UNESCO Headquarters, 21–23 September 2010, https://unesdoc.unesco.org/ark:/48223/pf0000189639.page=2 (accessed: 20.02.2021).

[24] Within the framework of an exchange, and following a request submitted by Jordan in 1983 to the ICPRCP, the Cincinnati Art Museum and the Department of Antiquities of Amman decided in 1986 to jointly exchange moulds of the respective parts of the sandstone panel of Tyche with the zodiac in their possession, in order to be able to present the work in its entirety.

[25] Information Kit on the 1970 Convention, 2014/WS/7/REV – May 2018, p. 6, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/movable/pdf/Infokit_en_final_March_2018rev_05.pdf (accessed: 20.02.2021).

[26] J. Woodhouse, S. Pepin, *House of Commons Library Briefing*, Paper No. 02075, 9 June 2017, p. 15, https://www.parliament.uk/commons-library (accessed: 20.02.2021).

[27] Previously, US President Ronald Reagan decided to withdraw in 1984 in an effort to thwart the recognition of Soviet historical sites.

## 6. Enforceability of the agreement reached in mediation

Finally, if the parties agree on mediation, what remains is the question of its ultimate result. Any type of proceedings is only beneficial insofar as its final decision can be effectively enforced. A successful mediation indisputably ends with the parties reaching an agreement, but the nature of this document is elusive. While it definitely has an *inter partes* effect, its enforceability in reality depends on the law of the country where the enforcement is sought. An agreement reached in mediation binds the parties to perform their obligations under civil law rules, which means that if one party should refuse to comply the other may only seek enforcement in court (presumably where the refusing party has assets), as with any other contract. The only way to bypass this procedure is to rely on national law or international treaty if signed by said country.[28] This has led some authors to observe that mediation falls short of advantages provided by arbitration, as no instrument comparable to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, prepared and opened for signature on 10 June 1958 (hereinafter: the New York Convention)[29] exists.[30] Such shortcomings have led to the recent adoption of a new instrument which tries to mimic not only the benefits, but also much of the structure of the New York Convention. Signed in Singapore in 2019, its main goal is to ensure direct enforceability of agreements concluded in mediation (called settlement agreements).

When assessing whether the Singapore Convention can be applied to mediation agreements resolving cultural heritage cases, Austrian arbitration practitioners seem to have given it the green light.[31] Additionally, the 2020 WIPO Mediation Rules have been updated in several respects so that parties may benefit from provisions of the Singapore Convention, although the special ICOM-WIPO Rules remain unchanged. Nevertheless, there are a few reasons to be vigilant when approaching the subject. What may stand in the way of cultural heritage disputes' benefiting from the Singapore Convention is deeply tied to their heterogenic nature. The very first article of the Convention clearly outlines two crucial conditions for this instrument to apply: the dispute must contain an international element and, more importantly, be commercial in character. Unlike its counterpart, the UNCITRAL Model Law on Mediation,[32] the Singapore Convention does not offer any examples of what commercial disputes are, and the

---

[28] Guide to WIPO Mediation, World Intellectual Property Organization 2018, p. 33, https://tind.wipo.int/record/29081?ln=en (accessed: 20.02.2021).

[29] https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf (accessed: 20.02.2021).

[30] I. Barker, "Thoughts on an International ADR Regime for Repatriation of Cultural Property" [in:] *Art and Cultural Heritage*…, p. 485. The author wrote this text before the Singapore Convention was adopted.

[31] N. Pitkowitz, A. Fremuth-Wolf, A.K. Radschek, "The Vienna Innovation Propositions…", p. 563.

[32] 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation (accessed: 13.02.2021).

Model Law itself does not list cultural heritage disputes as an example.[33] Moreover, the Commentary of the Convention notes that it does not cover non-commercial matters that are more likely to clash with public policies specific to legal cultures and national circumstances.[34] What should be noted, however, is that classification of something as commercial or not only affects the applicability of the Singapore Convention; mediation as an alternative dispute resolution method is not limited to commercial disputes, and it is much more versatile than international commercial arbitration, and it can even be called upon in criminal and family matters. Therefore, disputes falling outside the commercial category can still be settled in mediation, but the parties cannot hope to benefit from the direct enforcement provided in the Convention.

If we bear in mind the public interest in many disputes involving cultural objects (discussed above), it is evident that some cultural heritage disputes can hardly be considered as purely commercial. In order to ascertain whether a dispute would fall within the commercial category, and thus should not face any obstacles to being submitted to mediation, international commercial arbitration practice can to some extent provide guidelines. Following this lead, some aspects indisputably fall into the category of the commercial, as was true in the case *Shaanxi Cultural Heritage Promotion Center v. China Institute in America*, where the loan agreement did contain a dispute resolution clause providing for CIETAC arbitration.[35] Following the "China's Terracotta Army" exhibition of 111 Chinese terracotta warriors, Discovery Times Square Museum and China Institute in America failed to pay the third instalment of the agreed inter-museum loan price to the Shaanxi Cultural Heritage Promotion Center. This led to arbitration proceedings and to the claimant's winning the case. Therefore, proceedings involving inter-museum loans, in particular the failure of a party to insure an artefact or pay an agreed amount, are not likely to raise classification concerns.

Disputes pertaining to other matters should be reviewed carefully. This is a step further from the mere question of categorization, as it affects the suitability of a dispute to be submitted to any other forum except a court at all. The question whether the dispute requires significant transparency, judicial (national or international) determination, or is banned from the ADR framework for whatever reason, is the core issue here. Though it is hard to determine the exact pool of problematic cases because of national divergences in approach to cultural heritage, some general rules can be observed. It seems that at least two legal systems must be considered when evaluating whether cultural heritage disputes are capable of settlement by mediation: the place where mediation is held and the place where enforcement is sought. The Singapore Convention itself offers two grounds for a country to refuse enforcement of a mediation

---

[33] See footnote in art. 1(1) UNCITRAL Model Law.

[34] N. Alexander, S. Chong, *The Singapore Convention on Mediation: A Commentary, Global Trends in Dispute Resolution*, vol. 8, Kluwer Law International 2019, p. 27. The authors further refer to the Working Group Report of Working Group II (Arbitration and Conciliation) on the Work of its Sixty-Third Session, A/CN.9/861 (2015), para. 42.

[35] Shaanxi Cultural Heritage Promotion Center v. China Institute in America (Award), CIETAC Case No. DR-120228/C-USA-NTS, 31 March 2014.

settlement in art. 5(2): if it is contrary to public policy or if its subject matter is not capable of settlement by mediation. One particularly discussed field of an ambiguous nature is the suitability of intellectual property rights to be submitted to ADR, a topic often intertwined with cultural objects.[36] On the subject of cultural heritage itself, it has been noted that specific issues of a public policy nature, or inalienable rights, may be difficult to submit to arbitration in certain jurisdictions.[37] In absolute terms, private ownership of a cultural object deemed inalienable by a country cannot be the subject of a dispute in any forum on its territory, stemming from its *extra commercium* status. Also, as has already been touched on above, when theft and illegal trafficking of cultural objects are involved, any parallel criminal proceedings can also affect some aspects of any mediation.

Finally, another problem raised by the Convention itself allows contracting states to put a reservation on its application in line with art. 8. If a reservation is put in place, a country can choose not to apply the Convention to settlement agreements to which it is a party, or to apply it only to the extent that the parties to the settlement agreement have agreed to such application. Belorussia, Iran, and Saudi Arabia have opted for the reservation so far.[38]

If one were to be asked the "yes" or "no" question on the subject, these remarks on the potential of cultural heritage disputes to be covered by the Singapore Convention seem to point to an unnerving answer – "maybe".

## 7. Conclusions

While offering mediation to the other party should always be a preliminary step, its success will depend on numerous factors. One cannot rely on an infallible checklist when it comes to human relations, good or bad; but knowing what to take into account can guide a party and even help avoid some obstacles.

Like any other method of dispute resolution, mediation has its down sides. It does not operate in a vacuum, removed from outside influences and, as such, it may not be able to remedy discrepancies in parties' relative power. The political background of a case such as a state supporting its museums, or the financial capability of an individual requesting restitution still have a significant bearing on the outcome. While obtaining a court decision and being a winner may be the only mind set for some, weighing that option against publicly losing a prized exhibition item or a national symbol may dissuade others from attempting ADR first.

---

[36] D. Plant, *Course on Dispute Settlement in International Trade, Investment and Intellectual Property* (prepared on behalf of UNCTAD), United Nations Conference on Trade and Development: Dispute Settlement, 2003, p. 41, http://unctad.org/en/docs/edmmisc232add25_en.pdf (accessed: 10.02.2021).

[37] S. Theurich, "Art and Cultural Heritage Dispute Resolution", *WIPO Magazine*, July 2009.

[38] As of 29 November 2020, fifty-three states have signed the Convention, and six states have ratified it, https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status (accessed: 10.01.2021).

Believing that participants in international fora will suddenly become less political and more interested in the restitution of foreign cultural heritage is somewhat unrealistic. Different interests will always exist and sometimes produce negative results in terms of reaching a settlement. However, it is important not to concentrate only on the less productive attempts of international bodies such as the ICPRCP, but also to give credit where it is due, acknowledging their success in a variety of other cases.

In order for mediation to become a reliable tool, it would have to work harder to adapt its mechanisms to cultural heritage and transparently to inform the parties what it has to offer. Once it gets familiar with the scope of this ADR, the art community should work toward including mediation clauses in contracts on cultural heritage. A lack of dispute resolution clauses is a simple barrier that creates unnecessary problems in practice, and this barrier can be easily bypassed in pre-existing legal relationships. In disputes with no previous contact between the parties, advertising mediation requires highlighting the amicability of the proceedings and the expertise of the mediator.

Finally, if mediation wants to beat court and arbitration to the finish line, it has to clearly state its position regarding the Singapore Convention. Bearing in mind that this is a novel instrument, it may be premature to predict how this relationship will unfold. However, parties will always demand a degree of legal certainty, wanting to know how and where their mediation settlement can be enforced. A structured, well-thought-out system must be built before it can be tested. This essentially means actualising the accountability of not only individuals, but also of museums and private collectors. Only through cooperation with the art community, that is legal scholars and practitioners who deal with cultural heritage and mediation, can the optimum results be achieved. Ironically, a more aggressive approach must be taken by the alternative dispute resolution method famous for its compliant nature if it is to build a solid practice which will recommend it to parties in the future.

## Literature

ADR Art & Cultural Heritage Statistics 2018 (01.01.2018–31.12.2018), Camera di Commercio Milano, https://www.camera-arbitrale.it/upload/documenti/statistiche/adr-art-facts-figures-2018.pdf (accessed: 1.02.2021).

Alexander N., Chong S., *The Singapore Convention on Mediation: A Commentary, Global Trends in Dispute Resolution*, vol. 8, Kluwer Law International 2019.

Barker I., "Thoughts on an International ADR Regime for Repatriation of Cultural Property" [in:] *Art and Cultural Heritage: Law, Policy and Practice*, ed. B. Hoffman, Cambridge University Press, New York 2006.

Blackaby N., Partasides C., Redfern A., Martin J., Hunter H., "An Overview of International Arbitration" [in:] *Redfern and Hunter on International Arbitration*, 6th ed., Oxford University Press, Oxford 2015.

Chechi A., *The Settlement of International Cultural Heritage Disputes*, Oxford University Press, Oxford 2014.

Hoffman B. (ed.), *Art and Cultural Heritage: Law, Policy and Practice*, Cambridge University Press, New York 2006.

Mealy N. "Mediation's Potential Role in International Cultural Property Disputes", *Ohio State Journal on Dispute Resolution* 2011, vol. 26, issue 1.

Pitkowitz N., Fremuth-Wolf A., Radschek A.K., "The Vienna Innovation Propositions: Venturing into New Fields and New Ways of Arbitration – Revisiting Traditional Ways of Arbitration" [in:] *Austrian Yearbook on International Arbitration*, eds. Ch. Klausegger, P. Klein, F. Kremslehner, A. Petsche, N. Pitkowitz, I. Welser, G. Zeiler, Vien 2019.

Plant D., *Course on Dispute Settlement in International Trade, Investment and Intellectual Property* (prepared on behalf of UNCTAD), United Nations Conference on Trade and Development: Dispute Settlement, 2003.

Roodt C., *Private International Law, Art and Cultural Heritage*, Edward Elgar Publishing Limited (Kobo Edition), Cheltenham, UK – Northampton, MA 2015.

Schneider M., "UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report" (prepared by M. Schneider on behalf of UNIDROIT Secretariat), *Uniform Law Review* 2001, vol. 6, issue 3.

Shehade M., Fouseki K., Walker Tubb K., "Editorial: Alternative Dispute Resolution in Cultural Property Disputes: Merging Theory and Practice", *International Journal of Cultural Property* 2016, vol. 23, issue 4.

Theurich S., "Art and Cultural Heritage Dispute Resolution", *WIPO Magazine,* July 2009.

Trioschi A., "Art-Related Disputes and ADR Methods: A Good Fit?", Kluwer Arbitration Blog, 8.07.2018, http://arbitrationblog.kluwerarbitration.com/2018/07/08/adr-art-cultural-heritage/ (accessed: 12.03.2021).

Wichard C., Wendland W.B., "Mediation as an Option for Resolving Disputes Concerning Traditional Knowledge" [in:] *Art and Cultural Heritage: Law, Policy and Practice*, ed. B. Hoffman, Cambridge University Press, New York 2006.

Woodhouse J., Pepin S., *House of Commons Library Briefing*, Paper No. 02075, 9 June 2017.

## Summary

***Milica Arsic***

**Mediation in cultural heritage disputes – *pro et contra***

It is common knowledge that mediation is available for various types of disputes ranging from commercial to family matters, avoiding the formalities, delays, and cost of court proceedings. Suitable for complicated yet delicate conflicts, this dispute resolution mechanism has become increasingly attractive for cultural heritage disputes. With parties aiming for compromise that may preserve confidentiality, the distinct features of the claims involving cultural heritage may impair as well as permit the traditional benefits of mediation. This paper aims to examine the relationship between cultural heritage and mediation while paying attention to its prospects under the auspices of the newly adopted the Singapore Convention. The author recommends several possible improvements relating to the mediation clause as a prerequisite to the proceedings, as well as the enforcement of the parties' agreement as their outcome.

**Keywords:** cultural heritage, dispute resolution clause, mediation, the Singapore Convention

## Streszcznie

*Milica Arsic*

**Mediacja w sporach dotyczących dóbr kultury – *pro et contra***

Powszechnie wiadomo, że z mediacji jako alternatywnej metody rozwiązywania sporów korzysta się w wielu rodzajach spraw, od gospodarczych po rodzinne, dzięki czemu można uniknąć utrudnień procesowych, przewlekłości i kosztów typowych dla spraw rozpoznawanych przez sądy. Metoda ta, przydatna w skomplikowanych i zarazem delikatnych sprawach, zyskuje zwolenników również wśród praktyków prawa ochrony dziedzictwa kultury. Jeżeli strony dążą do ugody zachowującej poufność, specyfika roszczeń dotyczących dziedzictwa kultury może osłabić, ale też może wzmocnić dobrodziejstwa płynące z mediacji. W niniejszym artykule przeanalizowano związki instytucji mediacji z dziedziną prawa ochronny dóbr kultury, ze szczególnym uwzględnieniem uregulowań niedawno przyjętej konwencji singapurskiej. Autorka rekomenduje poprawki w brzmieniu klauzul o mediacji jako warunek poprzedzający wszczęcie właściwego postępowania oraz omawia kwestie związane z wykonaniem i skutkami ugód.

**Słowa kluczowe:** dziedzictwo kultury, klauzula mediacyjna, mediacja, konwencja singapurska

**Mateusz M. Bieczyński**
University of the Arts, Poznań
mateusz.bieczynski@uap.edu.pl
ORCID: 0000-0002-4108-9449

https://doi.org/10.26881/gsp.2021.2.10

# From *the Codex Theodosianus* to the Nicosia Convention: The protection of cultural heritage as a means of secularisation[1]

## 1. Introduction

Cultural heritage has been characterised by researchers representing so-called "critical heritage studies" as a category conditioned by many social and political factors. Much has been said about the national, political, economic, or cultural conditions of the process in which a certain good or value is transformed into a legally protected object of cultural heritage. In academic publications, the mechanism in which this heritage is created – the mechanism of "becoming heritage" of a state (nation), a continent (e.g. Europe), or the world (humanity) – is often referred to as "heritagisation".[2]

The meaning of this term has undergone a thorough transformation and is still not fully accepted by scholars in all countries (some editorial boards rejected it until 2008). "In the English-speaking world, the term *heritagisation* was first used by Walsh in 1992, as a pejorative way to refer to 'the reduction of real places to tourist space (…) that contribute[s] to the destruction of actual places';[3] focusing the idea of the destruction of culture produced by tourism".[4] Nonetheless, the understanding of this notion become more general over the years.[5] In the most recent sources, it is used to describe

[1] The preparation of this article was financed from resources supplied by Poland's National Science Centre as a part of the project entitled *The Philosophical Origins of the Legal Limitations of Artistic Freedom* no. UMO-2012/05/D/HS2/03592, carried out within the framework of the SONATA grant programme.

[2] D.C. Harvey, "Heritage Past and Heritage Presents: Temporality, Meaning and Scope of Heritage Studies", *International Journal of Heritage Studies* 2001, vol. 7, no. 4, p. 320.

[3] K. Walsh, *The Representation of the Past: Museums and Heritage in the Post-modern World*, The University of York, York 1992, p. 4.

[4] S. Sánchez-Carretero, "To walk and to be walked… at the end of the world" [in:] *idem*, *Heritage, Pilgrimage and the Camino to Finisterre: Walking to the End of the World*, Springer, New York 2015, p. 12.

[5] For a detailed description of the evolution of the term "heritagisation", see: S. Sánchez-Carretero, "Significance and Social Value of Cultural Heritage: Analyzing the Fractures of Heritage" [in:] *Science and Technology for the Conservation of Cultural Heritage,* eds. M.A. Rogerio-Candelera, M. Lazzari, E. Cano, A Balkema Book, London 2013, pp. 388–400.

the transformation of objects (e.g. buildings) or meanings (e.g. specific traditions) into cultural heritage, mostly with reference to preservation efforts after the Second World War.[6] Welsh's original concept was preserved in defining this process as "a process in which heritage is used as a resource to achieve certain goals".[7] It corresponds with another term – "patrimonialisation" – that describes the same process, but considered from the point of view of political decision-making.[8]

"The term *patrimonialisation* is of Latin origin and derives from the word *patrimonium* that means "something inherited from the father", but also "assets". This word, however, points not to the object, but rather to the existence of a certain relationship to the heritage, a certain policy of creating heritage. It also emphasises the act of selecting things that are yet to become heritage".[9]

Understanding cultural heritage in the processual sense opens a new scholarly perspective – research on heritage-related practices and not only on 'heritage' as a subject. As characterised by Tomislav S. Šola, "the concept of heritage that unifies the occupations growing on it, in all variety of their practices and competencies, entails a theory which is formed on the (…) wide foundation. Thus, heritage science is a logical notion, and its derivative term, be it heritology (…) challenges the change of the current state of affairs (…)".[10] Viewing the social practices related to heritage as parts of a historical process makes it possible to understand that the concept had emerged much earlier than the first conscious theoretical reflection on it. Until the late 1990's, most studies devoted to the history of heritage as a legal issue situated its starting point at an arbitrary date. British authors, for example, referred to William Morris and The Ancient Monuments Protection Act 1882.[11] German-speaking researchers would begin with Alois Riegl and the *Denkmalschutzgetsetz* of 1903,[12] while the French situated its origins in The Law of 1887 on protection of historical monuments.[13]

---

[6] Cf. D. McCrone, A. Morris, R. Kelly, *Scotland – The Brand: The Making of Scottish Heritage,* Polygon, Edinburgh 1995, p. 1; D. Lowenthal, *The Heritage Crusade and the Spoils of History,* Cambridge University Press, Cambridge 1998, p. 1; B.J. Graham, G.J. Ashworth, J.E. Tunbridge, *A Geography of Heritage: Power, Culture, Economy*, Arnold, London 2000, p. 1.

[7] Y. Poria, "The Story behind the Picture: Preferences for the Visual Display at Heritage Sites" [in:] *Culture, Heritage and Representation: Perspectives on Visuality and the Past,* eds. E. Waterton, S. Watson, Ashgate, Burlington 2010, p. 218.

[8] M.-B. Fourcade, *Patrimoine et patrimonialisation: entre le matériel et l'immatériel*, Presses de l'Université Laval, Paris 2007, p. 138.

[9] H. Schreiber, "Patrymonializacja w stosunkach międzynarodowych. Wybrane tendencje w międzynarodowej ochronie dziedzictwa kulturowego (2006–2016)" [in:] *Księga jubileuszowa z okazji 40-lecia Instytutu Stosunków Międzynarodowych Uniwersytetu Warszawskiego*, eds. M. Gawrycki *et al*., Wydawnictwo Naukowe Scholar, Warszawa 2016, p. 396.

[10] T.S. Šola, *Mnemosophy: An Essay on the Science of the Public Memory*, Rostov Velikĭ, Zagreb 2015, p. 11.

[11] See: *William Morris: The Critical Heritage*, ed. P. Faulkner, Routledge, New York 1973; A.E. Donovan, *William Morris and the Society for the Protection of Ancient Buildings*, Routledge, New York 2008.

[12] E. Bacher, "Alois Riegl und die Denkmalpflege" [in:] *idem*, *Kunstwerk oder Denkmal? Alois Riegl Schriften zur Denkmalpflege,* Wien – Koln – Weimar 1995, pp. 13–48; see also: A. Riegl, *Der moderne Denkmalkultus: sein Wesen und seine Entstehung* [in:] *idem*, *Gesammelte Aufsätze,* Augsburg 1928, pp. 144–193.

[13] M. Roellinger, "Centenary of the French Law on Historic Monuments", *Art Antiquity & Law* 2014, vol. 19, no. 4, p. 327.

This article goes beyond this narrow perspective and tries to present the "establishing process of cultural heritage" in a broader perspective, in which national legal regulations are only indicators of some general tendencies. It focuses particularly on the transformation of religious sites and objects into legally protected cultural heritage.

The main thesis of this article is that the process of "heritagisation" of religion-related artifacts can be considered a political means of secularisation. Therefore, this discussion forms part of heritological research. Among others, this article aims to answer two main questions – what happens when religious sites, objects, and practices become heritage? Is it possible to extract a functional path in legal regulations giving an account of the protection of religious artifacts as cultural heritage in European history that changed their social perception? Is the "heritagisation" of religious objects equal to their conscious secular "patrimonialisation", or is secularisation just a side-effect of their being protected by legal regulations?

It seems, however, that the need to protect religious artifacts originated much earlier than the above-mentioned modern laws created in the nineteenth century. The beginnings of state normativisation in this field dates back to antiquity. This article raises the question of whether the approach of valuating the religious heritage that emerged then still remains valid. If it does, then to what extent was it valid for the later periods of historical evolution and development of the laws regarding the protection of cultural heritage?

The analysis is based on examples described in chronological order. They indicate a certain continuity of a so far not fully delineated tendency. It proposes an alternative idea for describing the origins of "heritagisation" of religious art. Special attention is given to the normative regulations of *The Codex Theodosianus* and the revolutionary activity of Abbé Grégoire and Alexandre Lenoir that resulted in the establishment of the *Musée national des Monuments Français* in 1795.[14]

Another part of this article is dedicated to the development of nineteenth- century standards regarding the protection of cultural heritage, their post-war internationalisation, and the latest tendencies in this field. One issue I shall address in detail will be the problem of incompatibility of existing standards with the so-called "living cultural heritage" of a religious nature, which, despite being protected, still has a religious context. As a contrast, I shall also discuss the desecularisation of religious cultural heritage – a process that began after the year 2000 and is a result of a change in the understanding of the term "cultural heritage" in the process of applying for UNESCO conventions on its protection.

[14] J.L. Sax, "Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea", *Michigan Law Review* 1989, no. 88, pp. 1143–1144; Ch.M. Greene, "Alexandre Lenoir and the Musée Des Monuments Français during the French Revolution", *French Historical Studies* 1981, vol. 12, no. 2, p. 213 (200–222).

## 2. *The Codex Theodosianus* as the original source of secular "heritagisation"

An investigation into the heritagisation of religious objects and constituencies in the longitudinal historical perspective requires a search for the earliest manifestations of such legislative strategies. In *The Codex Theodosianus* one can observe foundational regulations containing legal norms referring to relicts of Roman culture from the pre-Christian period. Among many regulations determining the attitude towards the pre-Christian art, one especially relevant is expressed in the Roman constitution dated 382. It states the following: "we decree, for the authority of the public Council, that temples once used for gatherings and already for common use, can stay open, if there are statues in them more appreciable for their artistic value than for the deity depicted, and we don't allow any imperial response, obtained with excuses, to be opposed to our decree. Since they are reason for unity in the city and when it's clear that gatherings happen often, your experience can evaluate to allow the temple to be open for any festive assembly, according to our sentences, but without meaning that forbidden sacrifices can be allowed during these occasions".[15]

There are at least three important elements of this regulation that are crucial for the matters discussed in this article. Firstly, it urges emperors to protect old temples and statues from destruction. Secondly, preference is given to artifacts not serving religious practices that are to be admired for their artistic value. Thirdly, the regulations authorises the organisation of gatherings and festive assemblies of a non-religious character in order to keep the "heritage" living. The Byzantine emperors pointed to the fact that preserving such practices was justified from the socio-political point of view – "they are reason for unity in the city".[16] The aspects of the aforementioned regulation – the secular protection of old art in order to keep it alive – can be regarded as early examples of a contemporary social and political issue in the legal field of cultural heritage protection. The special meaning of those norms has not yet been fully recognised in the scholarly literature.[17]

The call to evaluate works of pagan art in terms of their artistic and not religious value was an extremely important regulation in the history of European culture. In order to understand its importance, one must take into account the specific political circumstances in which those regulations came into being. They were first included in the Roman constitution of 382 CE. At that time, as a result of the Edict of Milan (313 CE), Christianity had been one of legally recognised religions of the Roman Empire for more than fifty years. It was also ten years before it became the official state religion.

---

[15] *Codex Theodosianus*, XVI.10.8, http://www.giornopaganomemoria.it/theodosian1610.html (accessed: 15.09.2020).

[16] *Ibidem*.

[17] T. Tsivolas was however recalling rule XVI.10.8 but only partly. He was putting the accent only on the anti-pagan overtone of this rule; cf. T. Tsivolas, *Law and Religious Cultural Heritage in Europe,* Springer, New York 2014, p. 6.

But already then, the followers of this relatively new monotheistic religion expressed their negative attitude towards the religious art of other faiths, often through physical destruction. By protecting the religious art of the old religions, efforts were made to ensure the durability of the culture of the Roman Empire, expressed in high-class artistic achievements. At the same time, Emperor Theodosius issued a series of edicts that made pagan worship illegal.[18]

The regulation included in the Roman constitution of 382 was later repeated in Libro XVI pn. 10.8. of *The Codex Theodosianus* that was published in 438. It was the last legal act signed by the emperors of both parts of the Roman Empire after its division in 395. At that time, the territory of Rome had already been considerably reduced by the attacks of barbarians. Invaders would destroy imperial monuments on the conquered lands. Those circumstances changed the meaning of the cited legal act. From then on, preserving the legacy of pagan Rome became a political and a civic duty.

The superiority of Roman culture over the cultures of invaders was symbolised in the high level of artistic culture of the former period. The norm from the XVI Libro Theodosiani pn. 10.8. excluded high-class art objects from the rules prohibiting pagan religion. It turned them into public property. The reason behind their protection was socio-political, and therefore secularised – social integrity. Of course, that does not mean that the Roman Empire was ever a secular state. It means, however, that in this case, the state consciously used law directed towards the preservation of cultural heritage as a mean of secularisation. The rule XVI.10.8. from *The Codex Theodosianus* remained valid even during the Byzantine iconoclastic civil wars.[19] While religious images created in the Christian period were destroyed, pagan Greek and Roman sculptures collected by the Emperor Justinian and assembled in Constantinople around the patriarchal cathedral of Hagia Sophia and The Hippodrome survived.[20] There were works of a different artistic level – outstanding pieces like *Hercules* by Lysipus or the famous statue depicting Romulus and Remus fed by a she-wolf, as well as those of inferior quality. Together, they surrounded the circus, emphasizing its eclectic and conservative character. This abundance of ancient art inspired visitors over the next several centuries, and was also admired by the Crusaders who arrived in Constantinople in the thirteenth century.[21] Byzantine regulations aimed at protecting ancient religious art as a secularised cultural heritage constituted a normative basis for the next few centuries.[22] They paved the way for the separation of religious and secular art in the

---

[18] A. Nagel, *The Controversy of Renaissance Art*, Chicago University Press, Chicago – London 2011, p. 175.

[19] P.J. Alexander, "Church Councils and Patristic Authority the Iconoclastic Councils of Hiereia (754) and St. Sophia (815)", *Harvard Studies in Classical Philology* 1958, vol. 63, p. 493 (493–505).

[20] C. Mango, "Antique Statuary and the Byzantine Beholder", *Dumbarton Oaks Papers* 1963, vol. 17, pp. 57–58; S. Guberti Bassett, "The Antiquities in the Hippodrome of Constantinople", *Dumbarton Oaks Papers* 1991, vol. 45, p. 87.

[21] C. Mango, "Antique Statuary…", p. 55.

[22] J. Trilling, "Daedalus and the Nightingale: Art and Technology in the Myth of Byzantine Court" [in:] *Byzantine Court Culture from 829 to 1204*, ed. H. Maguire, Harvard University Press, Washington 1997, p. 217.

Middle Ages.[23] Their influence was clearly visible in the admiration that the Catholic Church expressed towards Roman and Greek pagan art in the Renaissance (*rinascita del arte*).[24] They can be regarded as theoretical foundations for the recognition of ancient art as a model to follow by academia, from the late baroque (1648) to the end of the nineteenth century (academism).[25]

In the history of protection of religious works of art and architecture by the state in the late Roman Empire and in the Byzantine Empire, normative order was created around a new, different religion. One more aspect – related to the transition of the political and social system – has to be considered. For late Western and Eastern Roman rulers, it was important to keep the cultural integrity of society around a firm state identity. Religion and tradition, also this artistic tradition, were the main instruments used for the implementation of this policy. Both elements – pagan art and Christianity – appear partly contradictory. In this context, the decision to protect pagan art due to its artistic value and despite its religious functions was a political decision, which can be interpreted as one of the earliest examples of "patrimonilisation".

## 3. Secularisation of religious art during the French Revolution

The outbreak of the French Revolution in 1789 resulted in a dilemma similar to the late Roman transformation of the political and religious system. Overthrowing the monarchy and depriving the Catholic Church of its privileged position set before the revolutionary government the task of determining the status of church property of significant historical, cultural, and artistic value within the framework of a secular state.[26]

Initially, the government of the French Republic did not suppress spontaneous or organised acts of iconoclastic destruction of religious art that the commoners identified with their recent class oppression. However, as early as in July 1790, the revolutionary government issued a ban on the destruction of historical monuments.[27] The definite downfall of the monarchy on 10 August 1792 yet again set free forces of destruction. The French fell victim to the "epidemic of iconoclasm" that, above all, led to the destruction of religious art. The detailed report prepared by Abbé Grégoire in 1794

---

[23] C. Lord, C. Lewine, "Secular Imagery in Medieval Art", *Source. Notes in the History of Art*, Spring/Summer 2014, vol. 33, no. 3/4, Special Issue on Secular Art in the Middle Ages, pp. 1–2.

[24] A. Nagel, Ch.S. Wood, *Anachronic Renaissance*, Zone Books, New York 2020, p. 182; see also: A. Dunlop, *Painted Palaces: The Rise of Secular Art in Early Renaissance Italy,* Pennsylvania State University Press, Pennsylvania 2009, p. 43.

[25] R. Nelson, *The Spirit of Secular Art: A History of the Sacramental Roots of Contemporary Artistic Value,* Monash University Press, Clayton 2007, p. 05.10; see also: L.L. Meixner, "Courbet, Corot, and Democratic Poetics" [in:] *French Realist Painting and the Critique of American Society, 1865–1900,* Cambridge University Press, Cambridge 1995, pp. 142–193.

[26] J.L. Sax, "Heritage Preservation…", pp. 1143–1144; Ch.M. Greene, "Alexandre Lenoir…", p. 213.

[27] S.J. Idzerda, "Iconoclasm during the French Revolution", *The American Historical Review* 1954, vol. 60, no. 1, p. 15.

revealed the true scale of the damage.[28] It prompted the revolutionary government to adopt a protective policy regarding the works of art gathered in natonalised churches. It was ordered that such works of art be stored in newly-created warehouses, with the intention to later display them in the form of a museum collection of medieval art. The first collection of religious art was under the protection of Alexandre Lenoir (1761–1839) – it was the collection in the Petits-Augustins.

The final version of Abbé Grégoire's report was disclosed to the public in August 1794.[29] Its content was something more than just a concise description of acts of revolutionary vandalism. It also contained the author's personal reflection on the events he described. Abbé Grégoire considered the revolutionary call to destroy artifacts "an unpatriotic destruction of the history and the cultural heritage of the French nation".[30] Grégoire's firm stance against vandalizing monuments[31] proved very effective. In his report, he compared the destructive acts of the French nation to the ancient acts of vandalism that had led to the downfall of the Roman Empire. It stirred the imagination of the revolutionary leaders, and they could not ignore the author's call to take appropriate countermeasures. The Government of the Republic, however, dreaded using the argument about the anti-patriotic nature of acts of vandalism – if works of religious art had been nationalised and belonged to everyone, vandalizing them was to annihilate one's own culture and decreasing the amount of one's own property. The measures taken by the government made it possible to save, among other works, *The Dying Slave*, a sculpture by Michelangelo that initially embellished the tomb of Pope Julius II. The sculpture was relocated to the Musée Central.[32]

Alexandre Lenoir played an important role in the process of protection of France's religious cultural heritage. He organised a series of exhibitions of religious art staged in former churches. Lenoir created conditions for redefining artistic creation connected

---

[28] H. Grégoire, *Rapport sur les destructions opérées par le Vandalisme et les moyens de le réprimer*, Paris, 31 August 1794.

[29] Abbe Gregoire finished his report on revolutionary vandalism on 13 August 1794 (R. Reichardt, H. Kohle, *Visualizing the Revolution: Politics and the Pictorial Arts in Late Eighteenth Century France*, London 2008, p. 247). In his diary, which he kept in the years 1806–1807, Gregoire claimed to have been the first author to use the term "vandalism" to describe "a physical destruction of objects" (D. Gamboni, *The Destruction of Art: Iconoclasm and Vandalism since the French Revolution,* Reaktion Books, London 2012, p. 18). This term appears to be a more universal reference to the Vandals – the barbaric tribe that wreaked havoc in ancient Rome. Dario Gamboni defined the differences between the term "iconoclasm" and "vandalism". According to Gamboni, "iconoclasm" is mostly used to describe the destruction of works of religious art. In a symbolic sense, it can be understood as the act of rejecting the beliefs and institutions associated with them. "Vandalism", on the other hand, refers to any action aimed at destroying the material traces of the past, as well as any other objects that have a defined, mostly significant, cultural value. Destruction caused by vandalism is barbaric, full of ignorance, blind.

[30] J.L. Sax, "Heritage Preservation…", pp. 1143–1144.

[31] The French word *monuments* has a different meaning from English *monuments* or Polish *monumenty*. It also referred to works of a movable character that symbolised specific historical values, such as medallions or chronicles.

[32] A. McClellan, *Inventing the Louvre: Art, Politics and the Origins of the Modern Museum in Eighteenth-Century Paris*, New York 1994, p. 159; *idem*, "Nationalism and the Origins of the Museum in France", *Studies in the History of Art* 1996, vol. 47, p. 35.

with the monarchy, and he also created a whole theory of their protection.[33] His activity can be perceived as the beginning of modern monument protection understood as type of praxis but also as an area of law. To achieve his goals, Lenoir even became a politician and lobbied for the protection of works of art of high artistic valued that opposed the political line of the Revolutionary Committee. He openly opposed the *Comité d'Instruction Publique* – a revolutionary institution whose purpose was to clear public spaces of signs and symbols of the monarchy. Lenoir was also against the Jacobin dictatorship and a cultural policy based on the destruction of the cultural achievements of the ancien régime.[34] The success of Lenoir's plan depended on the recognition of works of religious art as historical artifacts rather than symbolic representations and carriers of the old socio-political order.[35] This recalls the issue governed by *The Codex Theodosianus* – works of art, apart from their religious value, are also of artistic value and, therefore, must not be destroyed. It clearly demonstrates how cultural heritage and its representations in many historical contexts became "a product of ideology".[36]

## 4. Cultural heritage concepts of the second half of the 19th century

In the nineteenth century, in most European countries, various types of associations calling for the legal protection of national cultural heritage began to operate. Soon, their actions were reflected in national agendas. Legislative initiatives were taken to draft laws in this area. Similar problems occurred in the second half of the nineteenth century in most European countries.[37] "Paradoxically, while heritage is used as a universal category in public discourse, the origins of international concern for heritage are perceived to be relatively recent, only dating from the post-war period. Instead, historians have sought explanations for the birth of heritage during the late eighteenth and the nineteenth century overwhelmingly in national contexts".[38] The scale of the phenomenon can be seen, for example, in the number of laws adopted before the outbreak of the First World War concerning the protection of cultural heritage in various

---

33 A. Lenoir, "Foreword to the 'Historical and Chronological Description of the Monuments of Sculpture'" [in:] *Art in Theory 1648–1815: An Anthology of Changing Ideas*, eds. Ch. Harrison, P. Wood, J. Gaiger, London 2000, p. 733.

34 Ch.M. Greene, "Alexandre Lenoir…", p. 213.

35 F. Haskell, *History and Its Images*, Yale 1993, p. 241.

36 K. Kuutma, "The Politics of Contested Representation: UNESCO and the Masterpieces of Intangible Cultural Heritage" [in:] *Prädikat „Heritage": Wertschöpfungen aus kulturellen Ressourcen*, *Studien zur Kulturanthropologie. Europäischen Ethnologie*, eds. D. Hemme, M. Tauschek, R. Bendix, no. 1, Berlin 2007, p. 177 (177–195).

37 C. Miele, "Heritage and Communities: Reflections on the English Experience in the Nineteenth and Twentieth Centuries" [in:] *idem*, *Towards World Heritage: International Origins of the Preservation Movement 1870–1930,* Routledge, London – New York 2011, pp. 155–180.

38 A. Swenson, "Introduction" [in:] *idem*, *The Rise of Heritage: Preserving the Past in France, Germany and England, 1789–1914,* Cambridge University Press, Cambridge 2013, p. 1; C. Miele, *Towards World Heritage*…, p. 7.

countries: Greece (1834, 1899), Sweden (1867), Hungary (1881), Britain (1882, 1913), Finland (1883), Turkey (1884), Tunisia (1886), France (1887, 1914), Bulgaria (1889), Romania (1892), Portugal (1901), Italy (1902, 1909) and India (1904)",[39] as well as in the German states of Hesse (1902) and Oldenburg (1911)".[40]

There were several reasons for this increase in interest in the second half of the nineteenth century. In addition to an obvious desire to ensure the security of national treasuries threatened by the ever-increasing art market, numerous political reasons were a driving force for public authorities. Increased awareness of the public value of the relics of the past resulted, among other factors, from clear social transformations consisting in the gradual democratisation of societies. Individual countries competed with each other in the field of culture, and having significant resources of a well-protected cultural heritage became a marker of status in international relations. In internal relations, the introduction of provisions to protect cultural heritage was an opportunity for the authorities to enlarge their patrimonial field. The tools for this could be protective provisions ensuring the protection of private property and expropriation on the grounds of public utility to the status of corporate bodies, such as Churches and communes. In the reality of the time, the inclusion of church property, e.g. medieval temples, within the scope of administrative conservation authority was a breach of the sacred immunity exempting church property from the jurisdiction of secular authority. For example, "the 1887 [French – M.B.] Act was not only an Act for the better protection of monuments, but also a measure to enhance a centralist approach and weaken the influence of local communities and the Catholic Church".[41] The situation was similar in Germany at a federal level. Some member states of the Union of German States feared the loss of control over artistic and architectural objects of considerable value located on their territory if a unified law were to be adopted conferring competence for their protection on the central state authorities.[42] No wonder, then, that solutions of this kind aroused considerable public opposition and caused significant delays in the legislative processes.

Activism in the field of conservation legislation revealed many of the social tensions that existed previously, but which now gained a new field of play. It should be noted that the debates held on the planned laws differed in terms of content from country to country. Austrian law developed by the art historian Alois Riegl is considered to be of particular importance for the development of monument conservation and museums.[43] The definitions of terms he developed, "monument", "historic value", and "preservation of monuments", were the starting point for many subsequent Euro-

[39] A. Swenson, "The Law's Delay? Preservation Legislation in France, Germany and England" [in:] *Toward World Heritage. International Origins of the Preservation Movement, 1870–1930,* ed. M. Hall, Ashgate, Burlington 2011, p. 140.

[40] *Ibidem*, p. 140.

[41] *Ibidem*, p. 142.

[42] See: W. Speitkamp, *Die Verwaltung der Geschichte: Denkmalpflege und Staat in Deutschland 1871–1933,* Vandenhoek & Ruprecht, Goettingen 1996, pp. 154–163.

[43] T. Rudkowski, "Ochrona zabytków. Niektóre aspekty filozoficzne i socjologiczne" [in:] *Dzieło sztuki i zabytek. Materiały pokonferencyjne*, Stowarzyszenie Historyków Sztuki, Warszawa 1975, pp. 13–16.

pean regulations.[44] The significance of Riegl's ideas lay in the complete rejection of the aesthetic criterion when assessing the historical value of the artifact and its inclusion in the collection of monuments.[45] Although this has long been considered a mistake, as contemporary artistic practice shows, the aesthetic criterion is not the fundamental and most important criterion for all works of art.[46] At that time, however, the thinking about art was dominated by an idea of art that was completely subordinated to the principles of aesthetics. Even Karl Marx writes that, contrary to animals, "man therefore also forms objects in accordance with the laws of beauty".[47] This only seems to confirm the then deeply rooted belief in the normative nature of aesthetic precepts.

In 1903, Alois Riegl published a book entitled *The Modern Cult of Monuments: Its Character and Origin*.[48] The author includes numerous reflections on the values justifying the policy of protecting material traces of the past.[49] He creates a previously unknown typology of axiological justifications for the value of ancient objects used as criteria for granting them legal protection. He identifies "art value" (*Kunstwollen*), "historical value" resulting from the age of a given work, "commemorative value" and "use value".[50] He also shows that the concept of a monument refers to both intentional monuments, i.e. those constructed deliberately to commemorate an event or a person, as well as "unintentional monuments", the value of which results from their uninterrupted existence and their function of representing the achievements, attitudes and beliefs of previous generations.[51]

Riegel's contribution to the development of the legal theory of monument protection also consisted in changing the policy of art restoration. Previously, attempts had been made to recreate the original form of works of art at all cost, often at the cost of losing their historical character.[52] Riegel's theses[53] enabled the recognition of beauty in the footsteps of time and convinced the supporters of aesthetic justifications

---

[44] For more on this subject, see: A. Gerecka-Żołyńska, *Ochrona zabytków w Polsce. Zbiór podstawowych aktów prawnych z krótkim komentarzem*, Ośrodek Badania Rynku Sztuki Współczesnej, Poznań 2006, pp. 8–9.

[45] H. Zerner, "Alois Riegl: Art, Value and Historicism", *Daedalus* 1976, vol. 105, no. 1, p. 178.

[46] E. Naginski, "Riegl, Archeology and Periodisation of Culture", *RES: Anthropology and Aesthetics* 2001, no. 40, pp. 135–152.

[47] K. Marx, *Rękopisy ekonomiczno-filozoficzne z 1844 r*., Warszawa 1958, p. 517.

[48] A. Riegl, "Der moderne Denkmalkultus…", pp. 144–193; English version: *idem*, "The Modern Cult of Monuments", *Oppositions* 1982, no. 25, pp. 21–51.

[49] See: M. Gubser, "Time and History in Alois Riegl's Theory of Perception", *Journal of the History of Ideas* 2005, vol. 66, no. 3, p. 457.

[50] G. Araoz, "Preserving Heritage Places under a New Paradigm", *Journal of Cultural Heritage Management and Sustainable Development* 2011, no. 1, p. 56.

[51] See: M.A. Holly, "Review of Margaret Iverson's *Alois Riegl: Art History and Theory*", *Central European History* 1994, vol. 27, no. 4, pp. 537–539.

[52] T. Arrhenius, "The Cult of Age in Mass Society: Alois Riegl's Theory of Conservation", *Future Anterior: Journal of Historic Preservation, History, Theory and Criticism* 2004, vol. 1, no. 1, pp. 75–81.

[53] See, *inter alia*: A. Riegl, "The Modern Cult of Monuments: Its Essence and Its Development" [in:] *Historical and Philosophical Issues in the Conservation of Cultural Heritage*, eds. N.S. Price *et al*., The Getty Conservation Institute, Los Angeles 1996, pp. 69–83.

to abandon practices which could lead to the obliteration of traces under the rubric of reconstruction and renovation.[54]

Recognition of the importance of works created in the past for the development of national culture was conducive to the autonomy of art, which consists in separating its social value from the religious, political or propaganda functions attributed to it. The decision on what constitutes historical value and what qualifies as a monument was left to the state authorities, as a result of which they became one of the factors co-shaping the cultural policy of the state[55]. The legal regulation of cultural heritage in technical terms, regardless of the social functions attributed to it – past and present – significantly changed the way individual items are perceived in society. The medieval cathedral was no longer just a temple. As a result of the professionalisation of conservation protection of old works of art or architecture, religious works of art were moved from the symbolic sphere to the scientific sphere. The recognition of a work of art or an architectural object as part of the cultural heritage of a country or nation resulted in the change of its status from an object of worship subject only to the church to an object of social value accorded by the secular state. Ensuring the protection of valuable religious objects, therefore, meant, in practice that they were, to a greater or lesser extent, placed under the authority of the state administration.

## 5. The protection of cultural heritage after the Second World War

The Second World War, which ruined many invaluable artistic and architectural testimonies of the past, was a driving force for action at an international level to create supranational protection instruments. To this end, UNESCO was set up at the UN – the United Nations Educational, Scientific and Cultural Organisation. Under its auspices, new – in the intention of its creators – universal rules for dealing with cultural heritage of various types under various conditions were developed. "In response to specific circumstances, UNESCO has fostered the creation of standard-setting instruments and international organisations like the International Centre for the Study of Preservation and Restoration of Cultural Property (ICCROM) and the International Council on Monuments and Sites (ICOMOS). Standard-setting instruments include sets of recommendations on archeological excavations from 1956 (UNESCO), landscapes from 1962 (UNESCO), cultural property endangered by public or private works (UNESCO 1968), and historic urban areas from 1976 and 2011 (UNESCO). In addition, there are fully fledged UNESCO conventions, such as the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), the Convention Concerning the Protection of the World Cultural

[54] D. Reynolds Cordileone, *Alois Riegl in Vienna 1875–1905: An Institutional Biography*, Ashgate, Burlington 2014, p. 276.

[55] H. Schreiber, "Patrymonializacja w stosunkach międzynarodowych…", pp. 385–398.

and Natural Heritage, or World Heritage Convention (1972), the Convention on the Protection of the Underwater Cultural Heritage (2001)".[56] This long list of technical instruments among other kinds of heritage also covers religious heritage. This activates the above-mentioned problem of possible secularisation through "heritagisation". This problem was, in fact, considered. In many UNESCO-affiliated publications the problem of the religious provenance of heritage sites has been channeled through references to concepts such as "religious diversity" and "worldview pluralism".[57] Until the 1980s, the issue of "living cultural heritage" was not the subject of any extensive theoretical or practical reflection.[58] This caused "a growing dissatisfaction among many developing countries, especially in the Latin American, African, and Asian-Pacific regions, with the 1972 Convention (…), which was viewed as 'Eurocentric' both in its operation and conception".[59] In this body of UNESCO international legal acts , both through the standards and procedures adopted for protection and through the very layer of language used to describe religious objects, buildings, places, and traditions, a hierarchy of normative order was established – the primacy of secular law over religious law; and the primacy of the state over the church. In this vision of culture, traditional social practices, including religious ones, were seen as "an obstacle for (…) development".[60] It should be noted, however, that a policy of secularisation of this kind, which is veiled in language, is being opposed by conservative circles in various countries. Therefore, especially in many recent studies, attention is drawn to the need for the sacralisation of cultural heritage of religious provenance, in order to meet social needs more widely and to restore the full validity of the voice of human communities.[61]

The situation began to change with the establishment of new protection instruments – the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), and the Convention on the Protection of the Diversity of Cultural Expressions (2005) – and practical guidelines for their application. The fact that greater account was taken of the interests of people actively benefiting from a cultural heritage, including a religious heritage, only confirmed that the previous line of interpretation was a consequence of the implementation of a specific policy and was not the result of

---

[56] C. Cameron, "UNESCO and Cultural Heritage: Unexpected Consequences" [in:] *A Companion to Heritage Studies,* eds. W. Logan, M.N. Craith, U. Kockel, Wiley Blackwell, Oxford 2016, pp. 322–323.

[57] Cf. F. Champion, "Diversity of Religious Pluralism", *The Public Management of Religious Diversity, International Journal on Multicultural Societies (IJMS)* 1999, vol. 1, no. 2, pp. 40–54.

[58] Janet Blake sees the origins of the change in the re-examination of the notion "culture" at the World Conference on Cultural Policies (MONDIACULT) held in Mexico in 1982.

[59] J. Blake, "From Traditional Culture and Folklore to Intangible Cultural Heritage: Evolution of a Treaty", *Santander Art and Culture Law Review* 2017, no. 2, p. 44; cf. G. Boccardi, "Authenticity in the Heritage Context: A Reflection beyond the Nara Document", *The Historic Environment: Policy & Practice* 2018, vol. 10, no. 1, p. 1; K. Chainoglou, "The Protection of Intangible Cultural Heritage in Armed Conflict: Dissolving the Boundaries Between the Existing Legal Regimes?", *Santander Art and Culture Law Review* 2017, no. 2, pp. 109–134; A.F. Vrdoljak, *Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage*, 2005, http://www.esil-sedi.eu/sites/default/files/Vrdoljak09-05.pdf (accessed: 21.09.2020).

[60] J. Blake, "From Traditional Culture…", p. 44.

[61] See: S. Samida, "On the Genesis of Heritage: Cultural Heritage between 'Sacralisation' and 'Eventisation'", *Zeitschrift fur Volkskunde,* January 2013, no. 109(1), pp. 77–98.

objective limitations of the system.[62] As Lucas Lixinski rightly points out, "we are thus moving away from physical remnants and towards living cultures; from States toward communities of practice; from preservation to safeguarding; and from Western-centric appreciations of 'Outstanding Universal Value' towards culturally-sensitive engagements which represent all peoples. In short, the 2003 Convention contains elements that can turn international heritage law on its head".[63] This shift can be connected with the influence of a "human rights-based orientation".[64]

## 6. Contemporary contexts of the secularisation of cultural heritage

The process of secularisation through heritagisation is still awaiting a careful investigation. Some authors referring to this topic problematise other aspects like, for instance, the economic dimension of that process. Anne Formerod and invited authors show in a monograph entitled *Funding Religious Heritage* a problem that is a consequence of the above process. That is, how to bear the costs of maintaining religious objects that have become protected under the cultural heritage law?[65] This financial burden that falls on local authorities has forced some of them to sell or destroy some religious buildings.[66]

The economic aspect of a joint process of "patrimonialisation" (named by some authors as "politicisation"[67]) or "heritagisation" also applies to Muslim countries. For example, it has been noticed in the Maghreb that religious sites and rituals have been incorporated within national and international tourism strategies, so that traditional religious practices have undergone far-reaching commercialisation.

It is worth noting that "all religious communities have norms on the construction, maintenance, and protection of their religious sites and objects, many of which norms may or may not be mirrored in those of the State".[68] They are generally a combination of rules resulting from guidelines for religious worship (e.g. defining the rules of accessibility of places considered sacred) and general standards aimed at protecting the material substance of the objects (e.g. defining the responsibility for supervising the condition of architectural objects). The inclusion of these religious cultural her-

---

[62] Cf. K. Zalasińska, "Building Bridges Between the 1972 and 2003 Conventions – Searching for an Integrated Protection of Cultural Heritage under UNESCO's Cultural Conventions System", *Santander Art and Culture Law Review* 2017, no. 2, pp. 77–90.

[63] L. Lixinski, "Intangible Cultural Heritage: Successes, Disappointments, and Challenges", *Santander Art and Culture Law Review* 2017, no. 2, p. 18 (17–20).

[64] J. Blake, "From Traditional Culture…", p. 41.

[65] *Funding Religious Heritage,* ed. A. Fornerod, Routledge, New York 2015.

[66] The Saint-Pierre-aux-Liens, a nineteenth-century neo-gothic parish church was scheduled for demolition in 2007 by the city council.

[67] K. Boissevain, "Studying Religious mobility: Pilgrimage, Shrine Visits and Religious Tourism from the Maghreb to the Middle East" [in:] *New Pathways in Pilgrimage Studies: Global Perspectives,* eds. D. Albera, J. Eade, Routledge, New York 2019, p. 99.

[68] N. Doe, "Foreword" [in:] T. Tsivolas, *Law and Religious…*, p. vii.

itage sites within the scope of secular law results in a dualism in their legal status. They, thus, become a kind of *res mixtae*, subject to two legal systems simultaneously.

It would be wrong to understand the secularisation tendencies described in this paper as unequivocally negative, or marked with a hidden meaning. The policy of secularising cultural heritage itself seems to be an attempt to protect it from the antagonistic aspects of the practices of believers of different faiths, manifesting itself in the destruction of valuable historical or artistic objects in the name of religious precepts. Examples of such religiously motivated destruction are easy to find. It is enough to remember the events in the Middle East that have been broadcast or re-transmitted all over the world – the destruction of monuments to the Buddha of Bamyan in Afghanistan, Palmyra in Syria, or the collection of the Museum in Mosul.[69] These cases have aroused world public opinion and prompted many governments to prepare a new convention to combat offences relating to cultural property, known as The Nicosia Convention (form the place of its signing),[70] and "The Blood Antiquities Convention", which is a response to a rising level of cultural vandalism. Of particular importance has been the extensively reported trial at the International Court of Justice in The Hague of Ahmad Al Mahdi Al Faqui (the Al-Mahdi case), the commander in charge of a group of Muslim fighters responsible for the crime of intentional attacks directed against protected cultural heritage monuments in Timbuktu in Mali.[71]

Both the Nicosia Convention and the Hague trial files reveal, at a linguistic level, the above mentioned "technicisation" of the treatment of religious cultural heritage as a protected asset because of its artistic and historical value, and not as a religious asset, above all in terms of its material sustainability. For many commentators, the Nicosia Convention, in particular, was also a disappointment for other procedural reasons.[72] In this sense, both in the Convention and in the judicial proceedings, the legislative strategy launched by *The Codex Theodosianus* to counter religious iconoclasm has continued.

---

[69] See: M.M. Bieczyński, "Destrukcja dzieł sztuki a prawo w ujęciu historycznym", *Studia Politologiczne* 2018, vol. 50, pp. 217–236.

[70] M.M. Bieczyński, "The Nicosia Convention 2017: A New International Instrument Regarding Criminal Offences against Cultural Property", *Santander Art and Culture Law Review* 2017, no. 2/3, p. 256.

[71] Cf. K. Wierczyńska, A. Jakubowski, "Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgement in the Al-Mahdi Case", *Chinese Journal of International Law* 2017, vol. 16, issue 4, pp. 695–723; see also: M. Lostal, *International Cultural Heritage Law in Armed Conflict: Case Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan,* Cambridge University Press, Cambridge 2017.

[72] J. Stepnowska, "The Blood Antiquities Convention and Asian Cultural Property. A Remedy or Dissapointment? The Case of Cambodia", *Gdańskie Studia Azji Wschodniej* 2019, no. 15, pp. 133–140; D. Fincham, "The Blood Antiquities Convention as a Paradigm for Cultural Property Crime Reduction", *Cardozo Arts & Entertainment* 2019, vol. 37(2), pp. 299–336.

## 7. De-sacralisation of cultural heritage as a sign of resistance to global trends

The UNESCO heritage protection regime prior to 2000 was accused in the field of theoretical assessments of the "'fabrication' of cultural heritage (…) which breaks the continuity of the time".[73] It has been pointed out that the criteria used for inclusion on the World Heritage List closely link the sites with the time of their creation, turning them into dead entities that lose their connection with the present.

Against this background, the post-war standards of cultural heritage protection formulated within global organisations dealing with its protection and conservation, in particular those from International Centre for Study and Restoration of Cultural Property (ICCROM), are criticised. One particularly active publicist is Gamini Wijesuriya, former Director Conservation of the Department of Archaeology of Sri Lanka (1983–2000), Vice President of the World Archaeological Congress (WAC) and ICCROM staff member responsible for organisation of Training Courses and activities related to World Heritage. In his publications he takes a critical approach towards conservation philosophy, which – in his opinion – "in its formative stages was rooted in the contemporary secular values of the Western world".[74] In his interpretation, until more or less the end of the twentieth century, cultural heritage was dominated by a European approach based on the paradigm of protecting primarily its material substance, with complete disregard for the values it had for the community making it, in for particular religious use ("living monuments", i.e. those which continue to serve the purposes for which they were originally intended). He goes as far as to comment on "the ignorance of all values thereby distancing heritage from the society".[75] He directly refers to the notion of secularisation understood as "a phenomenon of the separation or distancing between materiality (i.e. the fabric or the sites) and spirituality (i.e. the concerns of the people connected to the sites) and overemphasizing the importance of the former".[76] According to Wijesuriya, most acts of international law, such as the UNESCO and Council of Europe conventions, have had such an impact, particularly the Venice Charter. He also refers to the critical remark made by Andrzej Tomaszewski, Chair of the ICOMOS International Scientific Committee on Theory and Philosophy: "From the period between the two world wars, we may observe a paucity of deeper-theoretical studies (…) Instead of these, we have seen the creation of increasing numbers of documents concerning conservation, of very variable scientific potential (…) As a rule, they contain empty desiderata presented for acceptance and use and not only theoretical reflection.

---

[73] T. Poddubnych, "Heritage as a Concept through the Prism of Time", *Social Evolution & History*, September 2015, vol. 14, no. 2, p. 108 (108–131).

[74] G. Wijesuriya, "Towards the De-secularisation of Heritage", *Built Heritage* 2017, no. 1(2), p. 1 (1–15).

[75] *Ibidem*, p. 1.

[76] G. Wijesuriya, "From Venice Charter to Nara+20: Beyond Heritage Secularisation", Paper presented at the international Symposium on the Conservation of Brick Monuments at World Heritage Sites, Ayuttahaya, 19–20 October 2017.

Philosophy and theory have been replaced by doctrine".[77] In response to these shortcomings, Wijesuriya calls for an open rather than restrictive interpretation of existing international law, so that the social or community cultural dimension of religious heritage can be taken into account. However, he believes that after 2000, there has been a clear change in the interpretation of the provisions of international legal instruments on the protection of cultural heritage, one that is conducive to taking into account the needs of religious communities interested in the lively enjoyment of their cultural heritage. This was particularly noticeable in the text Operational Guidelines of the World Heritage Convention (2005), Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), the UNESCO Recommendation on Historic Urban Landscapes (2014), and Policy for Integrating a Sustainable Development Perspective into the Processes of the World Heritage Convention (2015). Despite the positive assessment of this noticeable trend, Wijesuriya notes that it is necessary to monitor conservation and protection practices in order to restrain the de-secularisation process. As he points out, "there are evident changes over the last two decades that have captured the concerns of people and integrated them into conservation and management practice",[78] but "it is recognised that some of these themes and ideas are in the early stage of development and only have a history of two decades".[79]

This criticism is particularly important as it comes from the peripheries of the world of conservation. The Sri Lankan author invokes numerous examples of spontaneous revitalisation of heritage damaged by bombings or natural disasters carried out without initiating formal and administrative procedures. He claims that "Times have changed. Other cultures have earned respect and the differences which they represent in relations to those of the West have enriched the vision which humanity has of itself and of its culture".[80] This last quoted sentence situates the problem in another heritological context – post-colonial studies. It has often been noted that for a long time the "heritagisation" of conquered lands was perceived by the invading countries (i.e. Britain, France, Germany) as a "civilizing mission",[81] which resulted in detaching cultural heritage from its original contexts. As a result of these processes, a "living" religious heritage became a "dead" one. Thus, "globally, heritage is increasingly promoted as a force of good",[82] but it had and has some "bad" dimensions, or at least scope for improvement.

In this context, the concept of de-secularisation proposed by Wijesuriya seems to be tantamount to sensitising today's practices related to the creation, protection, and

---

77 A. Tomaszewski, "Conservation: its Future as Discipline and its Theory" [in:] *Cultural Heritage in the 21st Century: Opportunities and Challenges,* eds. M.A. Murzyn, J. Purchla, International Cultural Centre, Kraków 2007, pp. 163–170.

78 G. Wijesuriya, "Towards the De-secularisation…", p. 13.

79 *Ibidem*, p. 10.

80 *Ibidem*, p. 5.

81 Cf. *Cultural Heritage as Civilizing Mission: From Decay to Recovery. Proceedings of the 2nd International Workshop on Cultural Heritage and the Temples of Angkor (Chair of Global Art History, Heidelberg University, 8–10 May 2011)*, ed. M. Falser, Springer, Heidelberg 2015.

82 A. Swenson, "Introduction"…, p. 1.

revitalisation of religious cultural heritage to the complicated consequences of previous practices in this field. According to the author, "de-secularisation is about reconnecting or reestablishing the flouted linkages between heritage and people and easing the dominance or authority of secularisation".[83]

The perspective described by Wijesuriya is also reflected in the texts of other authors[84]. In a slightly more balanced tone, Giovanni Boccardi draws attention to a similar processes, stating that "accepting the relative validity of different views on heritage, as the Nara Document on Authenticity implicitly seems to do, may certainly provide some advantages. It reflects the need to democratise heritage and to introduce a more people-centered approach to its identification, conservation and management within a larger sustainable development perspective".[85]

Other authors also point to the need for a change in protection of "living religious monuments". Olivia Niglio, for instance, argues that "it is essential to deepen the knowledge of priorities in enhancing the cultural heritage and to reaffirm the centrality of man, the community and all those principles that represent the milestones of a growth based on interculturalism, which necessarily implies a process of a constructive and proactive interest in other cultures towards our neighbours".[86] This is why the cultural-religious heritage has a crucial role, with culture reemerging as a main priority within policies of sharing; it is also useful in supporting an open dialogue and development, to the benefit of individual freedom".[87]

Calls for a change in cultural policies regarding the interpretation of international legal acts aimed at the protection of religious cultural heritage are a fresh voice in the discussion. Although the proposed changes seem positive (they meet people's needs), it should be remembered that static law, despite its dynamic interpretation, changes slowly (exemplifying the necessity of so-called legal certainty). "The living dynamic heritage is a relatively new concept. With the creation of the UNESCO Intangible Heritage Convention in 2003 and the introduction of the 'Intangible Heritage' concept itself, UNESCO basically created new standards for cultural heritage selection. Cultural heritage must, from now on, be defined in a dynamic view of culture",[88] including in its religious dimension.[89] Although an increasing number of authors point to the need

---

83 G. Wijesuriya, "Towards the De-secularisation…", p. 7.

84 See: R.W. Khalaf, "Authenticity or Continuity in the Implementation of the UNESCO World Heritage Convention? Scrutinizing Statements of Outstanding Universal Value, 1978–2019", *Heritage* 2020, no. 3, pp. 243–274; *idem*, "The Implementation of the UNESCO World Heritage Convention: Continuity and Compatibility as Qualifying Conditions of Integrity", *Heritage* 2020, no. 3, pp. 384–401; *idem*, "Continuity: A Fundamental Yet Overlooked Concept in World Heritage Policy and Practice", *International Journal of Cultural Policy* 2019, vol. 27, pp. 102–116.

85 G. Boccardi, "Authenticity in the Heritage Context…", p. 12.

86 Cf. F. Follo, "Inculturation ou inter-culturalite et rencontre des cultures?" [in:] *Reflexion*, Mission Entrageres de Paris, April 2010, pp. 63–67.

87 O. Niglio, "Knowing, Preserving and Enhancing: The Cultural-Religious Heritage", *Alma Tourism* 2017, no. 15, p. 153.

88 T. Poddubnych, "Heritage as a Concept…", p. 116.

89 Cf. A. Leblon, "A Policy of Intangible Cultural Heritage Between Local Constraints and International Standards: 'The Cultural Space of the yaaral and the dengal'" [in:] *Heritage Regimes and the State*, series:

to open up the doctrine of protecting cultural heritage to religious aspects and to revitalise it in a certain way, this subject still requires sectoral and cross-industry negotiations.

## 8. Conclusions

The processes described in this article related to state legal and political legitimacy and institutionalisation of cultural heritage are only a part of a multi-faceted research field and certainly do not meet the criteria for an overall historical theory. Rather, the aim of this study is to draw attention to an extremely important and, as yet, not fully developed research area, which is the inclusion of the heritagisation of religious cultural heritage as a tool of secularisation. In a sense, this giving (heritagisation) of works of sacred art and buildings serving cult purposes is a manifestation of and at the same time a testimony to the church's subordination to state power ("patrimonialisation"). In the first stage, this subordination takes place in the language field.

The renouncement of the symbolic aspect of religious objects in statutory nomenclature and a limitation to the technical definition of their (former, original) function leads to their meaningful detachment from the source contexts – "in many instances the reformation of religious forms as *heritage* entails a process of profanisation through which their initial sacrality is being lost".[90] Similar processes also take place with regard to folklore, which, when included in the scope of protective regulations and called cultural heritage, loses its connection with the communities in which it was formed.[91] Although this significant flattening of religious contexts is often explained by reasons of accessibility (e.g. for tourists), the protests of the social groups concerned only confirm David E. Harvey's statement that "it certainly cannot be claimed that heritage is *only* about the economic practices of exploitation".[92] Cultural heritage appears to be a "value loaded concept"[93] bringing together the interests of many public-life actors representing different and often opposing interests. This concept is, in fact, a broad field of social mediation in which "the evidence of history cannot be so easily separated from the interpretation built upon it".[94] Any change in the legal status of a religious object – past or present – has many practical consequences for members of religious communities. Just as any representation, whether verbal or pictorial, arouses the interest of the audience and becomes a point of reference for them, so does religious cultural

Göttingen Studies in Cultural Property, eds. R.F. Bendix, A. Eggert, A. Peselmann, Göttingen University Press, Göttingen 2013, pp. 97–110.

90 B. Meyer, M. de Witte, "Heritage and the Sacred: Introduction", *Material Religion: The Journal of Objects, Art and Belief* 2013, vol. 9, issue 3, p. 277 (274–280).

91 K. Kuutma, "From Folklore to Intangible Heritage" [in:] *A Companion to Heritage Studies*…, p. 42.

92 D.C. Harvey, "Heritage Pasts and Heritage Presents…", p. 324.

93 D. Hardy, "Historical Geography and Heritage Studies", *Area* 1988, vol. 20, no. 4, pp. 333-338.

94 N. Johnson, "Historical Geographies of the Present" [in:] *Modern Historical Geographies*, eds. B.J. Graham, C. Nash, Prentice Hall, Harlow 2000, p. 252 (251–272).

heritage changes in terms of the relationship between particular epistemologies. In other words, cultural heritage, including religious heritage, appears to be "an integral part of a broader set of cultural, social, political and economic practices".[95]

In the view in this paper, it is becoming a field of symbolic practice oriented towards the present day of the acting entity, on which it imprints a mark of its political power. Like other fields of state, political, and legal activity, the protection of cultural heritage and the process of its constitution is subject to historical changes.[96] Keir Reeves and Gertjan Plets express this attitude succinctly: "One of the core principles of culture, and in turn heritage, is that it is not stable. Instead, culture is constantly reproduced and revised in relation to both internal and external changes and perceived needs".[97] In these changes, it is possible to identify clear trends, one of which is the translation into this field of broader conditions related to the definition of relations between the church and the state. The revision of UNESCO's interpretation paradigms in the twenty-first century gives an opportunity for a more balanced development of the sphere of protection of religious cultural heritage. "Contrary to all the discussions opposing development and preservation, the concept of living heritage aims at proving the possible simultaneous coexistence of both preservation and development, where the preservation is not considered as a frozen moment but as a mechanism of continuity".[98]

A separate question that could be asked, as it were, in the margins of this article is that of two other trends in heritage creation practices – the opposite, the de-sacralisation of religious sites protected under secular law, which consists of restoring rituals, and the practice of giving sites, buildings and objects recognised as cultural heritage the character of uniqueness – the sacralisation of secular artefacts. This third trend has already been pointed out by several authors in relation to various sites and locations around which a certain form of worship followed by many adherents has appeared.[99] It would require conducting separate research to compare three processes – the secularisation of religious cultural heritage, the de-sacralisation of previously secularised heritage and the sacralisation of secularised heritage. Brigit Meyer and Marleen de Witte, editors of *Heritage and the Sacred: Introduction* published in 2015, argue that, "two processes are at the heart of the interplay between the fields of *heritage* and *religion*. First, the *heritagisation of the sacred*: how religious traditions become represented and recognised (or contested and rejected) in the framework of *heritage*. And second, the *sacralisation of heritage*: how certain heritage forms become imbued

---

95 K. Reeves, G. Plets, "Cultural Heritage as a Strategy for Social Needs and Community Identity" [in:] *A Companion to Heritage Studies*…, p. 203.

96 *Ibidem*, p. 206.

97 *Ibidem*, p. 207.

98 T. Poddubnych, "Heritage as a Concept…", p. 117.

99 M. Hall, "Niagara Falls: Preservation and the Spectacle of Anglo-American Accord" [in:] *Towards World Heritage: International Origins of the Preservation Movement 1870–1930,* ed. M. Hall, Routledge, London – New York 2011, pp. 23–44; T.G. Otte, "'The Shrine at Sulgrave': The Preservation of the Washington Ancestral Home as an 'English Mount Vernon' and Transatlantic Relations" [in:] *Towards World Heritage*…, pp. 109–138.

with a sacrality that makes them appear powerful, authentic, or even incontestable"[100]. Sacralisation would consist of the two aforementioned types.

Jennie Sjoeholm makes accounts even more complicated by indicating that "the changes in meaning during the heritagisation process can be divided into four dimensions to analyze the complicated relationship between different interests and strategies (…). Heritagisation can refer to: the addition of new heritage; reaffirmation of already designated heritage; re-interpretation of already designated heritage; rejection of previous designated heritage".[101] This shows that patrimonialisation as a part of the cultural policy of the countries and international communities acting through UNESCO and its branches is made concrete in concrete strategies, including the broad concept of heritagisation. This suggests that all the processes described above – heritagisation, de-heritagisation, re-heritagisation, secularisation (as a result) – can be linked together. However, demonstrating the extent to which one of these results from the other would require further, more detailed research. But even by just simply suggesting such parallels, a new research field unfolds. This suggests that a specific cult of monuments may be the cultural equivalent of a weakening or deliberately weakened religion, and the processes of patrimonialisation of religious cultural heritage described in this article can be perceived as a root of it.

## Literature

Alexander P.J., "Church Councils and Patristic Authority the Iconoclastic Councils of Hiereia (754) and St. Sophia (815)", *Harvard Studies in Classical Philology* 1958, vol. 63.

Araoz G.,"Preserving Heritage Places under a New Paradigm", *Journal of Cultural Heritage Management and Sustainable Development* 2011, no. 1.

Arrhenius T., "The Cult of Age in Mass Society: Alois Riegl's Theory of Conservation", *Future Anterior: Journal of Historic Preservation, History, Theory and Criticism* 2004, vol. 1, no. 1.

Bacher E., "Alois Riegl und die Denkmalpflege" [in:] *idem*, *Kunstwerk oder Denkmal? Alois Riegl Schriften zur Denkmalpflege,* Wien – Koln – Weimar 1995.

Bieczyński M.M., "Destrukcja dzieł sztuki a prawo w ujęciu historycznym", *Studia Politologiczne* 2018, vol. 50.

Bieczyński M.M., "The Nicosia Convention 2017: A New International Instrument Regarding Criminal Offences against Cultural Property", *Santander Art and Culture Law Review* 2017, no. 2/3.

Blake J., "From Traditional Culture and Folklore to Intangible Cultural Heritage: Evolution of a Treaty", *Santander Art and Culture Law Review* 2017, no. 2.

Boccardi C., "Authenticity in the Heritage Context: A Reflection beyond the Nara Document", *The Historic Environment: Policy & Practice* 2018, vol. 10, no. 1.

[100] B. Meyer, M. de Witte, "Heritage and the Sacred…", p. 277.

[101] J. Sjoeholm, *Heritagisation, Re-Heritagisation, De-Heritagisation of Built Environments. The Urban Transformation of Kiruna, Sweden*, Lulea University of Technology, Lulea 2016, p. 1; cf. R. Harrison, "Forgetting to Remember, Remembering to Forget: Late Modern Heritage Practices, sustainability and the 'Crisis' of Accumulation of the Past", *International Journal of Heritage Studies* 2013, vol. 19, no. 6, pp. 579–595.

Boissevain K., "Studying Religious mobility: Pilgrimage, Shrine Visits and Religious Tourism from the Maghreb to the Middle East" [in:] *New Pathways in Pilgrimage Studies: Global Perspectives*, eds. D. Albera, J. Eade, Routledge, New York 2019.

Cameron C., "UNESCO and Cultural Heritage: Unexpected Consequences" [in:] *A Companion to Heritage Studies,* eds. W. Logan, M.N. Craith, U. Kockel, Wiley Blackwell, Oxford 2016.

Chainoglou K., "The Protection of Intangible Cultural Heritage in Armed Conflict: Dissolving the Boundaries Between the Existing Legal Regimes?", *Santander Art and Culture Law Review* 2017, no. 2.

Champion F., "Diversity of Religious Pluralism", *The Public Management of Religious Diversity, International Journal on Multicultural Societies (IJMS)* 1999, vol. 1, no. 2.

Doe N., "Foreword" [in:] T. Tsivolas, *Law and Religious Cultural Heritage in Europe,* Springer, New York 2014.

Donovan A.E., *William Morris and the Society for the Protection of Ancient Buildings*, Routledge, New York 2008.

Dunlop A., *Painted Palaces: The Rise of Secular Art in Early Renaissance Italy,* Pennsylvania State University Press, Pennsylvania 2009.

Falser M. (ed.), *Cultural Heritage as Civilizing Mission: From Decay to Recovery. Proceedings of the 2nd International Workshop on Cultural Heritage and the Temples of Angkor (Chair of Global Art History, Heidelberg University, 8–10 May 2011)*, Springer, Heidelberg 2015.

Faulkner P. (ed.), *William Morris: The Critical Heritage*, Routledge, New York 1973.

Fincham D., "The Blood Antiquities Convention as a Paradigm for Cultural Property Crime Reduction", *Cardozo Arts & Entertainment* 2019, vol. 37(2).

Follo F., "Inculturation ou inter-culturalite et rencontre des cultures?" [in:] *Reflexion*, Mission Entrageres de Paris, April 2010.

Fornerod A. (ed.), *Funding Religious Heritage,* Routledge, New York 2015.

Fourcade M.-B., *Patrimoine et patrimonialisation: entre le matériel et l'immatériel*, Presses de l'Université Laval, Paris 2007.

Gamboni D., *The Destruction of Art: Iconoclasm and Vandalism since the French Revolution*, Reaktion Books, London 2012.

Gerecka-Żołyńska A., *Ochrona zabytków w Polsce. Zbiór podstawowych aktów prawnych z krótkim komentarzem*, Ośrodek Badania Rynku Sztuki Współczesnej, Poznań 2006.

Graham B.J., Ashworth G.J., Tunbridge J.E., *A Geography of Heritage: Power, Culture, Economy*, Arnold, London 2000.

Greene Ch.M., "Alexandre Lenoir and the Musée Des Monuments Français during the French Revolution", *French Historical Studies* 1981, vol. 12, no. 2.

Grégoire H., *Rapport sur les destructions opérées par le Vandalisme et les moyens de le réprimer*, Paris, 31 August 1794.

Guberti Bassett A., "The Antiquities in the Hippodrome of Constantinople", *Dumbarton Oaks Papers* 1991, vol. 45.

Gubser M., "Time and History in Alois Riegl's Theory of Perception", *Journal of the History of Ideas* 2005, vol. 66, no. 3.

Hall M., "Niagara Falls: Preservation and the Spectacle of Anglo-American Accord" [in:] *Towards World Heritage: International Origins of the Preservation Movement 1870–1930,* ed. M. Hall, Routledge, London – New York 2011.

Hardy D., "Historical Geography and Heritage Studies", *Area* 1988, vol. 20, no. 4.

Harrison R., "Forgetting to Remember, Remembering to Forget: Late Modern Heritage Practices, sustainability and the 'Crisis' of Accumulation of the Past", *International Journal of Heritage Studies* 2013, vol. 19, no. 6.

Harvey D.C., "Heritage Past and Heritage Presents: Temporality, Meaning and Scope of Heritage Studies", *International Journal of Heritage Studies* 2001, vol. 7, no. 4.

Haskell F., *History and its Images*, Yale 1993.

Holly M.A., "Review of Margaret Iverson's *Alois Riegl: Art History and Theory*", *Central European History* 1994, vol. 27, no. 4.

Idzerda S.J., "Iconoclasm during the French Revolution", *The American Historical Review* 1954, vol. 60, no. 1.

Johnson N., "Historical Geographies of the Present" [in:] *Modern Historical Geographies*, eds. B.J. Graham, C. Nash, Prentice Hall, Harlow 2000.

Khalaf R.W., "Authenticity or Continuity in the Implementation of the UNESCO World Heritage Convention? Scrutinizing Statements of Outstanding Universal Value, 1978–2019", *Heritage* 2020, no. 3.

Khalaf R.W., "Continuity: A Fundamental Yet Overlooked Concept in World Heritage Policy and Practice", *International Journal of Cultural Policy* 2019, vol. 27.

Khalaf R.W., "The Implementation of the UNESCO World Heritage Convention: Continuity and Compatibility as Qualifying Conditions of Integrity", *Heritage* 2020, no. 3.

Kuutma K., "From Folklore to Intangible Heritage" [in:] *A Companion to Heritage Studies,* eds. W. Logan, M.N. Craith, U. Kockel, Wiley Blackwell, Oxford 2016.

Kuutma K., "The Politics of Contested Representation: UNESCO and the Masterpieces of Intangible Cultural Heritage" [in:] *Prädikat „Heritage": Wertschöpfungen aus kulturellen Ressourcen*, *Studien zur Kulturanthropologie. Europäischen Ethnologie*, eds. D. Hemme, M. Tauschek, R. Bendix, no. 1, Berlin 2007.

Leblon A., "A Policy of Intangible Cultural Heritage Between Local Constraints and International Standards: 'The Cultural Space of the yaaral and the dengal'" [in:] *Heritage Regimes and the State*, series: Göttingen Studies in Cultural Property, eds. R.F. Bendix, A. Eggert, A. Peselmann, Göttingen University Press, Göttingen 2013.

Lenoir A., "Foreword to the 'Historical and Chronological Description of the Monuments of Sculpture'" [in:] *Art in Theory 1648–1815: An Anthology of Changing Ideas*, eds. Ch. Harrison, P. Wood, J. Gaiger, London 2000.

Lixinski L., "Intangible Cultural Heritage: Successes, Disappointments, and Challenges", *Santander Art and Culture Law Review* 2017, no. 2.

Lord C., Lewine C., "Secular Imagery in Medieval Art", *Source. Notes in the History of Art*, Spring/Summer 2014, vol. 33, no. 3/4, Special Issue on Secular Art in the Middle Ages.

Lostal M., *International Cultural Heritage Law in Armed Conflict: Case Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan,* Cambridge University Press, Cambridge 2017.

Lowenthal D., *The Heritage Crusade and the Spoils of History,* Cambridge University Press, Cambridge 1998.

Mango C., "Antique Statuary and the Byzantine Beholder", *Dumbarton Oaks Papers* 1963, vol. 17.

Marx K., *Rękopisy ekonomiczno-filozoficzne z 1844 r*., Warszawa 1958.

McClellan A., *Inventing the Louvre: Art, Politics and the Origins of the Modern Museum in Eighteenth-Century Paris*, New York 1994.

McClellan A., "Nationalism and the Origins of the Museum in France", *Studies in the History of Art* 1996, vol. 47.

McCrone D., Morris A., Kelly R., *Scotland – The Brand: The Making of Scottish Heritage,* Polygon, Edinburgh 1995.

Meixner L.L., "Courbet, Corot, and Democratic Poetics" [in:] *French Realist Painting and the Critique of American Society, 1865–1900,* Cambridge University Press, Cambridge 1995.

Meyer B., de Witte M., "Heritage and the Sacred: Introduction", *Material Religion: The Journal of Objects, Art and Belief* 2013, vol. 9, issue 3.

Miele C., "Heritage and Communities: Reflections on the English Experience in the Nineteenth and Twentieth Centuries" [in:] *idem*, *Towards World Heritage: International Origins of the Preservation Movement 1870–1930,* Routledge, London – New York 2011.

Nagel A., *The Controversy of Renaissance Art*, Chicago University Press, Chicago – London 2011.

Nagel A., Wood Ch.S., *Anachronic Renaissance*, Zone Books, New York 2020.

Naginski E., "Riegl, Archeology and Periodisation of Culture", *RES: Anthropology and Aesthetics* 2001, no. 40.

Nelson R., *The Spirit of Secular Art: A History of the Sacramental Roots of Contemporary Artistic Value,* Monash University Press, Clayton 2007.

Niglio O., "Knowing, Preserving and Enhancing: The Cultural-Religious Heritage", *Alma Tourism* 2017, no. 15.

Otte T.G., "'The Shrine at Sulgrave': The Preservation of the Washington Ancestral Home as an 'English Mount Vernon' and Transatlantic Relations" [in:] *Towards World Heritage: International Origins of the Preservation Movement 1870–1930,* ed. M. Hall, Routledge, London – New York 2011.

Poddubnych T., "Heritage as a Concept through the Prism of Time", *Social Evolution & History*, September 2015, vol. 14, no. 2.

Poria Y., "The Story behind the Picture: Preferences for the Visual Display at Heritage Sites" [in:] *Culture, Heritage and Representation: Perspectives on Visuality and the Past,* eds. E. Waterton, S. Watson, Ashgate, Burlington 2010.

Reeves K., Plets G., "Cultural Heritage as a Strategy for Social Needs and Community Identity" [in:] *A Companion to Heritage Studies,* eds. W. Logan, M.N. Craith, U. Kockel, Wiley Blackwell, Oxford 2016.

Reichardt R., Kohle H., *Visualizing the Revolution: Politics and the Pictorial Arts in Late Eighteenth Century France*, London 2008.

Reynolds Cordileone D., *Alois Riegl in Vienna 1875–1905: An Institutional Biography*, Ashgate, Burlington 2014.

Riegl A., *Der moderne Denkmalkultus: sein Wesen und seine Entstehung,* [in:] *idem*, *Gesammelte Aufsätze,* Augsburg 1928.

Riegl A.,"The Modern Cult of Monuments", *Oppositions* 1982, no. 25.

Riegl A., "The Modern Cult of Monuments: Its Essence and Its Development" [in:] *Historical and Philosophical Issues in the Conservation of Cultural Heritage*, eds. N.S. Price, N. Kirby Talley, A. Melucco Vaccaro, The Getty Conservation Institute, Los Angeles 1996.

Roellinger, M., "Centenary of the French Law on Historic Monuments", *Art Antiquity & Law* 2014, vol. 19, no. 4.

Rudkowski T., "Ochrona zabytków. Niektóre aspekty filozoficzne i socjologiczne" [in:] *Dzieło sztuki i zabytek. Materiały pokonferencyjne*, Stowarzyszenie Historyków Sztuki, Warszawa 1975.

Samida S., "On the Genesis of Heritage: Cultural Heritage between 'Sacralisation' and 'Eventisation'", *Zeitschrift fur Volkskunde,* January 2013, no. 109.

Sánchez-Carretero S. "Significance and Social Value of Cultural Heritage: Analyzing the Fractures of Heritage" [in:] *Science and Technology for the Conservation of Cultural Heritage,* eds. M.A. Rogerio-Candelera, M. Lazzari, E. Cano, A Balkema Book, London 2013.

Sánchez-Carretero S., "To walk and to be walked… at the end of the world" [in:] *idem*, *Heritage, Pilgrimage and the Camino to Finisterre: Walking to the End of the World*, Springer, New York 2015.

Sax J.L., "Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea", *Michigan Law Review* 1989, no. 88.

Schreiber H., "Patrymonializacja w stosunkach międzynarodowych. Wybrane tendencje w międzynarodowej ochronie dziedzictwa kulturowego (2006–2016)" [in:] *Księga jubileuszowa z okazji 40-lecia Instytutu Stosunków Międzynarodowych Uniwersytetu Warszawskiego*, eds. M. Gawrycki, M.E. Haliżak, R. Kuźniar, G. Michałowska, D. Popławski, J. Zajączkowski, R. Zięba, Wydawnictwo Naukowe Scholar, Warszawa 2016.

Sjoeholm J., *Heritagisation, Re-Heritagisation, De-Heritagisation of Built Environments. The Urban Transformation of Kiruna, Sweden*, Lulea University of Technology, Lulea 2016.

Šola T.S., *Mnemosophy: An Essay on the Science of the Public Memory*, Rostov Velikĭ, Zagreb 2015.

Speitkamp, W., *Die Verwaltung der Geschichte: Denkmalpflege und Staat in Deutschland 1871–1933,* Vandenhoek & Ruprecht, Goettingen 1996.

Stepnowska J., "The Blood Antiquities Convention and Asian Cultural Property. A Remedy or Dissapointment? The Case of Cambodia", *Gdańskie Studia Azji Wschodniej* 2019, no. 15.

Swenson A., "Introduction" [in:] *idem*, *The Rise of Heritage: Preserving the Past in France, Germany and England, 1789–1914,* Cambridge University Press, Cambridge 2013.

Swenson A., "The Law's Delay? Preservation Legislation in France, Germany and England" [in:] *Toward World Heritage. International Origins of the Preservation Movement, 1870–1930,* ed. M. Hall, Ashgate, Burlington 2011.

Tomaszewski A., "Conservation: its Future as Discipline and its Theory" [in:] *Cultural Heritage in the 21st Century: Opportunities and Challenges,* eds. M.A. Murzyn, J. Purchla, International Cultural Centre, Kraków 2007.

Trilling J., "Daedalus and the Nightingale: Art and Technology in the Myth of Byzantine Court" [in:] *Byzantine Court Culture from 829 to 1204*, ed. H. Maguire, Harvard University Press, Washington 1997.

Tsivolas T., *Law and Religious Cultural Heritage in Europe,* Springer, New York 2014.

Vrdoljak A.F., *Minorities, Cultural Rights and the Protection of Intangible Cultural Heritage*, 2005, http://www.esil-sedi.eu/sites/default/files/Vrdoljak09-05.pdf.

Walsh K. *The Representation of the Past: Museums and Heritage in the Post-modern World*, The University of York, York 1992.

Wierczyńska K., Jakubowski A., "Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgement in the Al-Mahdi Case", *Chinese Journal of International Law* 2017, vol. 16, issue 4.

Wijesuriya G., "From Venice Charter to Nara+20: Beyond Heritage Secularisation", Paper presented at the international Symposium on the Conservation of Brick Monuments at World Heritage Sites, Ayuttahaya, 19–20 October 2017.

Wijesuriya G., "Towards the De-secularisation of Heritage", *Built Heritage* 2017, no. 1(2).

Zalasińska K., "Building Bridges Between the 1972 and 2003 Conventions – Searching for an Integrated Protection of Cultural Heritage under UNESCO's Cultural Conventions System", *Santander Art and Culture Law Review* 2017, no. 2.

Zerner H., "Alois Riegl: Art, Value and Historicism", *Daedalus* 1976, vol. 105, no. 1.

## Summary

***Mateusz M. Bieczyński***

**From *the Codex Theodosianus* to the Nicosia Convention:
The protection of cultural heritage as a means of secularisation**

This article tries to present the establishing process of cultural heritage in a broader perspective, in which national legal regulations are only indicators of some general tendencies. It focuses particularly on the transformation of religious sites and objects into legally protected cultural heritage. The main thesis of this article is that the process of "heritagisation" of religion-related artifacts can be considered a political means of secularisation. Therefore, this discussion forms part of heritological research. Among others, this article aims to answer two main questions. What happens when religious sites, objects, and practices become heritage? Is it possible to extract a functional path in legal regulations giving an account of the protection of religious artifacts as cultural heritage in European history that changed their social perception? Is the "heritagisation" of religious objects equal to their conscious secular "patrimonialisation", or is secularisation just a side-effect of their being protected by legal regulations?

**Keywords**: *The Codex Theodosianus*, The Nicosia Convention, protection of cultural heritage, process of "heritagisation"

## Streszczenie

***Mateusz M. Bieczyński***

**Od *Kodeksu Teodozjusza* do konwencji z Nikozji – ochrona dziedzictwa kultury
jako narzędzie sekularyzacji**

W artykule podjęto próbę przedstawienia procesu kształtowania się dziedzictwa kultury w szerszej perspektywie, w której krajowe regulacje prawne są jedynie wyznacznikiem pewnych ogólnych tendencji. Skoncentrowano się przede wszystkim na przekształcaniu miejsc i obiektów kultu religijnego w prawnie chronione dziedzictwo kultury. Autor stawia tezę, że proces „udziedziczania" religijnych artefaktów można uznać za polityczny środek sekularyzacji. Stąd też artykuł stanowi część badań heritologicznych. Ma na celu między innymi odpowiedzieć na dwa główne pytania. Po pierwsze, co się dzieje, gdy miejsca, obiekty i praktyki religijne stają się dziedzictwem? Po drugie, czy w przepisach prawnych można wyodrębnić funkcjonalną ścieżkę opisującą ochronę artefaktów religijnych jako dziedzictwa kultury w historii Europy, która zmieniła ich społeczne postrzeganie? Czy „odziedziczenie" obiektów religijnych jest równoznaczne z ich świadomą świecką „patrymonializacją", czy też sekularyzacja jest tylko skutkiem ubocznym ich ochrony za pomocą regulacji prawnych?

**Słowa kluczowe:** *Kodeks Teodozjusza*, konwencja z Nikozji, ochrona dziedzictwa kultury, proces „udziedziczania"

**James K. Reap**
University of Georgia, Athens, USA
jreap@uga.edu
ORCID: 0000-0003-1821-0332

https://doi.org/10.26881/gsp.2021.2.11

# Designating cultural properties in the United States of America

## 1. Introduction

In examining the designation of cultural property in the United States, one must consider its federal system of government and the authority given to each level of government to regulate historic properties. The United States' Constitution is based on the premise that power should not be concentrated in one person or group, or in one place. Power at the federal government level is divided among three branches of government: the executive (President), legislative (Congress), and judicial (federal courts) branches. Power is also shared among the different levels of government: federal, state, and local. The federal Constitution specifies which powers are granted to the federal government, such as defense, foreign relations, and currency regulations, for example. However, the Constitution also limits the power of the federal government and the Tenth Amendment further specifies that "The powers not delegated to the United States (i.e., the federal government), nor prohibited by it to the states, are reserved to the states respectively, or to the people".

Each state has its own constitution, which specifies which powers the state may exercise and which powers are delegated to local governments. The relationship between states and local governments is very complex, and differs from state to state. Local governments have no inherent power of their own – their authority comes from the state. Some states have given broad powers to local governments while others have given more limited powers.[1]

Among the powers traditionally reserved to the states is the so-called "police power", a concept derived from Anglo-Saxon law. This is the inherent authority of the state to regulate, protect and promote public health, safety, morals, and general welfare. Exercising this power, states have enacted laws regulating the use of land and have delegated some of their authority to local governments. Many local governments, in turn,

[1] T.J. Tryniecki, P.W. Salsich, *Land Use Regulation: A Legal Analysis & Practical Application of Land Use Law*, United States of America: Section of Real Property, Probate and Trust Law, American Bar Association 2003, pp. 5–7.

have enacted local planning, zoning, and historic preservation laws. The U.S. Supreme Court has held that the power to protect buildings and areas with special historic, architectural, or cultural significance is a legitimate use of the police power.[2]

## 2. Designation at the federal level

The National Historic Preservation Act[3] of 1966 (NHPA) forms the framework for the current American preservation program. It embodies the philosophy that preservation must be a partnership between the federal, tribal, state and local governments, and the private sector. It has had great influence on the evolution of preservation in the United States since the 1960s by establishing national standards and by promoting those standards through both regulations and incentives.

A key component of the national preservation program is the National Register of Historic Places. Authorized under the NHPA, the National Register is the official list of properties deemed worthy of preservation in the United States. There are over 95,000 properties listed in the Register comprising districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.[4]

Any person or organization can prepare the documentation for a nomination to the Register – property owners, local governments, preservation organizations, etc. Nominations from the state level are submitted to a state review board composed of professionals in the fields of history, architecture, archaeology, and related disciplines, who recommend its nomination if the members believe it meets the criteria for listing. Formal nominations are submitted by State Historic Preservation Officers (SHPO).[5] Properties under the ownership or control of the federal government or Native American tribes may be nominated by Federal Preservation Officers (FPO) or Tribal Preservation Officers (TPO), respectively.

The National Park Service has compiled a detailed guide to assist in determining whether properties meet the criteria for designation: "How to Apply the National Register Criteria for Evaluation".[6] In addition, there are a number of publications designed

---

[2] *Penn Central Transportation Co. v. New York City*, 438 U.S. 105 (1978).

[3] Public Law 89-665; 16 U.S.C. 470 *et seq*.

[4] National Register of Historic Places, https://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm (accessed: 10.10.2020).

[5] The SHPO is a state official who has been appointed under the provisions of the NHPA to administer the federal-funded preservation program in his/her state under in accordance with federal regulations and grant agreements. During the review period at the state level, property owners of properties being considered may object to their listing. If the owner of an individual property, or the majority of owners within a district, objects to their nomination, the historic property cannot be listed in the Register.

[6] How to Apply the National Register Criteria for Evaluation (1995 Edition, Revised for Internet 1995), *National Register Bulletin*, https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf (accessed: 10.10.2020).

specifically to assist in evaluating particular types of properties: historic residential suburbs, archaeological properties, historic aviation properties, aids to navigation, battlefields, cemeteries and burial places, landscapes, mining properties, properties that have achieved significance within the past fifty years, post offices, rural historic landscapes, traditional cultural properties, and vessels and shipwrecks.

Federal procedures require that a property considered for nomination must be significant – that is, "it must represent a significant part of the history, architecture, archaeology, engineering, or culture of an area, and it must have the characteristics that make it a good representative of properties associated with that aspect of the past."

In order to determine whether a property is significant, the Park Service guidelines require that it be evaluated in its historic context – "those patterns or trends in history by which a specific occurrence, property, or site is understood and its meaning (and ultimately its significance) within history or prehistory is made clear. Historians, architectural historians, folklorists, archaeologists, and anthropologists use different words to describe this phenomenon such as trend, pattern, theme, or cultural affiliation, but ultimately the concept is the same."

The guidelines suggest that to decide whether a property is significant the following must be determined:

1) the facet of prehistory or history of the local area, State, or the nation that the property represents;
2) whether that facet of prehistory or history is significant;
3) whether it is a type of property that has relevance and importance in illustrating the historic context;
4) how the property illustrates that history; and
5) whether the property possesses the physical features necessary to convey the aspect of prehistory or history with which it is associated.[7]

If the property is determined to represent an important aspect of the area's history or prehistory and also is determined to possess integrity, it qualifies for listing in the Register.

The standards for evaluating the significance of properties nominated for listing in the Register were developed by the United States National Park Service through a process that sought to recognize the significant contributions of all peoples to the nation's heritage. Properties must be shown to be significant for one or more of the four Criteria for Evaluation. The basis for judging a property's significance is historic context. After identifying a relevant context with which the property or properties are associated, these criteria are applied: the quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

A. That are associated with events that have made a significant contribution to the broad patterns of our history; or

[7] These five steps are discussed in more detail in this bulletin.

B. That are associated with the lives of persons significant in our past; or
C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
D. That have yielded or may be likely to yield, information important in prehistory or history.

The kinds of events to which Criterion A applies would include an important event or pattern of events in American history that contributed to the development of a locality, state, or the nation. Criterion B could be applied to the home on an important industrialist, studio of a significant sculptor, or business headquarters of a commercial or industrial leader. Criterion C might be applicable to a building representing a significant architectural style or containing highly artistic decorative features, a significant designed landscape, or an engineering work such as a bridge representing technological advances. Criterion D is most often applied to archaeological sites where the artifacts, soil, or other features make it possible to answer important research questions or test hypotheses that amplify currently available information. Buildings can also qualify under Criterion D if they could yield information on construction techniques, local building materials, or evolution of local building practices, for example.

Applying these examples to a particular historic context of "19th Century Gunpowder Production in the Brandywine Valley", properties associated with important events in the founding and development of the industry would be considered under Criterion A. Criteria B would embrace persons significant in the founding of the industry or important in its development. Criteria C would apply to buildings, structures, or objects reflecting important design qualities integral to that industry, and Criteria D would be relevant for properties that convey important information about the industrial processes.[8]

There are special considerations for certain properties. Ordinarily cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past fifty years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

1) a religious property deriving primary significance from architectural or artistic distinction or historical importance; or
2) a building or structure removed from its original location but which is primarily significant for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or

[8] How to Apply the National Register Criteria for Evaluation...

3) a birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his or her productive life; or
4) a cemetery which derives its primary importance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or
5) a reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or
6) a property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or
7) a property achieving significance within the past fifty years if it is of exceptional importance.[9]

As part of the evaluation process, it is important to determine whether the property has local, state or national significance by examining the historical contexts at these different levels. Local historical contexts are used to establish the importance of a property within the history of a town, city, county, cultural area or region. State historical contexts help establish the importance of a property within the history of a state, as a whole, while national contexts are used to establish that properties represent an aspect of United States history. The bulletin emphasizes that properties of national significance must be "of exceptional value in representing or illustrating an important theme in the history of the nation", but they need not be of a property type found throughout the entire country. An example given is a Civil War battlefield, found only in the eastern part of the country, but having great significance to the history of the whole country. Among the properties designated as nationally significant in the National Register are prehistoric and historic properties included in the National Park System.[10] Also included are properties designated as National Historic Landmarks.

## 3. National Historic Landmark Program

Properties designated as National Historic Landmarks are distinguished from other properties considered of national significance by possessing "exceptional value or quality in illustrating and interpreting the heritage of the United States".[11]

The National Park Service primarily uses theme studies to identify potential National Historic Landmarks. These studies employ comparative analysis to establish the relative importance of properties associated with a specific area of American history.

[9] Properties must generally be fifty years of age before listing in the Register; those less than fifty years of age must have exceptional significance.

[10] This paper will not discuss criteria for acquisition or designation of properties as part of the National Park System.

[11] How to Prepare National Historic Landmark Nominations (1999 Edition; Reformatted for Web 2018), *National Register Bulletin*, https://www.nps.gov/subjects/nationalhistoriclandmarks/nhl-bulletin.htm (accessed: 10.10.2020).

The first thematic framework was adopted in 1926 and revised in 1970 and 1987. Originally focusing primarily on military and political figures, later revisions adopted a more chronological and topical approach, but the concept of "stages of American progress" remained the same. The current framework was developed in 1993 in part because of a 1980 federal court decision that declared invalid a National Historic Landmark designation based on a "failure to prepare and publish rules of procedure to govern the designation process".[12] This subsequently prompted the Department of the Interior to also seek an amendment to the National Historic Preservation Act that would "grandfather" all National Historic Landmarks designated prior to 6 February 1979.[13] The revised framework recognized an expanded approach to examining and understanding American history that encompasses ordinary people and everyday lives in addition to the prior focus on great individuals and events.[14] The historic importance of potential Landmarks is evaluated by the Park Service and an advisory board comprising citizens who are experts in the conservation of natural, historic, and cultural areas. While they are able to make recommendations, decisions on designation are made by the Secretary of the Interior.[15]

Criteria for selection as National Historic Landmarks are very similar to those for listing properties in the National Register of Historic Places. However, they must be of national significance, falling under one or more of the six National Historic Landmark criteria while retaining a high degree of integrity: "The quality of national significance is ascribed to districts, sites, buildings, structures and objects that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, technology and culture; and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling, and association",[16] and also "retain, to a high degree, the physical features that made up its historic character and appearance."[17]

Six Criteria of National Significance:

1) properties that are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represents, the broad national patterns of United States history and from which an understanding and appreciation of those patterns may be gained;
2) properties that are associated importantly with the lives of persons nationally significant in the history of the United States;
3) properties that represent some great idea or ideal of the American people;

---

12 *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980).

13 16 U.S.C. 470a(a)(1)(B).

14 National Historic Landmarks: https://www.nps.gov/subjects/nationalhistoriclandmarks/nhl-thematic-framework.htm (accessed: 24.10.2020).

15 National Historic Landmarks Program: https://www.nps.gov/orgs/1582/index.htm (accessed: 24.10.2020).

16 How to Prepare National Historic Landmark Nominations…

17 National Historic Landmarks: https://www.nps.gov/subjects/nationalhistoriclandmarks/nhl-thematic-framework.htm (accessed: 24.10.2020).

4) properties that embody the distinguishing characteristics of an architectural type specimen exceptionally valuable for the study of a period, style or method of construction, or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction;
5) properties that are composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but collectively compose an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture;
6) properties that have yielded or may be likely to yield information of major scientific importance by revealing new cultures, or by shedding light upon periods of occupation over large areas of the United States. Such sites are those which have yielded, or which may reasonably be expected to yield, data affecting theories, concepts and ideas to a major degree.

As in the case of National Register criteria, ordinarily, cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings and properties that have achieved significance within the past fifty years are not eligible for designation. Properties which fall into the following categories require special consideration.[18]

## 4. Results of designation at the federal level

In addition to wider recognition of listed properties, there are several consequential results of federal designation. Section 106 of the National Historic Preservation Act of 1966 requires that all properties listed in, or eligible for listing in, the National Register be given consideration in the planning of federal, federally licensed, and federally funded projects. The responsible federal agency must give consideration to the effects these projects may have on the listed properties and provide the Advisory Council on Historic Preservation an opportunity to comment. Provisions of the National Environmental Policy Act[19] also require an environmental review process for any project that may adversely affect properties listed in, or eligible for listing, in the National Register. Federal regulations set out procedures for coordinating reviews that satisfy the requirements of each law in regard to consideration of National Register properties.[20] These protections are procedural rather than substantive. The decision to proceed with the project is within the discretion of the federal agency with responsibility over it. However, the object of the environmental review is to avoid, if possible, adverse impacts on

[18] National Historic Landmarks: https://www.nps.gov/subjects/nationalhistoriclandmarks/eligibility.htm (accessed: 3.11.2020).
[19] 42 U.S.C. paras. 4321 *et seq*.
[20] General Rules for NEPA-Section 106 Coordination, https://www.npi.org/nepa-and-section-106-national-historic-preservation-act (accessed: 10.03.2021).

historic properties through a process of disclosure, research, evaluation, consultation and, ideally, agreement among relevant governmental agencies, non-governmental organization, and affected members of the public. Federal law also contains provisions that specifically address federal agency responsibilities where National Historic Landmarks are involved. Agencies are directed "to the maximum extent possible (…) minimize harm" to National Historic Landmarks affected by federal undertakings.[21]

There are also economic incentives provided by federal designation, the most important being the investment tax credit. Owners of listed properties may be eligible for federal income tax credit amounting to twenty percent of expenditures incurred in a certified rehabilitation of designated income-producing properties (commercial, industrial, or residential rental). To be certified, a project must comply with the Secretary of the Interior's Standards for Rehabilitation, ensuring that the character-defining features and integrity of the property are maintained. Federal tax deductions are also available for the charitable donation of a conservation easement ensuring the perpetual protection of historically important land areas or structures. In addition to tax benefits, designated properties may be eligible for federal historic preservation grants, when funds are appropriated by Congress. Grant-funded projects must also meet the same Secretary of the Interior's Standards as tax assisted projects to ensure preservation standards are met on any construction work undertaken.

## 5. The United States and the World Heritage Convention

The United States took a leadership role in the creation of the World Heritage Convention and became the first nation to ratify it in 1973 by a vote in the Senate of 95-0. The United States served as a member of the World Heritage Committee for much of that body's existence and in 1978 hosted the first Committee meeting that listed sites. Of the twelve sites listed at that time, two were in the United States: Mesa Verde and Yellowstone National Parks. Since that time, implementing laws and regulations – and politics – have had the practical effect of limiting U.S. participation.

As a signatory to the Convention, the United States is obligated to "ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage (…) situated on its territory" and to take "effective and active measures" to protect this heritage.[22]

After the Convention entered into force, implementing legislation was established in the U.S. by the 1980 Amendments to the National Historic Preservation Act (NHPA).[23] The 1980 amendments gave the Secretary of the Interior the responsibility of directing and coordinating U.S. activities under the Convention in coordination with the

[21] 42 U.S.C. paras. 4321 *et seq*.

[22] Convention Concerning the Protection of the World Cultural and Natural Heritage, 23 November 1972, 27 U.S.T. 37, 11 I.L.M. 1358, articles 4–6.

[23] The National Historic Preservation Act of 1966, 16 U.S.C. para. 470 *et seq*.

Secretary of State, the Smithsonian Institution, and the Advisory Council on Historic Preservation.[24] Regulations setting forth policies and procedures used by the U.S. Department of the Interior to direct and coordinate participation were adopted in 1982 and continue in force. The regulations also address maintenance of the U.S. Indicative Inventory of Potential Future World Heritage Nominations and the nomination of sites to the World Heritage List.[25]

The criteria for listing properties in the World Heritage List are established by the World Heritage Committee and are contained in the Operational Guidelines for the Implementation of the World Heritage Convention.[26] These criteria, of course, apply to properties nominated by the United States.[27]

To date, twenty-four properties in the United States have been inscribed on the World Heritage List, two of which are sites jointly listed with Canada. Eleven listings are cultural sites, twelve are natural sites, and one is categorized as mixed.[28] Many of these properties are the property of the United States government.

The relatively small number of U.S. inscriptions on the World Heritage List given the size of the country and its rich resources is due in part to the owner consent requirement included in the 1980 Amendments to the NHPA. The law prohibits any non-Federal property from being nominated unless the owner concurs in writing. The Interior Department adopted regulations requiring written concurrence not only from the owner of an individual property but from 100% of property owners in a multiple property nomination.[29]

Additionally, each owner must pledge to protect the property by executing a legal agreement specified in federal regulations. For non-governmental properties, the regulations require: 1) a written covenant executed by the owner(s) prohibiting, in perpetuity, any use that is not consistent with, or which threatens or damages the property's universally significant values, or other trust or legal arrangement that has that effect; and 2) the opinion of counsel on the legal status and enforcement of such a prohibition, including, but not limited to, enforceability by the federal government or by interested third parties.[30]

Properties nominated to the World Heritage List also must be determined to be "nationally significant". A property will be considered "nationally significant" only if it is: a property that the Secretary of the Interior has designated as a National Historic

---

24 Public Law 96-515, 12 December 1980, 94 Stat. 3000.

25 36 CFR 73.

26 https://whc.unesco.org/en/guidelines/ (accessed: 5.11.2020).

27 The National Park Service provides a publication that discusses the World Heritage Criteria and how those criteria differ from criteria normally applied to listing in the National Register of Historic Places. See: Users Guide to World Heritage Criteria, https://www.nps.gov/subjects/internationalcooperation/a-quick-guide-to-the-world-heritage-program-in-the-united-states.htm (accessed: 5.11.2020).

28 Properties inscribed on the World Heritage List (24), https://whc.unesco.org/en/statesparties/us (accessed: 15.10.2020).

29 16 U.S.C. 470a(a)(6); 36 CFR 60.6; 36 CFR 65.5(f)(1).

30 23 CFR 73.13(c).

Landmark[31] or a National Natural Landmark[32] under provisions of the 1935 Historic Sites Act;[33] an area the United States Congress has established by law as nationally significant; or an area the President of the United States has proclaimed as a National Monument under the Antiquities Act of 1906.[34] If a property proposed for nomination relates to an historical theme that has not been studied by the National Park Service, it may not be able to be listed as a National Historic Landmark, at least not in a timely matter.[35]

Tab. 1. Differences between National Register and World Heritage Nomination Process in the USA

| National Register | World Heritage |
|---|---|
| Must meet National Register eligibility criteria. | Must meet World Heritage Committee selection criteria. |
| No tentative list for National Register nomination. | Only properties on the Tentative List may be nominated. |
| Properties of national, state, or local significance, as determined by the State Historic Preservation Officer, Federal Historic Preservation Officer, or Tribal Historic Preservation Officer may be nominated to register. | Only nationally significant properties which are National Historic or Natural Landmarks, designated by Congress as nationally significant, or designated as a National Monument by the President qualify for nomination. |
| May be nominated by the State Historic Preservation Officer, Federal Historic Preservation Officer, or Tribal Historic Preservation Officer. | Only the Assistant Secretary of the Interior for Fish and Wildlife and Parks has the authority to nominate a property. |
| No agreement of a property owner to protect the historic integrity of the property is required. | The owner of any non-federal property must execute a legal instrument prohibiting in perpetuity any use that threatens the property's universally significant values. Opinion of council on the legal status and enforceability of the agreement is also required. |
| Listed unless a notarized objection from the owner of a single property or a majority of owners of properties in a district. | Not listed without written concurrence from 100% of property owners within the proposed boundaries. |
| Final decision on listing made by Keeper of the National Register of Historic Places in the U.S. Department of the Interior. | Final decision on listing made by World Heritage Committee. |

Source: Own elaboration.

31 36 CFR part 65.
32 36 CFR part 62.
33 Public Law 74-292; 49 Stat. 666; 16 U.S.C. 461 *et seq*.
34 16 U.S.C. 433.
35 See the discussion on theme studies for National Historic Landmarks, above.

## 6. State registers of historic places

Many states operated historic preservation programs prior to the enactment of the National Historic Preservation Act (NHPA). Those programs were often limited in scope, involving for example, historic marker programs and management of state-owned historic properties or museums. The elements and operation of the programs tended to be quite different from state to state. The enactment of the NHPA brought much more uniformity to the programs by providing grants to the states, provided they assume certain responsibilities and adhere to federally-mandated standards and guidelines for those activities and programs.[36] Each of the state historic preservation offices has a role in nominating properties to the National Register of Historic Places. In addition, many states have established and maintain separate state registers of historic places. While different in a number of respects, the criteria for listing properties, and even the procedures, are often nearly identical to those of the National Register. However, the criteria are subject to different interpretations by state review bodies.

Most state registers include all properties and districts within their borders that are listed in the National Register. Maryland law requires all properties included in or eligible for National Register listing be included in the Maryland Inventory of Historic Properties (art. 83B, sec. 5-615 of the Maryland Code). Some state registers also include additional properties identified by state and local governments. The Connecticut Register, for example, includes properties *nominated* to the National Register by the state in addition to as those actually listed or determined eligible by the Keeper of the National Register. Additionally, the Connecticut Register includes properties surveyed by the State Historical Commission in the 1960s, all districts and individual properties approved by local preservation commissions (even if not subsequently designated by local elected officials), resources included in the 1987 survey of state-owned buildings, and all properties approved by the Historic Preservation Council at their regularly scheduled meetings.[37]

There are several reasons for maintaining these seemingly duplicative listings. Officials in some states may wish, for political or other reasons, to withhold National Register listing for a property. In some cases, they may wish to list properties considered important in their state that were not accepted for listing in the National Register. While Kansas, for example, utilizes the same eligibility criteria for listing in the National Register and the Register of Historic Kansas Places, the state register allows more flexibility in the interpretation of the requirements.[38]

---

[36] N. Tyler, I. Tyler, T. Ligibel, *Historic Preservation*, 3rd ed., New York 2017, p. 77.

[37] State Register of Historic Places, https://portal.ct.gov/DECD/Content/Historic-Preservation/01_Programs_Services/Historic-Designations/State-Registry-of-Historic-Places (accessed: 12.03.2021).

[38] National Register of Historic Places / Register of Historic Kansas Places, Kansas Historical Society, https://www.kshs.org/p/national-register-of-historic-places-register-of-historic-kansas-places/14635 (accessed: 12.03.2021).

State law may also provide protection for properties listed in the state register from state-funded projects that would threaten them through state environmental protection acts[39]. These are often broad in scope and protect such resources as air, water, and archaeological resources. Importantly, some environmental acts, such as the California Environmental Quality Act (CEQA) and the New York State Environmental Quality Review Act (SEQRA) apply to local government actions as well. The Georgia Environmental Policy Act of 1991, modeled on the National Environmental Policy Act, requires the disclosure of environmental effects of proposed state projects, including those affecting historic properties. The agency proposing a project must include an assessment of project impact on historic or archaeological properties listed in or eligible for listing in the Georgia Register of Historic Places.[40] Having an environmental assessment of a project affecting a historic place or cultural landscape does not ensure its preservation; however, the full disclosure and opportunity for public input can be effective in preventing or mitigating negative effects of a state project. Another approach to protection is illustrated by the Minnesota Environmental Rights Act (MERA) which creates a civil action for the protection of "natural resources", including "historical resources". Minnesota actions to prevent the demolition of historic properties are typically based upon MERA.[41]

Designation of a property in a state register may also provide property owners with the possibility of economic incentives. These incentives can make historic rehabilitation financially more feasible, attract private capital to areas that have seen disinvestment, create high-wage jobs, and provide the state with a strong return on its investment. Tax incentives are generally the most widely utilized economic incentive. The National Trust for Historic Preservation has developed a guide to best practices for state historic tax credits.[42] Examples of well-crafted state historic tax credits include those from Texas[43] and Virginia.[44] The Georgia state income tax credit for rehabilitated historic property allows the owners of designated properties who follow state rehabilitation guidelines an income tax credit equaling 25% of qualifying rehabilitation expenses up to $100,000 for a personal residence, and $300,000, $5 million, or $10 million for other properties. Georgia also has a state preferential property tax assessment for rehabilitated property available for both owner-occupied residential properties and income-generating properties, one which freezes the county property tax assessment at its pre-rehabilitation value for more than eight years after rehabilitation.[45]

---

39 E. Lyon, D. Brook, "The States" [in:] *A Richer Heritage*, ed. R. Stipe, Chapel Hill, NC 2003, p. 88.

40 Official Code of Georgia Annotated 12-16.1 *et seq*.

41 Minn. Stat. ch. 116B.

42 Report on State Historic Tax Credits: Maximizing Preservation, Community Revitalization, and Economic Impact (November 2018), https://forum.savingplaces.org/viewdocument/report-on-state-historic-tax-credit (accessed: 10.03.2021).

43 Report on Historic Preservation Tax Credits in Texas, https://www.thc.texas.gov/public/upload/publications/Tax_credit_report_2020_final.pdf (accessed: 10.03.2021).

44 Rehabilitation Tax Credits, https://www.dhr.virginia.gov/tax-credits/ (accessed: 10.03.2021).

45 State Tax Incentives, https://www.dca.ga.gov/georgia-historic-preservation-division/tax-incentives-grants/state-tax-incentives (accessed: 20.03.2021).

Governments and nonprofit organizations can also accept donations from property owners of conservation easements.[46] These restrictions on future use and development designed to preserve the properties' character-defining features can result in income tax deductions for the donor. There are a variety of state-funded grant programs for designated historic properties at the state level, in addition to the federally funded historic preservation grants administered by State Historic Preservation Offices. The Massachusetts Preservation Project fund, for example, is a state-funded 50% reimbursable matching grant program established in 1984 which provides grants of up to $30,000 for pre-development, development, and acquisition projects.[47] The Georgia Heritage Grant program has distributed more than $3.5 million in matching funds for development and pre-development preservation projects funded by special automobile license plate fees.[48] Generally, the amounts of the state grants are not as substantial as tax incentives, but may be particularly beneficial for tax-exempt nonprofit organizations and local governments or property owners that do not qualify for tax benefits.

## 7. Local historic preservation ordinances

Perhaps the most effective listing mechanism to protect cultural properties in the United States is found at the local level. States delegate authority to local governments to enact laws or ordinances for the protection of heritage resources. The specific scope and content of local preservation legislation varies considerably due to the differences among the states in the authority delegated to local governments, community need, and the type of resources protected. Generally, though, preservation ordinances regulate changes that would negatively affect or destroy the character-defining features of the designated historic properties or districts. There is a particular emphasis on mandatory control over changes in the exterior architectural features of designated buildings. Over 2,300 local governments across the United States have enacted some form of historic preservation ordinance. A typical preservation ordinance would generally contain provisions setting out criteria and procedures for designating historic districts and landmarks. While state enabling legislation and local ordinances vary, many contain remarkably similar criteria for designation, and the influence of National Register criteria is quite evident. Three examples follow.

The Georgia state legislation authorizing local governments to protect historic resources provides the following general criteria that local governments must incorporate in their own legislation. "Historic district" means a geographically definable area,

[46] N. Tyler, I. Tyler, T. Ligibel, *Historic Preservation*…, pp. 312–316.
[47] https://www.sec.state.ma.us/mhc/mhcmppf/mppfidx.htm (accessed: 10.03.2021).
[48] https://www.dca.ga.gov/georgia-historic-preservation-division/support-historic-preservation (accessed: 10.03.2021).

urban or rural, which contains structures, sites, works of art, or a combination thereof which:

A. have special character or special historical or esthetic interest or value;
B. represent one or more periods or styles of architecture typical of one or more eras in the history of the municipality, county, state, or region; and
C. cause such an area, by reason of such factors, to constitute a visibly perceptible section of the municipality or county.[49]

"Historic property" means a structure, site, or work of art, including the adjacent area necessary for the proper appreciation or use thereof, deemed worthy of preservation by reason of its value to the municipality, county, state, or region for one or more of the following reasons:

A. it is an outstanding example of a structure representative of its era;
B. it is one of the few remaining examples of a past architectural style;
C. it is a place or structure associated with an event or person of historic or cultural significance to the municipality, county, state, or region; or
D. it is a site of natural or esthetic interest that is continuing to contribute to the cultural or historical development and heritage of the municipality, county, state, or region.[50]

The State of North Carolina has published a model historic preservation ordinance for adoption by local governments. This model contains only very general criteria: "To be designated as a historic landmark, a property, building, site, area, or object shall be found by the Commission to possess special significance in terms of its history, prehistory, architecture, archaeology, and/or cultural importance, and to retain the integrity of its design, setting, workmanship, materials, feeling, and/or association".[51]

The historic preservation ordinance in the City of Seattle, Washington, establishes the following designation criteria:

An object, site or improvement which is more than twenty-five (25) years old may be designated for preservation as a landmark site or landmark if it has significant character, interest or value as part of the development, heritage or cultural characteristics of the City, state, or nation, if it has integrity or the ability to convey its significance, and if it falls into one (1) of the following categories:

A. it is the location of, or is associated in a significant way with, an historic event with a significant effect upon the community, City, state, or nation; or
B. it is associated in a significant way with the life of a person important in the history of the City, state, or nation; or
C. it is associated in a significant way with a significant aspect of the cultural, political, or economic heritage of the community, City, state or nation; or

---

49 O.C.G.A. para. 44-10-22(5).
50 O.C.G.A. para. 44-10-22(7).
51 5.2. Criteria for Designation: https://files.nc.gov/ncdcr/historic-preservation-office/CLG/Model-PreservationCommissionOrdinance.pdf (accessed: 5.11.2020).

D. it embodies the distinctive visible characteristics of an architectural style, or period, or of a method of construction; or
E. it is an outstanding work of a designer or builder; or
F. because of its prominence of spatial location, contrasts of siting, age, or scale, it is an easily identifiable visual feature of its neighborhood or the City and contributes to the distinctive quality or identity of such neighborhood or the City.[52]

## 8. Neighborhood Conservation Districts

Neighborhood conservation districts are similar to local historic districts, but their primary purpose is preservation of community character rather than a focus on historic fabric. In many cases, the property owners in the area are not prepared to accept the degree of control over their properties typical of a historic district. While some type of design review is part of most conservation districts, what is reviewed varies from ordinance to ordinance based on the resources to be protected and the desired level of protection. Binding review of exterior architectural alterations is usually not part of the review provided in conservation districts. The review in conservation districts may be mandatory or advisory. Many conservation district ordinances regulate demolition or new constructions on vacant lots. Others focus on general urban design issues such as height, scale, building placement, setback, materials, or landscape features.[53] These objectives may be implemented through incentives in addition to or in lieu of legal mandates. Conservation districts provide a vehicle for public education and encourage involvement in the local planning process. To the extent that they address overall environmental character, they may be quite appropriate for buffer zones.

The criteria for designation in many conservation district ordinances, particularly those that have a historic preservation planning purpose, may be quite similar to criteria in local historic district ordinances or for the National Register of Historic Places.[54]

In San Antonio, Texas, to be designated as a Neighborhood Conservation District, an area must meet the following criteria:

1) contain a minimum of one blockface (all the lots on one side of a block);
2) at least 75% of the land area in the proposed district was improved at least 25 years ago, and is presently improved; and
3) possess one or more of the following distinctive features that create a cohesive identifiable setting, character, or association:
   a) scale, size, type of construction, or distinctive building materials,

---

52 SMC para. 25.12.350.

53 *Conservation Districts, Cultural Resources Partnership Notes*, ed. H. Renaud, Heritage Preservation Services, National Park Service (n.d.).

54 J. Miller, "Protecting Older Neighborhoods Through Conservation District Programs", *Preservation Leadership Forum, National Trust for Historic Preservation*, *Forum News*, November/December 2004, vol. 11, issue 2, https://forum.savingplaces.org/viewdocument/protecting-older-neighborhoods-thro (accessed: 5.11.2020).

b) spatial relationships between buildings,
c) lot layouts, setbacks, street layouts, alleys or sidewalks,
d) special natural or streetscape characteristics, such as creek beds, parks, greenbelts, gardens, or street landscaping,
e) land use patterns, including mixed or unique uses or activities, or
f) abuts or links designated historic landmarks and/or districts.[55]

The Chapel Hill, North Carolina, ordinance is almost identical, but adds a fifth criterion: "The area must be predominantly residential in use and character".[56] Incentives for designated historic properties are also found at the local level. Forms of assistance for property owners include zoning and building code relief. Zoning relief allows flexibility of use, design standards, and parking requirements, and building code relief allows planning officials to modify specific construction code requirements for designated properties. Transfer of development rights (TDR) programs authorize owners in designated districts to transfer or sell unused development rights to nearby properties or a TDR bank, thus compensating them for lost development potential caused by preservation regulations. The property owners who purchase development rights may use them to create higher density on their property than zoning would otherwise allow. Local governments, when authorized by state law, can also offer incentives in the form of property tax abatements or exemptions, tax freezes, or tax credits. Examples of cities offering such tax incentives include Cumberland, Maryland, Tampa, Florida, Spokane, Washington, and Chicago, Illinois, among others. There are also various preservation grant and loan programs offered to owners of locally designated properties. Hillsborough County, Florida, for example, offers a challenge grant program for rehabilitation or restoration of historic structures, compatible additions to historic properties, and improvements to historic sites or grounds. Grants must be matched by the recipient on a one-to-one basis not to exceed $250,000 in any one year.[57] The City of Sacramento, California, jointly administers a grant program with the non-governmental Sacramento Heritage, Inc., funding projects up to $25,000 to facilitate the preservation of designated residential and commercial properties in the city.[58]

## 9. Conclusions

Since historic preservation in the United States operates independently – though cooperatively – at the national, state, and local levels, the criteria for designation of historic resources differ accordingly. However, the criteria for designation to the National Register of Historic Places have strongly influenced the criteria contained in state

55 San Antonio Uniform Development Code, sec. 36-335(b).
56 Town of Chapel Hill Land Use Management Ordinance, sec. 3.6.5(a) (2003).
57 https://www.hillsboroughcounty.org/en/businesses/business-community/grants/action-folder/apply-for-a-historic-preservation-challenge-grant (accessed: 10.03.2021).
58 https://www.cityofsacramento.org/Community-Development/Planning/Urban-Design/Preservation/Historic-Places-Grant (accessed: 10.03.2021).

registers and local ordinances. This influence comes not only from the prestige of the National Register, but its mandatory use in federal projects and programs and the economic incentive programs that are tied to it. The independence of the various levels of government within the framework, however, allows state and local programs to mold their criteria to meet political needs and to address local circumstances and unique resources. One National Register criteria has engendered a good bit of debate in recent years as interest grows in protecting the "recent past": ordinarily properties that have achieved significance within the past fifty years are not eligible for designation. In spite of that debate, there seems to be general consensus that the criteria established over the past forty years at the various levels of government remain appropriate for the designating historic properties.

## Literature

How to Apply the National Register Criteria for Evaluation (1995 Edition, Revised for Internet 1995), *National Register Bulletin*, https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf (accessed: 10.10.2020).

How to Prepare National Historic Landmark Nominations (1999 Edition; Reformatted for Web 2018), *National Register Bulletin*, https://www.nps.gov/subjects/nationalhistoriclandmarks/nhl-bulletin.htm (accessed: 10.10.2020).

Lyon E., Brook D., "The States" [in:] *A Richer Heritage*, ed. R. Stipe, Chapel Hill, NC 2003.

Miller J., "Protecting Older Neighborhoods Through Conservation District Programs", *Preservation Leadership Forum, National Trust for Historic Preservation, Forum News*, November/December 2004, vol. 11, issue 2.

Renaud S. (ed.), *Conservation Districts, Cultural Resources Partnership Notes*, Heritage Preservation Services, National Park Service (n.d.).

Tryniecki T.J., Salsich P.W., *Land Use Regulation: A Legal Analysis & Practical Application of Land Use Law*, United States of America: Section of Real Property, Probate and Trust Law, American Bar Association 2003.

Tyler N., Tyler I., Ligibel T., *Historic Preservation*, 3rd ed., New York 2017.

## Summary

***James K. Reap***

**Designating cultural properties in the United States of America**

The designation of cultural properties in the United States of America differs among the various levels of government – national, state, and local – because of the federal legal system. While the approach of the National Historic Preservation Act serves as a framework, state and local laws enable a varied and flexible approach based on local priorities while remaining compatible with the federal system.

**Keywords**: National Historic Preservation Act, federal legal system, National Register

## Streszczenie

***James K. Reap***

**Klasyfikacja rzeczy jako dóbr kultury w Stanach Zjednoczonych Ameryki**

Zasady klasyfikowania rzeczy jako dóbr kultury w Stanach Zjednoczonych różnią się na poziomach krajowym, stanowym i miejscowym; co jest konsekwencją federalnego charakteru państwa. O ile ustawa o ochronie dziedzictwa historycznego (National Historic Preservation Act) ma charakter regulacji ramowej, o tyle prawo stanowe i miejscowe prezentuje zróżnicowane i zarazem elastyczne podejście, uwzględniające lokalne priorytety, ale z zachowaniem zgodności z prawem federalnym.

**Słowa kluczowe:** ustawa o ochronie dziedzictwa historycznego, federalny system prawny, narodowy rejestr

**Dimitrij Davydov**
University for Police and Public Administration of the State of North-Rhine Westphalia, Cologne
dimitrij.davydov@hspv.nrw.de
ORCID: 0000-0001-5905-4087

https://doi.org/10.26881/gsp.2021.2.12

# Federal variety versus harmonisation: Recent monument legislation in Germany

## 1. Introduction

"God save me from dust and dirt, from fire, war and monument protection" – this ironic slogan sometimes adorns facades of historic buildings in Germany, including a nineteenth-century house in the core of the UNESCO World Heritage Site in Bamberg. In fact, the image of monument protection as a kind of natural disaster is a rather persistent misperception. According to an estimate of the Federal Statistical Office, there are approximately one million protected buildings in Germany[1] – most of them owned by private persons. Thus, conflicts between private interests and state restrictions are destined to arise. Even though heritage protection is held in high esteem by the German public since the European Architecture Heritage Year in 1975, current challenges, such as demographic change, climate change, and structural transformation outweigh cultural heritage and put it under serious pressure to adapt. Consequently, controversies between the public interest in heritage preservation and issues regarding rural and urban development, energy supply, and conservation of resources are the order of the day as well.

## 2. Legislative powers and administrative responsibilities

Whereas in the Unification Treaty of 31 August 1991 the reunified Germany is characterised as a "cultural state" (art. 35), in the German Basic Law the legislative power in the culture field is not explicitly assigned to the Federation, except for the safeguarding of German cultural assets against removal from the country (art. 72 sec. 1 subsec. 5a). Consequently, cultural heritage legislation predominantly belongs to the constitutional competencies of the German states (*Länder*). Thus, at the federal level, the Act on the Protection of Cultural Property in Germany of 31 July 2016, solely governs

[1] Federal Statistical Office, press release, 13.06.2018, No. 208.

the national market and the international traffic in artworks and antiques.[2] Any other issues of cultural heritage protection are regulated by laws of the German states.

As far as monument legislation is concerned, the sixteen monument protection laws of the states cover protection, preservation, and popularization of architectural and archaeological monuments, according to regional features and legal tradition. This "federal variety" in the field of monument protection causes different legal approaches to the distribution of administrative responsibilities, listing procedure, assessment of interferences, and the prosecution of offences. All attempts to achieve a legal harmonisation have failed so far. Particularly, a draft resolution for a Model Law on Monument Protection, submitted by Alliance 90/The Greens in 2013,[3] was rejected by the German Bundestag.[4]

According to this, there is no federal authority responsible for monument protection. Especially, the Federal Government Commissioner for Culture and the Media has no administrative competence for protection of monuments, but rather supports this public task by launching subsidy programmes for the maintenance of monuments of national significance. On the contrary, all issues of monument protection, such as the creation of permanent inventories of monuments and the assessment of building projects in the heritage sector, are to be managed by authorities at the regional and municipal level.

For the German administrative structure, a division into specialised monument preservation services (*Denkmalfachbehörden*) which usually cover the territory of a state,[5] and on-site monument protection authorities (*Denkmalschutzbehörden*) is very typical. Whilst the monument preservation services are mainly concerned with identification and evaluation of monuments, conducting archaeological excavations and historic construction research and popularisation of the architectural and archaeological heritage, the monument protection authorities ensure the enforcement of the monument legislation. This includes, for example, the issuing of permissions for building projects concerning monuments and sites, the ordering of maintenance measures, and the prosecution of administrative offences against monuments. Furthermore, the monument protection authorities are usually divided into Lower Monument Authorities, established at the district or the local level, and a Higher Monument Authority, located within a ministry of the state. In some German states, a middle level of monument protection authorities is also provided.

Administrative interaction (*verwaltungsinterne Beteiligung*) between the monument preservation services and the monument protection authorities varies from one state to another. Before taking decisions, particularly concerning restoration, main-

---

[2] Federal Government Commissioner for Culture and the Media, *Key aspects of the new Act on the Protection of Cultural Property in Germany*, Berlin 2016.

[3] German Bundestag, Printed Matter 17/13914 of 12.06.2013, p. 2.

[4] In the field of building legislation, however, a Model Building Code (*Musterbauordnung*) has been adopted by the Conference of Construction Ministers (*Bauministerkonferenz*) in 2002.

[5] Except for North Rhine-Westphalia, where there are separate monument preservation services for both the regions of Rhineland and Westphalia-Lippe.

tenance, or conversion of a monument, a monument protection authority regularly submits its proposal to the responsible monument preservation service, which has to evaluate and to approve or reject it.[6] Thereby, the approval (or rejection) of the proposed action is of a different significance: whilst in Hesse a suggested decision can be vetoed by the State Monument Preservation Office, in North Rhine-Westphalia the monument protection authority is not bound by a negative statement of the monument preservation service. Accordingly in Hesse, the Lower Monument Protection Authority may complain to the Higher Monument Protection Authority in order to force through the vetoed decision. On the contrary, in North Rhine-Westphalia, the outvoted Monument Preservation Service has a right to apply to the Higher Monument Protection Authority if it wants its decision to prevail.

Despite the fact that any nationwide harmonisation at the legislative level, as mentioned above, has failed so far, a kind of harmonisation has been achieved, at least, in the field of the law enforcement. Thus, the German National Monument Protection Committee (Deutsches Nationalkomitee für Denkmalschutz), an expert body, maintained both by the Federation and the German states, serves as a communication platform, *inter alia*, on legal topics. Furthermore, the monument preservation services of the states have established two professional associations, the Union of Regional Conservationists in the Federal Republic of Germany (Vereinigung der Landesdenkmalpfleger) and the Union of Regional Archaeologists in the Federal Republic of Germany (Verband der Landesarchäologen) at the national level. Although these organisations are not entrusted with tasks of a public authority, they, however, provide an opportunity to coordinate strategies to combat cross-border challenges.

## 3. Objects of protection

### 3.1. Monuments

The key notion of the German monument legislation is indeed the notion of "monument" (*Denkmal*). Despite varying terminology used in the monument protection laws of the German states – those in Brandenburg and North Rhine-Westphalia use the term "monument", whilst those in Baden-Württemberg and Hesse prefer the term "cultural monument" – there is a general idea of what objects are to be preserved. The term "monument" is understood to cover all kinds of property of historic, artistic, scientific, or urban significance, either in the form of solid objects or in the form of groups of items. In particular, monuments are usually divided into subcategories, such as building monument (*Baudenkmal*), ground monument (*Bodendenkmal*),[7] or garden monument (*Gartendenkmal*), whereas groups of buildings may be characterised

[6] J. Viebrock, "Monument Preservation Services" [in:] *Martin/Krautzberger. Manual for Monument Protection and Monument Preservation*, eds. D. Davydov, J. Spennemann, Munich 2017, p. 371.

[7] This sub-category includes archaeological and occasionally also palaeontological remains.

as ensembles (*Ensemble* or *Gesamtanlage*), protected zones (*Schutzzone*), monument zones (*Denkmalzone*), or monument areas (*Denkmalbereich*). Besides that, moveable monuments (*bewegliches Denkmal*), such as the Feldmann's ferries wheel in Telgte (Westphalia) or the riverboat "The City of Cologne" (Rhineland), are covered by law.[8] As far as "combined works of man and nature" (sites) are concerned, which are mentioned in the Convention for the Protection of the Architectural Heritage of Europe of 3 October 1985 (the Granada Convention) as a part of architectural heritage, there are just a few monument protection laws to consider here. For instance, in the Monument Protection Law of Schleswig-Holstein historic cultural landscapes and parts of them are characterised as "monument areas" (*Denkmalbereich*) which is a sub-category of the monument.

Although the monument protection laws of Bavaria, Rhineland-Palatinate, Saxony-Anhalt, and Schleswig-Holstein define monuments as things "from bygone times", a specific age which an object must reach in order to become a protected monument is not incorporated into law. However, in conservation theory the general idea has been established that a certain distance in time – for instance, one generation – is necessary in order to adequately appreciate the significance of a building or an art object.[9] Thus, in practice it is rare that objects are placed under protection before reaching the age of thirty. In exceptional cases, indeed, this time limit can be reduced. For example, the new building of the plenary chamber of the German Bundestag in Bonn, completed in 1992, could be considered as a striking example of a bygone political era just after the transfer of the capital to Berlin, so it became a protected monument in 2000.

In the archaeological sector the idea that archaeological ground monuments must regularly come from "illiterate epochs" predominated for the long time. As the former Hessian Monument Protection Law of 5 September 1985 had referred to illiterate epochs, the Administrative Court in Wiesbaden, which dealt with a law case of illicit excavations in November 2000, stated that metal detecting finds from the Thirty Years War did not belong to archaeological heritage.[10] Later on, the Hessian legislator abandoned this restriction in the course of a legal amendment in 2016. In the explanatory memorandum[11] to the new Hessian Monument Protection Law of 28 November 2016, the legislator made clear that archaeological heritage may include even material remains from the Second World War.

Basically, the legal concept of monument does not imply that just a few exquisite, excellent or unique buildings, such as the castle of Eltz or the Cathedral of Cologne, deserve to be protected. Since an extension of the understanding of the term monu-

---

[8] A moveable monument may at the same time be recognised as national cultural property pursuant to the Cultural Property Protection Act of 31 July 2016.

[9] D. Davydov, "Too Close to Present Time? The Time Limit as a Requirement of the Term Monument" [in:] *Monument Preservation as a Cultural Practice*, ed. Monument Preservation Office of Lower Saxony, Hannover 2018, pp. 64–68.

[10] Decision of the Administrative Court in Wiesbaden of 3.05.2000, 7 E 818/00.

[11] Landtag of Hesse, Printed Matter 19/3570 of 6.07.2016, p. 13.

ment[12] was established in the course of the European Architecture Heritage Protection Year 1975, it is generally accepted that even average objects which represent the lifestyle of the poorer classes – those "modest works of the past" mentioned in art. 1 of the Venice Charter for the Conservation and Restoration of Monuments and Sites of 31 May 1964 (hereinafter: the Venice Charter) – may be taken under protection. Thus, in 2016 the Higher Administrative Court of North Rhine-Westphalia confirmed that even the subterranean remains of an ordinary rural cottage from the nineteenth century can be considered an archaeological monument.[13]

Deviating from this, in Baden-Wuerttemberg the legislator divided monuments into those of particular significance and ordinary ones. According to this classification, the protective regime of a monument may prove to be higher or lower: whilst a monument of particular significance must not be modified, reconstructed, restored, extended by annexes, or decked out with advertising without permission, an ordinary monument simply must not be destroyed or affected without permission. Moreover, in Baden-Wuerttemberg the preservation of a monument's setting (which is required in art. 6 of the Venice Charter) is solely intended for monuments of particular significance. A similar two-tier system, established in Schleswig-Holstein since 1958, was abandoned in 2014.[14]

### 3.2. UNESCO World Heritage

The forty-six UNESCO World Heritage sites in Germany constitute a specific category of protected objects. As in most German states no special provisions on the World Heritage exist or, at best, general obligations to take account of World Heritage have been adopted, in practice the question may arise whether a World Heritage site may be considered a monument or an ensemble or a protected object *sui generis*. At first glance, the properties inscribed on the World Heritage List as Cultural Heritage sites are also single monuments or groups of monuments pursuant to the monument protection laws of the German states. Even one of the World Nature Heritage sites, the Messel Pit Fossil Site in Hesse, is a protected ground monument according to the Hessian Monument Protection Law. On closer inspection, however, it becomes evident that there is no strict coherence between inscription as a World Heritage site and legal status as a monument. In fact, a piece of ground belonging to a World Heritage site may not necessarily be a monument or part of a monument. Thus, the Administrative Court in Dessau decided in 2001 that the Garden Kingdom Dessau-Wörlitz, which had been added to the World Heritage List just one year before, was not a monument as a whole pursuant to the then applicable version of the Monument Protection Law of Saxony-Anhalt, because the law did not protect historic cultural landscapes.[15] The court

[12] W. Sauerländer, "Extension of the concept of monument?", *Die Denkmalpflege* 1975, no. 1/2, pp. 187–201.
[13] Decision of the Higher Administrative Court of North Rhine-Westphalia of 14.12.2016, 10 A 1445/15.
[14] Landtag of Schleswig-Holstein, Printed Matter 18/2031 of 17.06.2014, p. 21.
[15] Decision of the Administrative Court in Dessau of 6.04.2001, 2 A 424/98 DE.

argued that it is a task of the legislator – and not of the judiciary – to harmonise the monument protection legislation with the UNESCO World Heritage Convention if their scopes diverge.

For that reason, the legislators in Saxony-Anhalt and Schleswig-Holstein have implemented the UNESCO World Heritage Convention by introducing more or less detailed legal provisions on World Heritage in the monument protection laws. Pursuant to para. 2 sec. 2 subsec. 2 of the Monument Protection Law of Saxony-Anhalt, the subcategory "monument area" (*Denkmalbereich*) may include, *inter alia*, historic cultural landscapes inscribed in the World Heritage List. In Schleswig-Holstein, the legislator has qualified World Heritage sites either as "protected zones" (*Schutzzone*) or as "monuments" (para. 2 sec. 3 of the Monument Protection Law). As opposed to this, the Saarland Monument Protection Law simply declares that building monuments and ground monuments inscribed in the World Heritage List are to be considered as monuments pursuant to this law.

## 4. Administrative procedures

### 4.1. Listing procedure

Two different procedures have been established in order to place identified monuments under protection (*Unterschutzstellung*). In either case, an identified monument is to be included in a list of monuments (*Denkmalliste*) which is usually established, kept up to date, and published by state monument preservation services.[16] The legal significance of the monument list, however, differs from one German state to another.

Within the scope of the formerly widespread so-called constitutive system, which nowadays still exists in North Rhine-Westphalia, an identified monument is placed under protection by being included in the monument list. Thus, the inclusion in the list is constitutive for protection. As the listing is an administrative act,[17] it can be contested by any person concerned. In turn, an identified monument remains unprotected as long as the inclusion is not completed. A variant of the constitutive system is established in Bremen: the protective regime is, however, activated not by the inclusion of an identified monument in the monument list as such, but by a written order, issued by the monument protection authority and open to appeal. The monument is to be included in the list after this order becomes final.

As opposed to this, the so-called *ipsa lege* system, used in most of the German states, does not require the inclusion of an identified monument in the list as a con-

[16] In North Rhine-Westphalia, in contrast, the local monument protection authorities are responsible for the monument list.

[17] According to the judgement of the Higher Administrative Court of North Rhine-Westphalia of 2.04.2013, 10 A 671/11, a sovereign decision to include a monument in the list has to be qualified as a "general order" (*Allgemeinverfügung*), as this administrative act concerns the public law status of an object.

dition for launching the protective regime. Rather, it is sufficient that the identified building, ensemble, or archaeological remain meets at least one of the appropriate legal criteria, such as historical, artistic, scientific or urban significance. Finally, in Baden-Wuerttemberg the *ipsa lege* system and the "constitutive system" are combined: whilst ordinary monuments are protected *ipso iure*, those of particular significance have to be included in a so-called "monument book" (*Denkmalbuch*) as a condition of their protection.

Opinions strongly diverge on the question as to which system is more effective and practicable. On the one hand, legal certainty for the persons concerned and clarity of the legal status of the property are significant benefits of the constitutive system. If the property owner does not contest the placement of his/her property under protection within the relevant period of time, this decision becomes final and can not be revised in the future. As the monument list reveals the main characteristics of a monument and the scope of its protection, financial risks and opportunities can be better estimated by potential buyers and developers. On the other hand, complexity and duration of the listing procedure are a serious disadvantage of the constitutive system. In practice, it could happen that months go by from the identification of a monument by the monument preservation service to the completion of the listing procedure. Obviously, long-term uncertainty about the legal status of the property can be a burden for the owner. Moreover, within the scope of the constitutive system, protection authorities are forced to adjust their case-by-case orders to the monument list's content: if a specific feature of a listed monument is not explicitly mentioned in the monument list, appropriate conservation can hardly be expected in this regard. Thus, the Higher Administrative Court of North Rhine-Westphalia decided that the monument protection authority is not allowed to demand traditional materials, in particular, the installation of wooden windows instead of plastic windows in a late nineteenth-century villa, if the historic significance of the used material is not expressly declared in the local monument list.[18]

As for the *ipsa lege* system, the administrative decision to include an identified monument in the monument list can not be qualified as an administrative act[19] and, accordingly, can not become final. The property owner, though, has the right to go to the Administrative Court, which then clarifies whether the listed property is a monument. Otherwise, the legal status of the property remains open. In this case, a judicial clarification can be arranged by any legal successor in the future. Thus, a certain risk of a subsequent loss of protection is implied. A huge advantage of this system, nonetheless, is that there is no gap between the identification of a monument by the responsible preservation service and its protection by law.

While the monument preservation services of the German states have an official mandate to identify monuments and sites and to assess their historic and cultural value, in the Monument Protection Laws no concrete specifications are made for the

[18] Decision of the Higher Administrative Court of North Rhine-Westphalia of 2.03.2018, 10 A 2580/16.
[19] Decision of the Administrative Court in Frankfurt am Main of 28.08.2018, 8 K 7264/17.F.

assessment procedure. At best, in some states administrative instructions have been adopted which contain certain selection criteria. Apart from that, the state preservation services simply act upon standards of their professional associations, which have the status of recommendations.

Nevertheless, the expertise of the state preservation services plays an important role in disputes concerning a monument's significance, particularly, in the context of administrative court proceedings. Although a few private experts have authorisation in the monument sector, in practice, the state preservation services have a *de facto* monopoly on the assessment of monument value. Generally speaking, official expertise ranks higher than private expertise. In accordance with this, administrative courts make use of private experts if, and only if, the expert opinion delivered by the state monument service contains contradictions or some special knowledge is required.[20]

### 4.2. Approval procedure

The monument approval procedure (*denkmalrechtliches Erlaubnisverfahren*) is one of the central administrative procedures in the field of monument protection. The monument owner is required to have permission if he/she plans to perform any conservation or restoration work or to adapt the monument for modern use.[21] An approval application shall be, in any case, accompanied by project documentation. In the event that a demolition of the monument is intended, the application shall include a verifiable statement that the owner's interests prevail over the public interest in regard to monument preservation. Particularly, if an applicant wants to get rid of an unprofitable property, he/she is required to submit a profitability calculation which reveals that a permanent preservation of the monument can not be compensated for by its current receipts.

Besides the work in and on a monument, construction projects in its surroundings regularly require consent. Thus, construction works in the monument's setting shall not be allowed if, therefore, the outward appearance or the structure of the monument would be substantially affected. As monuments are not provided with a permanent buffer zone, approval authorities have to assess the impact of construction projects in the surroundings of monuments on a case-by-case basis. Thus, an Administrative Court in Hesse stated that the installation of wind turbines planned about three to four kilometers away from the medieval castle of Münzenberg would have a serious impact on the appearance of this prominent monument,[22] whilst an Administrative Court in North Rhine-Westphalia denied the negative impact of the Lenin statue in

[20] D. Davydov, "Legal Requirements" [in:] *Martin/Krautzberger…*, pp. 149–153.

[21] As a rule, it is up to the monument protection authorities to issue permits, but in the case of complex infrastructure projects, a monument approval is embedded in another administrative procedure, for instance, in the planning approval process (*Planfeststellungsverfahren*).

[22] Decision of the Administrative Court in Gießen of 15.09.2020, 1 K 4076/17.GI.

Gelsenkirchen, erected just ten meters away from the protected savings bank building from the early 1930s.[23]

At the same time, concrete requirements for impact assessment are not laid down by the law. Consequently, in practice, the standards of the professional associations and the international principles of conservation, such as the ICOMOS charters, are more or less taken as a basis by the responsible authorities. As there is, however, not a shred of reference to these principles in the heritage protection laws – or even in the explanatory memoranda – some administrative courts tend to ignore them. Particularly, the Higher Administrative Court of North-Rhine Westphalia stated in 2008[24] and once again in 2018[25] that the Venice Charter is not binding with regard to questions as to of what is a monument in North Rhine-Westphalia and how to deal with it.

### 4.3. Monument protection order

In the event that a monument owner neglects his/her legal obligation to maintain the monument, conservation measures can be demanded by the monument protection authority (*Erhaltungsanordnung*). At the same time, monument protection authorities are strictly required to comply with the principle of proportionality (*Verhältnismäßigkeitsprinzip*) so that they usually pare down their demands to the minimum. As a rule, the responsible authority requests the owner to undertake just the most urgent work in order to stop decay.

An administrative order is also the tool of choice in the event that illicit construction work or other unauthorised activities are performed in or on the monument. The responsible monument protection authority can immediately bring illicit works to a halt (*Stilllegungsverfügung*) and request the restoration of the *status quo ante* (*Wiederherstellungsanordnung*). Such administrative orders can be combined with the threat of a fine or other coercive means. However, it remains a point of contention whether reconstruction can be demanded if a monument has been completely demolished. On the one hand, monuments are protected by law precisely because of their authenticity. On the other hand, a reconstruction order has a general preventive effect even if the finally reconstructed building does not fit the legal criteria of a monument any more.

## 5. Monument protection versus property guarantee

As mentioned above, the overwhelming majority of protected objects is owned by private persons. Accordingly, legal restrictions, such as the obligation to maintain monuments, are in competition with constitutionally protected rights, especially with the right of ownership, provided in art. 14 of the Basic Law. Opinions are divided about

[23] Decision of the Administrative Court in Gelsenkirchen of 5.03.2020, 16 L 250/20.
[24] Decision of the Higher Administrative Court of North Rhein-Westphalia of 26.08.2008, 10 A 3250/07.
[25] Decision of the Higher Administrative Court of North Rhein-Westphalia of 2.03.2018, 10 A 2580/16.

what is the scope of the liabilities which the state can place on the individual owner. In particular, the abstract formulation of the obligation to maintain monuments does not explain to what extent financial encumbrances are to be accepted.

According to the Federal Constitutional Court, the legislator has a certain amount of room for manoeuvre by defining the content and the limits of the constitutional right to property. The higher the public interest in the property, the more limitations of the owner's powers are acceptable. The legislator is, however, not allowed to touch the essence of the property guarantee to which the Court attributes profitability. Consequently, if the monument's owner has no opportunity to use it profitably as a result of the protective regime, the legal status of the monument "does not deserve to be called private property".[26] Thus, legal norms limiting the owner's powers *pro bono publico* are unconstitutional if they mean that the owner is neither able to use the monument profitably nor to dispose of it at an acceptable price, and if his/her financial burden is not compensated by the state.[27] As a result, the maintenance of an unprofitable and unsaleable monument must not be demanded. In practice, the monument protection authority either has to comply with the owner's request, particularly, to permit a demolition of the monument, or it may offset unreasonable burdens by awarding a grant or assuming ownership with fair compensation.[28]

Although general constitutional requirements with regard to monument protection practice seem to be clear, the devil is in the details. For how long has an owner to offer the monument on the real estate market in order to verify that it is unsaleable? The Higher Administrative Court of Rhineland-Palatinate stated that two years are a reasonable term, at least when we speak about monuments in remote areas with a low demand for such buildings.[29] On the contrary, the Higher Administrative Court of North Rhine-Westphalia argued that there is no legal basis for this specification.[30] Is an owner required to put both the plot and the protected building up for sale? The Higher Administrative Court of Saxony-Anhalt decided that the monument and the plot constitute an "economic unit", so that the total income shall be taken in account, if the monument's profitability is in doubt.[31] It can, therefore, be concluded that an "economic unit" is also the relevant object of examination as far as the saleability of the monument is concerned. As opposed to this, the Higher Administrative Court of North Rhine-Westphalia considered that a protected building can be lawfully parcelled and sold separately, so that the owner is not required to offer his/her property as a whole to the market.[32]

Still another issue is a limitation of property rights for archaeological reasons. Pursuant to art. 6 no. ii of the European Convention on the Protection of the Archaeologi-

---

[26] Decision of the Federal Constitutional Court of 2.03.1999, 1 BvL 7/91.
[27] *Ibidem*.
[28] Decision of the Higher Administrative Court of North Rhine-Westphalia of 27.06.2013, 2 A 2668/11.
[29] Decision of the Higher Administrative Court of Rhineland-Palatinate of 17.07.2015, 8 A 11062/14.OVG.
[30] Decision of the Higher Administrative Court of North Rhine-Westphalia of 2.03.2018, 10 A 1404/16.
[31] Decision of the Higher Administrative Court of Saxony-Anhalt of 15.12.2011, 2 L 152/06.
[32] Decision of the Higher Administrative Court of North Rhine-Westphalia of 2.03.2018, 10 A 1404/16.

cal Heritage (Revised) of 16 January 1992 (hereinafter: the Valletta Convention), each contracting state undertakes to increase material resources for rescue archaeology, *inter alia*, by taking measures to ensure that provision is made in major public or private development schemes for covering, from public sector or private sector resources, as appropriate, the total costs of any necessary related archaeological operation. Accordingly, it is a commonly accepted practice that developers whose projects interfere with archaeological monuments and sites are responsible for rescue archaeology measures. In Germany, this so-called the "polluter pays" principle (*Verursacherprinzip*) has been laid down in most of the monument protection legislation of the German states, for instance in para. 14 sec. 9 of the Monument Protection Law of Saxony-Anhalt. At the same time, a project developer has to bear the costs of rescue archaeology only "within a reasonable scope". Thus, it is still not completely clarified to what extent a developer can be burdened with costs. The Higher Administrative Court of Saxony-Anhalt decided that even an amount up to 15% of the total investment costs can be considered as "reasonable".[33] In practice, however, infrastructure projects with low investment costs but high damage on the archaeological heritage may take place occasionally. In this case, developer costs up to 15% of any profit seem to be reasonable.

Whilst in the Valletta Convention only "major public and private schemes" are mentioned, the question arises whether the "polluter pays" principle also implies that average private property owners who build single-family houses are required to bear the costs of archaeological rescue measures. On the one hand, in the monument protection laws no division into different categories of "polluters" is provided. On the other hand, the Federal Constitutional Court has pointed out that the right of ownership deserves the more respect the more an owner relies on the property.[34] Thus, from the constitutional point of view, there is a certain difference between a privately used property which deserves stronger protection and a commercially used property. Consequently, if private building projects make archaeological measures necessary, only a relatively modest part of the costs can be passed on the person causing them.

The legal status of a monument is otherwise not only a burden on private owners, but also a benefit, as it qualifies them for tax relief and entitles them to receive State aid. Besides that, the Federal Administrative Court decided in 2009 that it would violate the constitutional right of ownership if a monument owner would not be able to defend him/herself against neighbouring building projects which interfere with the visual integrity of his monument.[35] Since that time, it is commonly accepted that a monument owner may appeal against administrative permits issued for such projects. However, it is still not completely clarified under what conditions an action may have a chance of success.

---

33 Decision of the Higher Administrative Court of Saxony-Anhalt of 16.06.2010, 2 L 292/08.

34 Decision of the Federal Constitutional Court of 23.02.2010, 1 BvR 2736/08.

35 Decision of the Federal Administrative Court of 21.04.2009, 4 C 3/08.

## 6. Public participation

The appropriate way of making possible public participation in the protection of monuments, especially in administrative decision-making in this field, is a highly debated issue. A substantial impetus for greater public involvement comes from the Council of Europe. According to the Namur Declaration, adopted in 2015,[36] a participatory government in the heritage field is a part of the Cultural Heritage Strategy of the Council of Europe. This general approach includes the participation of citizens in "heritage inventories, survey and protection work, validated by experts to ensure the appropriate level of quality".[37]

In the monument protection laws of the German states, however, the role assigned to private persons interested in heritage is that of administrative volunteers (*Verwaltungshelfer*). This function does not imply any decision-making-power, but rather ancillary tasks. Besides that, in some states independent expert panels have been established at the governmental level. These "state monument councils" (*Landesdenkmalrat*), which usually consist of elected representatives of professional associations, universities, and religious communities, have an advisory function in "issues of major concern".[38] As opposed to that, no provision is made for the day-to-day participation of heritage NGOs in the administration's decision-making processes, such as the listing procedure and the approval procedure. All attempts to provide those NGOs with participatory rights have failed so far, in particular, the legislative proposals of the Left Party in Hesse in 2016[39] and of the Greens in Saxony in 2018.[40]

At the same time, in the Federal Nature Conservation Act,[41] the procedural participation of nature conservation associations recognised by the state was established in 2002. Moreover, the Environmental Appeals Act[42] put "recognised associations" – viz. environmental NGOs – in the position to file appeals (*Verbandsklage*) against administrative decisions which violate statutory provisions with regard to the environment. In 2009, the German Society for Pre- and Protohistory (Deutsche Gesellschaft für Ur- und Frühgeschichte e.V. – DGUF) failed in an attempt to receive recognition as a nature conservation association pursuant to the former version of the Federal Nature Conservation Act.[43] The Administrative Court argued that the society did not pursue

---

36 Council of Europe, Final Declaration of the 6th Conference of ministers responsible for cultural heritage.

37 Council of Europe, Recommendation of the Committee of Ministers to Member States on the European Cultural Heritage Strategy for the 21st century, of 22.02.2017, CM/Rec(2017)1.

38 D. Davydov, "The State Monument Council: The Institutionalisation of Public Participation in Monument Law", *Denkmalpflege in Westfalen-Lippe* 2016, no. 1, pp. 41–44.

39 Hessian Landtag, Printed Matter 19/3788 of 14.09.2016.

40 Saxon Landtag, Printed Matter 6/14736 of 13.09.2018.

41 Act on Nature Conservation and Landscape Management of 12 February1976, last revised on 29 July 2009, last amended on 19 June 2020.

42 Act Concerning Supplemental Provisions in Appeals on Environmental Matters Pursuant to EC Directive 2003/35/EC of 7 December 2006.

43 Decision of the Administrative Court in Cologne of 3.03.2009, 14 K 2310/07.

objectives of nature conservation "predominantly", even though the protection of historic cultural landscapes, which was one of the aims of the society, in fact, fitted the legal requirements. As the concept of environment used in the Environmental Appeals Act is, however, broader than the concept of nature conservation, it seems to be obvious that recognised environmental associations may appeal against administrative decisions which violate statutory provisions in the heritage sector.[44]

## 7. Sanctions

Illicit activities in the monument sector, such as demolition of protected buildings without permission and unauthorised prospecting for archaeological remains are liable to prosecution throughout Germany. Nevertheless, in Saxony and Schleswig-Holstein serious violations of statutory provisions with regard to monument protection are qualified as criminal offences which may be punished by imprisonment or monetary penalty, whereas in other states violations of any type are considered as administrative offences which may only be punished by an administrative fine. Consequently, there is no common standard for estimating the amount of fines. Whilst a private owner was ordered to pay a fine of €40,000 for having demolished his nineteenth-century villa in Bad Säckingen,[45] another owner was sentenced to a fine of €10,000 after he had painted black his nineteenth-century villa in Pforzheim without permission[46].

As far as illicit detection and excavation of archaeological remains is concerned, administrative fines lie, at best, in the three-digit range. As illegal activities in the archaeological sector are usually combined with a retention of finds,[47] offenders may also be called to account for embezzlement. Even then, applied penalties are sometimes too weak. For instance, an illicit detectorist in Rhineland-Palatinate, who had discovered a hoard of late Roman gold and silver objects (the so-called Ruelzheim Treasure) in 2014, finally received a simple warning with reservation of a fine of ninety daily penalty units.[48]

## 8. Conclusions

In conclusion, German monument legislation might be characterised as reasonably balanced. Although monument protection laws appear relatively generous with regard to the selection of objects which are to be placed under protection, they turn out

[44] J. Spennemann, "Monument Protection as Application of National Law Relating to the Environment", *Natur und Recht* 2020, no. 4, pp. 229–234.
[45] Decision of the Local Court in Bad Säckingen of 6.09.2013, 11 OWi 20 Js 7507/12.
[46] Decision of the Higher Regional Court in Carlsruhe of 6.05.2019, 2 Rb 9 Ss 731/18.
[47] Besides Bavaria, in all German states a treasure trove has been provided.
[48] Decision of the Regional Court in Frankenthal (Palatinate) of 8.02.2018, 5114 Js 14230/13 – 6 Ns.

to be rather strict in taking account of the owner's rights. In particular, where monument protection and property guarantee are in conflict, cultural heritage often gets the short end of the stick. The previously mentioned equation of monument protection and natural disaster is, thus, out of date. Quite the contrary, there is still room for improvement. Not only does implementation of the international principles of conservation fall short of expectations, but so too does the current level of public participation in administrative procedures with regard to heritage.

Besides that, legal fragmentation is quite apparent. Not every variation in law which is attributable to the cultural autonomy of the German states can be explained rationally. As the cross-border challenges of cultural heritage require coordinated legal measures, there is no way of avoiding legal harmonisation.

## Literature

Davydov D., "Legal Requirements" [in:] *Martin/Krautzberger. Manual for Monument Protection and Monument Preservation*, eds. D. Davydov, J. Spennemann, Munich 2017.

Davydov D., "The State Monument Council: The Institutionalisation of Public Participation in Monument Law", *Denkmalpflege in Westfalen-Lippe* 2016, no. 1.

Davydov D., "Too Close to Present Time? The Time Limit as a Requirement of the Term Monument" [in:] *Monument Preservation as a Cultural Practice*, ed. Monument Preservation Office of Lower Saxony, Hannover 2018.

Federal Government Commissioner for Culture and the Media, *Key aspects of the new Act on the Protection of Cultural Property in Germany*, Berlin 2016.

Sauerländer W., "Extension of the concept of monument?", *Die Denkmalpflege* 1975, no. 1/2.

Spennemann J., "Monument Protection as Application of National Law Relating to the Environment", *Natur und Recht* 2020, no. 4.

Viebrock J., "Monument Preservation Services" [in:] *Martin/Krautzberger. Manual for Monument Protection and Monument Preservation*, eds. D. Davydov, J. Spennemann, Munich 2017.

## Summary

***Dimitrij Davydov***

**Federal variety versus harmonisation: recent monument legislation in Germany**

Due to the division of powers between the Federation and the German states anchored in the Basic Law, German monument legislation is currently still fragmented. As the concept of a monument, administrative procedures, the status of UNESCO World Heritage sites, and possible sanctions in the event of offences against protected property are governed differently in sixteen monument protection laws, the question arises how to harmonise administrative practice.

**Keywords:** monument authorities, monument preservation, monument protection, UNESCO World Heritage List

## Streszczenie

*Dimitrij Davydov*

**Federalna różnorodność kontra harmonizacja – o ostatnich zmianach w prawie ochrony zabytków w Niemczech**

Niemieckie prawo ochrony zabytków pozostaje niejednolite, co wynika z zakotwiczonego w ustawie zasadniczej RFN podziału kompetencji pomiędzy federacją a krajami związkowymi. Ponieważ definicja zabytku, procedury administracyjne, status obiektów wpisanych na Listę Światowego Dziedzictwa UNESCO, a nawet sankcje karne za czyny przeciwko dobrom o szczególnym znaczeniu dla kultury różnią się między szesnastoma ustawami, wyłania się kwestia sposobów harmonizacji praktyki administracyjnej w tej dziedzinie.

**Słowa kluczowe**: organy właściwe w sprawach ochrony zabytków, ochrona zabytków, opieka nad zabytkami, Lista Światowego Dziedzictwa UNESCO

**Emanuele Spina**
Studio Legale "Iureconsulti", Florence
e.spina@iureconsulti.it
ORCID: 0000-0001-7421-0199

https://doi.org/10.26881/gsp.2021.2.13

# The annulment of the export license for artworks in Italian law: The guarantee of legal certainty in relation to recent administrative and legal measures

## 1. A brief *excursus* on the institution of administrative self-defense

Wishing to analyze the legal arguments on the basis of which some self-defense annulments of free-circulation certificates[1] were issued by the Ministry of Culture, highlighting the most problematic aspects relating to the principle of legal certainty that must govern a legal system, it is necessary to briefly review, for the benefit of the reader not accustomed to Italian administrative law, the principles governing the annulment instrument in self-defense[2], pursuant to art. 21 *nonies* L. 241/1990.[3]

---

[1] Terminology with which Italian law qualifies export licenses for artworks, issued by export offices pursuant to art. 68 of Legislative Decree 42/2004. Artworks by an author no longer living, which were produced more than seventy years previously, and which have a value of less than €13,500, are subject to the release of the free-circulation certificate.The free-circulation certificate is issued at the request of the interested parties after verifying the importance of the artwork for the national cultural heritage.

[2] This *excursus* will necessarily be of a schematic character, without any pretention to such completeness since a complete discussion of the topic would require an independent monograph.

[3] Art. 21 *nonies* L. 241/1990:

1. The illegitimate administrative provision pursuant to art. 21-octies, excluding the cases referred to in the same art. 21-octies para. 2, can be annulled ex officio, if there are reasons of public interest, within a reasonable time, in any case not exceeding eighteen months from the time of the adoption of the authorization measures or the attribution of economic advantages, including cases in which the provision was formed pursuant to art. 20, and taking into account the interests of the recipients and counter-interested parties, by the body that issued it, or by another body required by law. The responsibilities connected with the adoption and failure to annul the illegitimate provision remain valid.
2. This is without prejudice to the possibility of validating the voidable provision, provided there are reasons of public interest and within a reasonable period of time.

The administrative measures achieved on the basis of false representations of facts or substitutive declarations of certification and false or untruthful notary deed as a result of conduct constituting a crime, ascertained with a final judgment, can be annulled by the administration even after the expiry of the eighteen month period referred to in para. 1, without prejudice to the application of criminal sanctions as well as the sanctions provided for in Chapter VI of the consolidated act as per the decree of the President of the Republic of 28 December 2000, no. 445.

The annulment ex officio of an administrative measure presupposes the existence of a defect that could lead to its annulment by a judge; in this event, the administration that issued it, ex officio or upon request of interested parties, having become aware of its unlawful conduct, can provide for the annulment in self-defense where it recognizes a public interest. The law provides that the annulment cannot be ordered beyond eighteen months from the issuance of those provisions which are of an authorization nature, or which confer economic advantages. (The free-circulation certificate falls within the first type of administrative act, since it is an authorization to export a cultural property outside national borders.)

The defects of the provision are traditionally identified within the categories of incompetence, violation of the law, and excess of power. The defects of "incompetence" and "violation of the law" refer to administration behavior contrary to the positive rules of the legal system; the defect of "incompetence" refers more specifically to the violation of the rules that attribute to a body the power to issue the administrative act in question; the "violation of the law" defect more generally relates to all the other rules that regulate the action of the public administration. On the contrary, by "excess of power" we generally mean a defect in the administrative act concerning the exercise of a discretionary power; it, therefore, includes all cases in which the administrative authority, although not formally violating any rule of law, has not, however, exercised its power well, not pursuing, thus, the public interest in the best possible way. The annulment of the administrative act produces retroactive effects, as if the act had never been issued.

## 2. The errors of assessment of the administration that lead to annulment

Leaving aside, for the reasons of brevity already discussed, the analysis of the various categories of defects in an administrative act, it is appropriate to focus the reader's attention on the case in which the administration detects a misrepresentation of the facts,[4] which, during the investigation stage, led the Export Office to grant a permit that, otherwise, would not have been granted.

To be relevant for the purposes of annulment, in fact, the misrepresentation of the facts must have had a relevance in the reasoning that prompted the administration to grant the free-circulation certificate; for example, there are numerous cases in which a judge has recognized the influence of an erroneous attribution of an artwork, where the artwork's importance from a cultural point of view can be affirmed or excluded on the basis of other factors.[5]

[4] The case attributable to the category of excess of power.

[5] See, for example, the following decisions: Consiglio di Stato, sec. II, 29 January 2014; Consiglio di Stato, sec. II, 30 May 2011, n. 2165; TAR Toscana, sec. I, 10 February 2017, n. 218.

To better clarify these aspects, two case studies are offered here, chosen from among the numerous recent cases of annulment in self-defense of free-circulation certificates which we have had the opportunity to analyze.

The first case concerns a pair of portraits presented for export as belonging to a "Dutch school of the seventeenth century"; having obtained the free-circulation certificate, they were taken abroad, where a signature not visible to the naked eye was discovered belonging to a well-known painter of the Golden Age. Upon the return of the two artworks to Italy, the discovery was duly reported to the authorities who automatically canceled ex officio the previous free-circulation certificate, on the assumption that its issuance was the result of a negligent examination carried out by the Export Office when issuing the export license. In this case, the annulment may be considered legitimate upon the discovery of a suitable element to establish authorship of the two artworks which, from being classed as anonymous, pass to being attributed to the hand of a well-known Dutch artist of the seventeenth century. Here the administration demonstrates that the changed attribution has affected the relevance of the two artworks in terms of the conservation of Italian national cultural heritage (for example, as the author is not well represented in national collections).

On the other hand, reasons based on the particular value of the artwork are irrelevant, since these later evaluations were already originally known to the Export Office, which had already considered them irrelevant for the purposes of protecting cultural heritage. The new attribution does not affect this judgment.

The second case concerns a portrait of an illustrious figure of the Napoleonic period, presented for export with the correct indication of the portrait subject and its author (whose signature was indicated on the artwork). The Export Office, after analyzing the artwork, considered the portrait to be devoid of interest for the Italian cultural heritage, noting that it had not found the signature reported by the owner; it did not, however, disavow the attribution. However, once the portrait appeared on the international market as a signed artwork, the Ministry canceled the free-circulation certificate by arguing that, if the signature had been noticed by the Export Office, the artwork would have been subject to restriction.

In this case, I believe that the annulment is completely illegitimate, as the error of the Export Office, which did not find the signature of the author (which is actually present on the artwork), did not cause any misrepresentation of the facts, from the moment that the painting was evaluated for what it actually is, including its correct attribution.

The fact that an erroneous conviction, which gives rise to the administration's erroneous conviction, is caused by misleading information provided by the owner, or is discovered independently, is considered irrelevant: what matters is the error itself and not its cause. In this regard, the words of the Council of State[6] in a case linked to a panel depicting a Madonna are illuminating. In this case, the administration, based on the owner's declarations and the presence of heavy nineteenth-century interventions, had

[6] Consiglio di Stato, sec. IV, 14 January 2009, n. 136.

initially considered that the panel was a Giotto copy from the nineteenth century and had granted a free-circulation certificate; the artwork had been exported to the United Kingdom and, subsequently, re-imported to Italy under a temporary import regime[7] in order to be restored.

Following the restoration, after the nineteenth-century additions disappeared, it became clear that the panel was directly attributable to the hand of the great Tuscan master and that the Office that had originally granted the right to export it had committed a macroscopic error of assessment. For this reason, the administration had canceled the original free-circulation certificate, superseding, by virtue of the retroactivity of the annulment, also the temporary regime in which the artwork was in Italy, and forbidding a new export of the artwork.

A dispute arose which, in the first instance, was resolved in favor of the owner, since the Regional Administrative Court of Lazio accused the administration alone of not being able to distinguish between a nineteenth-century imitator of Giotto and the master himself.[8]

On appeal, however, the Council of State radically altered the point of view, stressing that the error previously made by various offices does not preclude that the public interest in removing the illegitimate act is still satisfied; therefore, in the presence of a new assessment of the facts, different from the original assessment, the administration is always allowed to cancel the illegitimate act, replacing it with one more compliant with the protection of the public interest.[9]

In conclusion, therefore, the principle must be considered established, according to which any error committed by the administration in the assessment of facts – which appears to have been relevant in relation to the purpose of issuing the free-circulation certificate – can lead to the annulment of the provision.

## 3. The time limit within which annulment is possible

As mentioned above, the provision on administrative self-defense provides that the power of annulment must be exercised within a reasonable period of time, in any case

[7] The temporary import regime is provided for those artworks that come from abroad and that will remain only temporarily in Italy; in these cases, the artwork maintains its permit to circulate on the international market, no state control over its later export being provided for.

[8] TAR Lazio, sec. II *quater*, 9 February 2007, n. 1046: "despite the said (restoration) interventions having brought out a historical and artistic relevance, this already existed, albeit hidden by the nineteenth-century repainting, which the administration was unable to recognize. Nor is an incorrect historical-artistic evaluation by the administration attributable to the applicant, as its value had been hidden by nineteenth-century repainting and not by its artifices, which had the only 'wrong' of having understood or known what (...) the administration was unable to recognize".

[9] Also in this case, the public interest lies in the conservation and enhancement of the national cultural heritage, in the face of a re-examination of the artwork, which, after the restoration and without the nineteenth-century additions, is "extraordinary workmanship and perhaps attributable to one of the greatest exponents of the Italian school of painting"

not exceeding eighteen months from the moment of the issuance of authorizations or conferring of economic advantages.

The administrative practice adopted by the Ministry of Culture and Activities has always observed this time limit, believing that free-circulation certificates are to be considered in all respects within the category of authorization documents (authorizing, precisely, the export of an artwork beyond national borders).

However, a curious sentence issued by the Regional Administrative Court of Lazio[10] has been recorded, which, with an obvious oxymoron, declares that "the nature of authorization cannot be recognized, in the sense understood by art. 21 *nonies* of Law 241/90, as part of the provisions that allow the export of artworks abroad". According to the Court, in fact, the aim of the regulation would consist in safeguarding those "measures to regulate private activities subject to authorization, which, once started on the basis of this title, continue over time, and for the realization of which the interested party allocates time and money, giving up investing in alternative activities, for which the legislator considered that the mere legal fact of the passage of time, given the various interests involved, is sufficient to consolidate the legitimate expectation of the interested party to continue the activity carried out in the absence of repressive actions by the supervisory authorities, putting the repressive aspects of the latter in strict terms of forfeiture". The Court motivates the exclusion of free-circulation certificates from the category of authorization documents by the opinion that "the object belongs to the owner, but the beauty belongs to everyone", and, therefore, the "superior national interest (…) does not permit attributing to a mere legal fact (such as the passage of time) a nullifying effect of the protected collective interest in order to privilege the purely economic interest of the owner of making a profit by selling the asset abroad".

Actually, the sentence in question appears rather weak from a motivational point of view and moved more by a "political" intent to safeguard the national cultural heritage, understood in an almost collectivist sense, than by a real investigation of legal hermeneutics, so much so that it appears to be a *unicum* in the Italian jurisprudential panorama. In fact, the exclusion of the free-circulation certificate from the category of provisions with an authorization content is not convincing, in the first place, in purely semantic terms, since the court itself is forced on more than one occasion to recognize that the order generically prohibits the export of artworks, unless they are provided with this certificate (from which the authorizing effect of the provision in question clearly emerges).

The thesis appears equally unfounded that limits the concept of an authorizing act to those acts that bind the private individual from an economic or temporal point of view; this appears to be built more on an alleged *ratio legis* aimed at the protection of economic activities[11] only, than on the text of the law, which does not contemplate

[10] TAR Lazio, sec. II *quater*, 10 July 2018, n. 10018.

[11] Moreover, this is not very acceptable and the result of an ideological and superficial vision of the art market which, in addition to mere speculation activities, entails the presence of numerous and

such a distinction. In conclusion, therefore, it can be argued that the free-circulation certificates can be annulled in self-defense within eighteen months from the date of issue, while noting a thesis that excludes the cogency of this time limit, but which appears to be absolutely in a minority, even if supported by an important voice in the Italian jurisprudential panorama.

## 4. The consequences of annulment of a free-circulation certificate

At this point, it is necessary to move the investigation on to the effects that the exercise of the power of annulment in self-defense has on the international circulation of artworks. As has been noted, in fact, the annulment has a retroactive effect and, therefore, any free-circulation certificate annulled must be considered, at least for Italian national law, as never having been issued.

This retroactive effect does not create particular problems where the artwork has not yet been exported: it goes without saying that the owner will no longer be able to transfer it outside the national borders, unless he/she obtains a new free-circulation certificate. But what effects are produced if the artwork has already been exported and, perhaps, sold to third parties on the international market?

Undoubtedly, consequences of a criminal nature for having unlawfully exported an artwork[12] must be excluded, since the original presence of the free-circulation certificate, even though it was later annulled, excludes the possibility that there was willful misconduct on the part of the owner who, at the time he/she exported the artwork, could not have done other than to believe in good faith in the validity of the export license. Equally, it can be excluded that there exists a generic obligation on the part of the owner to bring the artwork back to Italy; even in the absence of specific jurisprudence on this point, it can be considered that the artwork is now outside the sphere of national law and, as there is no provision that penalizes the owner for a failure to restore a piece of property, an eventual administrative measure that might make provision in this sense would prove to be essentially ineffective.

Furthermore, if such an obligation were to be considered to exist, a clear difference in treatment would be created between the case of the owner who limited him/herself to exporting only, who could well comply with the obligation to bring the artwork back into the national territory, and that of the former owner who, in addition to having exported the artwork, had already sold it to third parties; in the latter case, in fact, the person affected by the order to have the artwork returned to Italy could not

---

perhaps prevalent business activities that cannot be seen, because they cannot find protection like any other economic activity.

[12] Pursuant to art. 174 of Legislative Decree 42/2004, anyone who transfers objects of artistic, historical, archaeological, ethno-anthropological, bibliographic, documentary, or archival interest abroad without a free-circulation certificate or export license, is punishable by imprisonment from one to four years or with a fine of €258 to €5,165.

fulfill it, even if he/she wanted to. Having clarified this, it is necessary to ask whether it is possible for Italy to invoke the rules of European law or international treaties on the return of illegally exported cultural assets to obtain the return of an artwork that has left the national territory.

Regarding the UNIDROIT convention on stolen or illicitly exported cultural goods, the main international treaty on the subject, the answer would appear to be positive: in fact, art. 1 clarifies that "illicitly exported cultural goods" must be understood as those "cultural goods exported from territory of a Contracting State in violation of its law governing the export of cultural property in order to protect its cultural heritage". The express reference to the internal legislation of the Contracting State makes, in our case, the retroactive effect recognized on annulment of absolute importance: once the free-circulation certificate has been annulled, with retroactive effect, the exported good could no longer be said to be lawfully present abroad. In the abstract, an interpretation of the Convention in a more literal sense,[13] which examines the lawfulness of the factual and legal circumstances at the time the export took place, cannot be excluded; however, this thesis seems to me less adherent to the regulatory context, which favors interpretations based on the internal order of the requesting state, as well as on the aim of ensuring the best protection of cultural heritage.

Even more so, the EU Directive of 15 May 2014, n. 60, must be deemed applicable, not only because it, too, refers to the law of the injured country to establish whether exit from the territory took place lawfully, but also because, in this case, the discipline of annulment in self-defense has obtained important recognition since the sentence *Algera* made by the EC Court of Justice on 12/7/1957,[14] confirmed by all subsequent jurisprudential elaboration.[15] In this regard, it should be remembered that the Court of Justice has intervened on the matter several times, establishing, in the *De Compte*[16] case, a method of assessing the protection of legitimate expectation against the pursuit of the public interest, based on two distinct levels of analysis, according to which the private individual who claims to have acquired legitimate expectation should demonstrate that the administration has given rise to an objective and reasonable ex-

[13] It is recalled that, pursuant to art. 5 of the Convention, it will be the judge of the state in which the artwork is present who must provide the correct interpretation of the Convention itself; therefore, it is extremely probable that opposite theses and readings will arise on this point. In particular, not all legal systems afford the public administration an equal power of retroactive annulment of their acts; consequently, it is probable that in those states where this option is not envisaged, or is envisaged in an attenuated form, giving, for example, greater weight to the principle of the protection of legitimate expectations on the part of the citizen, judges will adopt a different attitude.

[14] EC Court of Justice, 12 July 1957, C 7/56 – C 3/57 – C 7/57.

[15] To supplement the discussion even if the topic undoubtedly goes beyond the limits of this article it should be noted that community jurisprudence on self-defense places greater emphasis on the protection of legitimate expectations as a guarantee of the principle of legal certainty, compared to the position taken by Italian jurisprudence, which, on the contrary, further enshrines the pursuit of the public interest, even to the detriment of the legitimate expectation of the private individual, shifting the protection of the latter eminently to the level of compensation for any damage caused (cf. Consiglio di Stato, sec. IV, 8 August 2019, n. 856).

[16] EU Court of Justice, 18 March 1999, C 2/98 P.

pectation to maintain the situation that arose with the measure then annulled, while the administration would have the burden of demonstrating the existence of a public interest sufficient to justify the sacrifice of this expectation.

This evaluation mechanism, however, does not fit the case of the protection of cultural heritage, since the matter is characterized by a very high degree of technical discretion on the part of an administration that does not allow a judicial review of the choices made to protect the national cultural heritage. In fact, where an administration has consistently and logically motivated the identification of a public interest in the cancellation of the free-circulation certificate, the judge is prohibited from investigating the merits of the arguments put forward.

This basically means that the dualistic criterion identified by the Court of Justice will find little possibility of concrete application, since the existence of a public interest in the annulment of the act will be recognized whenever the arguments put forward by the administration do not appear *ictu oculi* unreasonable, with all due respect to the protection of private expectations as to the preservation of the *status quo*.

## 5. Conclusions

If we want to draw the lines of the arguments presented up to now, it is evident that the Italian legal and jurisprudential system does not make it possible to consider the custody by the owner of an artwork as protected if a free-circulation certificate obtained is annulled, except if it is annulled for a clearly unsuitable reason. At present, therefore, only the expiry of eighteen months from the issuing of the deed allows the legal situation created with the release of the free-circulation certificate to be considered reasonably certain. This causes an obvious problem of certainty and stability of the right to be able to export artworks outside the national territory, with deleterious effects on the stability of the international market in Italian art.

The state of legal uncertainty has, up to now, been accompanied by prudent administrative action, aware of the delicacy of the matter and of the risks resulting from an abuse of its position of strength. The administrative authorities have tried to favor a management of the protection of cultural heritage based on export denials, rather than on the *ex post* review of an authorizations already granted. Today, however, we are witnessing a radical turnabout, with a pressing monitoring by the central bodies of the Ministry on the legitimacy of free-circulation certificates already granted; this state of affairs, in addition to representing an obvious *vulnus* in terms of legal certainty, runs the serious risk of causing a serious contraction of the art market, as well as the onset of a large number of disputes.

## Summary

*Emanuel Spina*

**The annulment of the export license for artworks in Italian law:
The guarantee of legal certainty in relation to recent administrative and legal measures**

This article originates from recent measures taken by the Italian Ministry of Culture which have ordered the annulment of some free-circulation certificates for administrative self-defense, pursuant to art. 21 *nonies* L. 241/1990. Such *ex post* control on the release of free-circulation certificates has alarmed national and international professional operators, and has created a situation of objective uncertainty about the possibility of exporting art objects purchased in Italy. This article, therefore, aims to analyze the legal substratum within which the Ministry's control and verification action moves, to determine, wherever possible, the limits of the lawfulness of such behavior.

**Keywords:** annulment of export licenses, Italian artworks, fine art international market, illegal artworks export

## Streszczenie

*Emanuel Spina*

**Stwierdzenie nieważności pozwolenia na wywóz dzieł sztuki w prawie włoskim –
nowe instrumenty administracyjnoprawne a zasada pewności prawa**

Impulsem do powstania artykułu były niedawno wprowadzone przez włoskie Ministerstwo Kultury zasady stwierdzania nieważności *ex officio* funkcjonujących w obrocie prawnym pozwoleń na wywóz dzieł sztuki w myśl art. 21(9) ustawy nr 241 z 1990 r. (art. 21-*nonies* L. 241/1990). Taki rodzaj kontroli *ex post* zaniepokoił przedsiębiorców zawodowo zajmujących się międzynarodowym obrotem dziełami sztuki i stworzył obiektywny stan niepewności prawnej co do przysługującego uprawnienia do wywozu dzieła poza terytorium Włoch. W artykule poddano analizie ramy prawne, w których minister sprawuje kontrolę oraz wytycza – gdzie to możliwe – granice legalności takiej ministerialnej kontroli.

**Słowa kluczowe**: stwierdzenie nieważności pozwolenia na wywóz dzieła sztuki, włoskie dzieła sztuki, międzynarodowy rynek sztuki, nielegalny wywóz dzieł sztuki

**Dinara Garaeva**
Kyushu University, Fukuoka
dinara.garaeva9391@gmail.com
ORCID: 0000-0003-4658-1392

https://doi.org/10.26881/gsp.2021.2.14

# The application of the Recommendation on the Historic Urban Landscape in terms of the limits of acceptable change

## 1. Introduction

It is almost ten years since the Recommendation on the Historic Urban Landscape (hereinafter: the Recommendation) was adopted by UNESCO on 10 November 2011. The Preamble of the Recommendation states the fact that, despite existing valid "standard-setting documents, including conventions, recommendations and charters" that protect historic areas, common, across-the-board phenomena are currently influencing the continuous development of cities that is not always positive. As a result, cities are subjected to expansion pressure, under which it is more and more difficult to cope with the task of preserving historic urban areas. Therefore, there was a need to summarize, rethink, and fill in the gaps in approaches to historical urban area protection.

While society recognizes the inevitability of irreversible, rapid urbanization, failures to safeguard historical cultural layers should not be allowed since urbanization and historical layers together shape today's cities and societies. It is not only individual architectural monuments that are included in the frameworks of urban areas that should be protected. We are in a new era in which we need to work on protecting larger areas "as the result of a historic layering of cultural and natural values and attributes, extending beyond the notion of 'historic centre' or 'ensemble' to include the broader urban context and its geographical setting" (part 1, art. 8 of the Recommendation).

This topic is also under especially close scrutiny in light of the United Nations recently adopting new approaches regarding the urban process, the protection of urban heritage, the control of development processes, and the establishment of sustainable environments that are also directly related to urban area environments. The Sustainable Development Goals (SDG)[1] and the New Urban Agenda – Habitat III are the basic,

[1] In this case, attention is focused on Goal 11 – "Make cities and human settlements inclusive, safe, resilient and sustainable."

modern instruments to disseminate and establish a vision of the global society toward the current and future environment. Moreover, these documents form the foundation of the modern sustainable city, including provisions which cover people's current concerns about the position of cultural heritage (which is, in most cases, included in the frameworks of urban areas) and the cities' own views on the urbanization process and their future.[2]

National governments have already begun implementing the rules and continue to do so today with a focus on the practical usage, methodology, and management of historic urban landscapes (hereinafter: HUL). In many cases, however, investigation into existing national legislation and methods of legal implementation is insufficient, which leads to misunderstandings and differences in approaches from country to country. Consequently, the limits of acceptable changes and the understanding of the scope of necessary preservation varies in different jurisdictions, countries, and societies. Varied understandings of the concept and the lack of work on harmonizing existing national legislation to international approaches has endangered parts of historical urban landscapes that are recognized internationally as cultural heritage, and they might be lost irrevocably.

In one of the most expansive works in the field of the HUL written by Francesco Bandarin and Ron van Oers, the concept of HUL in general is observed together with several questions concerning current issues in this field that remain unresolved. One of them regards the management of change: "Social, economic and physical changes tend to be seen as an alteration of the values to be preserved. As a consequence, both principles and practices are not adequately equipped to define the limits of acceptable change, and the assessments tend to be ad hoc and subjective. (…) Specific approaches need to be developed for the management of change in the field of architecture, infrastructure, public space and uses of existing buildings".[3]

Even though the focus was directed toward the management of limits, together with the architectural approach, there also should be appropriate legislation in order to successfully specify the methods.

Therefore, the aim of the current work was to examine the provisions and specific terms of the Recommendation that might be used as tools to limit changes in frameworks of urban areas. This work also investigates the current legislation of several countries that were mentioned in the UNESCO Recommendation on the Historic Urban Landscape. Report of the Second Consultation on its Implementation by Member States, 2019 that have already started implementing the Recommendation into their national legislative frameworks.

---

[2] F. Ahmadi, S. Toghyani, "The Role of Urban Planning in Achieving Sustainable Urban Development", *OIDA International Journal of Sustainable Development* 2011, vol. 2, no. 11, pp. 23–26, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1980454 (accessed: 4.05.2021).

[3] F. Bandarin, R. van Oers, *The Historic Urban Landscape. Managing Heritage in an Urban Century*, Wiley-Blackwell, Chichester 2012.

## 2. The vision of limits of change and achieving legal implementation

The Recommendation is an additional tool for existing international legal frameworks that attempts to navigate today's obstacles in the urban heritage struggle in the ongoing race of transformations within them. As an instrument of soft law, it is difficult to ask for immediate modifications according to the new vision established by the Recommendation. Even though we might believe that, as an isolate asset, urban heritage is under well-regulated protection, we are still in the process of refocusing on a new, landscape-based approach[4] that embodies the idea of maintaining the original landscapes and patterns of cities. This means that not only historic centers should be protected, but also the larger scale social and economic layers of cities. Legal regulations, which might still be considered weak and insufficient, play a significant role in this process.

One of the most difficult questions that has yet to be thoroughly discussed, especially from a legal perspective, is that regarding the limits of changes that are allowed. This refers not only to changes in the physical construction of individual monuments, buildings, and ensembles but also to whole patterns of cities that include the cultural, social, and intangible aspects of built heritage. To date, the idea and purpose of cultural heritage has been to preserve and keep structures without making any changes if possible. The landscape-based approach also does not mean that all changes are permitted, rather it is the transformation of historical and cultural patterns of cities to meet the current needs of societies while maintaining their historical essence.

Therefore, one of the main challenges and purposes is to find a balance between transformation processes and the historical essence of landscapes where legal regulations put this balance into frameworks and let practitioners make them perform. As the Recommendation is an additional tool to existing ones, together with it, in order to create a picture of to what extent the Recommendation introduces limits of change, it would be helpful to review previous documents that refer to urban issues.

First, it is necessary to understand the terms we encounter within the framework of this question. Change, limits, and historic urban landscape are the essentials of decision-making processes.[5] Even though the Recommendation has already introduced the current, widespread vision of the HUL principle (which, it should be noted, is not a new category of heritage type, but a specific approach), there are things that remain unclear such as in what way national policies should move in order to follow requirements, what is the scope of HUL, etc.

---

[4] L. Veldpaus, A.R. Pereira Roders, B.J.F. Colenbrander, "Urban Heritage: Putting the Past into the Future", *The Historic Environment*, April 2013, vol. 4, no. 1, pp. 3–18, http://orcp.hustoj.com/wp-content/uploads/2016/12/2013-Urban-Heritage-Putting-the-Past-into-the-Future.pdf (accessed: 1.05.2021).

[5] C. Nahoum, *Urban planning conservation and preservation*, McGraw-Hill Professional, New York 2001.

## 3. The Venice Charter

The Recommendation is not the first international document to raise the issue of landscape protection that also introduces urban terms and limits on change concerning heritage. Article 1 of the Venice Charter, adopted by ICOMOS in 1965, declares the necessity of including the "urban or rural setting in which is found the evidence of a particular civilization, a significant development or a historic event (…) or which have acquired cultural significance with the passing of time."[6] This can be considered the first mention in an international document of the issue of the scope of protection. Despite including as one of the functions of conservation "making use of monuments for some socially useful purpose," the charter still focuses mainly on conservation and preservation issues pertaining to individual monuments rather than providing them with one more chance to "be alive" for society.[7] But here we clearly understand that there is already a recognition of the larger scale that needs support in addition to individual buildings.

The limits of change are related to individual constructions, and it is strictly established that no "new construction, demolition or modification which would alter the relations of mass and color" or "traditional setting," this could simultaneously be applicable to a larger scope, especially considering the fact that HUL includes traditional settings and visual aspects. However, art. 7 introduces the concept of "public interest" where exceptional changes might have a place even in protected areas, if "it is justified by national or international interest of paramount importance." We struggle with the issue of what can be interpreted as being of "paramount importance" specifically when we are talking about urban areas that should provide sustainable, comfortable environments that satisfy current societal needs, and defining the framework is the responsibility of each state. Therefore, without specific clear limits or smoothly working mechanisms for regulating them, it is difficult to build sustainable environments in both short- and long-term perspectives.[8]

One example we can refer to is that of Russian Federation legislation concerning land and property control. The appropriation of plots of land, including through redemption for state and municipal needs, is conducted in accordance with art. 49 of the Land Code of the Russian Federation,[9] in exceptional cases related to: 1) the fulfillment

---

[6] International Charter for The Conservation and Restoration of Monuments and Sites. 2nd International Congress of Architects and Technicians of Historic Monuments, Venice 1964, accessible at: https://www.icomos.org/charters/venice_e.pdf (accessed: 20.03.2021).

[7] N. Akagawa, T. Sirisrisak, "The current issues on urban preservation in Bangkok", The 2005 World Sustainable Building Conference, Tokyo, 27–29 September 2005, https://www.irbnet.de/daten/iconda/CIB4150.pdf (accessed: 26.04.2021).

[8] M. Glasser, S. Berrisford, "Urban Law and Policy. A Key to Accountable Urban Government and Effective Urban Service Delivery", *World Bank Review* 2015, https://www.irbnet.de/daten/iconda/CIB4150.pdf (accessed: 5.05.2021).

[9] The Land Code of the Russian Federation from 25.10.2001 N 136-FL, accessible at: http://www.consultant.ru/document/cons_doc_LAW_33773/ (in Russian) (accessed: 20.03.2021).

of international obligations of the Russian Federation; 2) the placement of objects of state and municipal importance in the absence of other options for the possible placement of these objects; 3) other circumstances established by federal law.

There are plenty of cases when buildings in the vicinity of national cultural heritage (not all national heritage has the requirement of buffer zones) were appropriated by governments for "state needs." This can also happen with other architectural monuments that are of historical value, but, for various reasons, are not yet classified as cultural heritage sites under government protection. However, they are still located in specific historically and culturally valuable areas and are classified as such by local organizations working in the field of cultural heritage protection. These buildings, of course, create the necessary historical urban landscape and the cultural pattern of space.

However, according to art. 56.4 of the Land Code, officials can also appropriate land on the initiative of organizations, a complete list of which is approved by the Government of the Russian Federation. In order to seize land, a organization must submit a petition to the authorities. These organizations include, in particular, subjects of natural monopolies in the case of seizure of plots of land for placement; these ensure the activities of pipeline facilities, power plants, infrastructure facilities, public railway transport, and communication lines and structures. Thus, we can see, how the "public interest" of constructing appropriate infrastructure for social needs can turn into the "legal" demolition of urban spaces.

## 4. The Nairobi Recommendation

Although based on earlier international instruments,[10] the next document that is considered as the foundation of the current landscape-based approach is the Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas (referred to below as the Nairobi Recommendation)[11] from 1976, which introduced the following definition: any groups of buildings, structures and open spaces including archaeological and paleontological sites, constituting human settlements in an urban or rural environment, the cohesion and value of which, from the archaeological, architectural, prehistoric, historic, aesthetic or sociocultural point of view are recognized.

It sets forth the purpose of historic areas and, most importantly, it links it to urban planning and land development, which is the foundation of the protection process of any heritage type.

---

[10] The Recommendation on International Principles Applicable to Archaeological Excavations (1956), the Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites (1962), the Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works (1968), and the Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage (1972).

[11] http://portal.unesco.org/en/ev.php-URL_ID=13133&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed: 20.03.2021).

Part IV – Safeguarding measures includes recommendations on harmonizing legislation on safeguarding historic areas, land development, urban planning, public service mechanisms, and financial instruments that are considered to be concrete actions and can be implemented by national legislations. As well as designating historic areas and their surroundings as "forming an irreplaceable universal heritage" "in their totality" while ensuring that "views from and to monuments and historic areas are not spoilt and that historic areas are integrated harmoniously into contemporary life" concludes this quite full regulation framework.

Moreover, if we refer to the "Technical, economic and social measures" section, we find a detailed description of what should be avoided during the development of historic areas (i.e., what limits should be established) as follows:

- [to formulate town-plans] with architectural, economic and social considerations and of the ability of the urban and rural fabric to assimilate functions that are compatible with its specific character;
- in historic areas containing features from several different periods, preservation should be carried out considering the manifestations of all such periods;
- removal of extensions and additional storeys of no value, (…) [buildings surrounding heritage,] demolition of recent buildings which break the unity of the area may only be authorized in conformity with the plan;
- particular care should be devoted to regulations for and control over new buildings so as to ensure that their architecture adapts harmoniously to the spatial organization and setting of the groups of historic buildings (…) harmony of heights, colors, materials and forms, constants in the way the facades and roofs are built, the relationship between the volume of buildings and the spatial volume, as well as their average proportions and their position;
- the isolation of a monument through the demolition of its surroundings should not generally be authorized, neither should a monument be moved unless in exceptional circumstances and for unavoidable reasons;
- historic areas and their surroundings should be protected from the disfigurement caused by the erection of poles, pylons and electricity or telephone cables and the placing of television aerials and large-scale advertising signs.

Examples of regulations that have been introduced and are working concerning the successful control of building characteristics, especially with regard to corrections of landscapes the integrity of which has been disturbed by "electricity or telephone cables" or "advertising signs" mentioned in the Charter are found in current Japanese legislation.

Together with the Charter for the Conservation of Historic Towns and Urban Areas (Washington Charter 1987), and other international instruments up to 2011, an approximate vision was gradually established of what criteria should be used in order to limit changes in historic urban areas. According to art. 8 para. 3 of the Town Planning Law (from 1968 N100), all construction actions should be adopted by specific town plans that are approved by responsible committees that must follow limitations concerning urban landscape design establish by law, such as: area, height of building,

color, location, type of building, and materials. Detailed limitations vary among city rules since detailed plans are approved at the city level. However, according to art. 62 of the Town Planning Act, any violation of the form of design restrictions of buildings in the landscape district is punishable as follows:

- imprisonment for up to one year (art. 100);[12]
- fines of JPY 500,000 ($ 5,000) or less (art. 100);
- suspension of construction or correction order (art. 64 para. 1);
- construction supervisors and designers of buildings in violation;
- disposition of business suspension (art. 65 para. 2).[13]

The same punishments are applicable if construction is suspended or the correction order is violated.

## 5. The Recommendation of 2011

Until 2011, there was no common, integrated approach on how to combine the diverse ideas that are presented by various charters and other recommendations. Therefore, the Recommendation of 2011 is the obvious result of what was accomplished in this field previously, and it is a combination of all the ideas. The resulting document is an advanced vision of historic urban landscape safeguarding.[14]

The continued development of the idea was embodied in the Guidelines[15], the purpose of which is to help with the implementation of the Recommendation by distinguishing six steps that must be achieved first in order to fulfill obligations to protect HUL. Two of the steps, which can mostly be linked with legal regulations concerning limitations, are: 1) reaching a consensus on what values to protect and determining the attributes that carry these values; 2) assessing the vulnerabilities of these attributes to socio-economic stress and climate change and creating systems to provide protection from these stresses that lead to necessary transformations. Consequently, through these steps and basic tenets of the Recommendation together with all previous international tools that strengthen and support the HUL approach, we are entering a new period in which we need to look carefully at what has already been accomplished in the implementation of the HUL approach at national levels.

---

[12] J. Song, "The Origin and Evolution of Urban Heritage Conservation in the Specified Block System in Tokyo", *Journal of the City Planning Institute of Japan* 2017, vol. 52, no. 2, pp. 135–144, https://www.jstage.jst.go.jp/article/journalcpij/52/2/52_135/_pdf (accessed: 5.05.2021).

[13] The Town Planning Law of Japan (from 1968 N100), accessible at: https://elaws.e-gov.go.jp/document?lawid=343AC0000000100 (in Japanese) (accessed: 25.03.2021).

[14] Y. Erkan, "The Way Forward with Historic Urban Landscape Approach towards Sustainable Urban Development", *Built Heritage* 2018, vol. 2, no. 4, pp. 82–89, https://www.researchgate.net/publication/341706117_The_Way_Forward_with_Historic_Urban_Landscape_Approach_Towards_Sustainable_Urban_Development (accessed: 5.05.2021).

[15] The HUL Guidebook. Managing heritage in dynamic and constantly changing urban environments. A practical guide to UNESCOS's Recommendation on the Historic Urban Landscape

How does the existing system work? What contradictions, misunderstandings, and inconsistencies do we need to overcome within the international vision to achieve the desired goals?

To date, two consultations[16] have been organized on the implementation of the Recommendation by Member States that analyzed the results of surveys that are continually being conducted to document progress in this field. Two paragraphs are of particular interest: 1) Adoption of legislative and institutional frameworks and measures supporting the principles and norms of the Recommendation; 2) Terminology and definition of HUL. Based on the summaries of these questions, some countries have already introduced specific legislation concerning the protection of HUL; however, this survey does not afford us the opportunity to analyze how all legislation can be linked with the protection of HUL, whether or not it is harmonized, or to assess other issues pertaining to land regulations, administrative mechanisms, the interactions of private and public interests, etc.

Especially in urban terms, the results indicate there is huge gap in understanding on international and national levels because of the vast variety of definitions of urban areas, historic centers, and historic cities, the scopes of which should be defined in the regulation. The reasons are various, but one of them might be the lack of clear criteria and the quite wide understanding of the HUL approach introduced by the Recommendation.

Diversity ranges from no protection systems for historic urban landscapes (African countries, countries of the former Soviet Union),[17] to the recognition of urban areas as just "monuments, sites or ensembles" (Netherlands, Portugal, etc.) to quite wide-ranging, strong protection systems of historic conservation areas (Czechia), and also various, separate approaches to historical built-up areas, historically set environments, and urban fabric (Georgia).

## 6. Conclusions

While we have international instruments that establish a vision and disseminate ideas, many questions remain regarding how this should work in practice and how it should be implemented within legal frameworks. The most important idea raised by the Recommendation is the scope of what should be under protection from now on, and generally what the idea of protection from today's perspective means. This does not just refer to preserving and saving HUL from any changes, but it emphasizes trying to strike a balance between transformation and preservation. That is why it is even more impor-

[16] The UNESCO Recommendation on the Historic Urban Landscape. Report of the Second Consultation on its implementation by Member States, 2019. UNESCO World Heritage Centre.

[17] V.I. Safronov, "'Urban planning restoration' as one of the main methods of preserving World Heritage sites in the context of its development. Cultural heritage in Russia – problems and perspective". International Scientific Symposium, 19–21 September 2018.

tant now to distinguish clear limits on how we should move and transform the spaces around us. Previous international tools show us the foundation upon which the Recommendation of 2011 was created in a form that we can see right now and in a way that shows us how to continue to move forward. However, as the road is still meandering and has not yet cut a sharp path, national governments are losing their ways and moving toward the goal in very slow, small steps. Detailed analyses of current national legislation, their experiences, comparative studies and establishing a more concrete vision on the international level can all easily change this. This topic is still relatively new and requires more attention from a legal point of view to establish strong legal frameworks what will help the HUL approach function properly in the future.

## Literature

About Landscape town development system. Report. Ministry of Land, Infrastructure, Transport and Tourism Urban and Regional Development Bureau. Park Green Space / Landscape Division Landscape / History / Culture Environment Improvement Office.

Ahmadi F., Toghyani S., "The Role of Urban Planning in Achieving Sustainable Urban Development", *OIDA International Journal of Sustainable Development* 2011, vol. 2, no. 11.

Akagawa N., Sirisrisak T., "The current issues on urban preservation in Bangkok". The 2005 World Sustainable Building Conference, Tokyo, 27–29 September 2005.

Bandarin F., van Oers R., *The Historic Urban Landscape. Managing Heritage in an Urban Century*, Wiley-Blackwell, Chichester 2012.

Erkan Y., "The Way Forward with Historic Urban Landscape Approach towards Sustainable Urban Development", *Built Heritage* 2018, vol. 2, no. 4.

Glasser M., Berrisford S., "Urban Law and Policy. A Key to Accountable Urban Government and Effective Urban Service Delivery", *World Bank Review* 2015.

Nahoum C., *Urban planning conservation and preservation*, McGraw-Hill Professional, New York 2001.

Safronov V.I., "'Urban planning restoration' as one of the main methods of preserving World Heritage sites in the context of its development. Cultural heritage in Russia – problems and perspective", International Scientific Symposium, 19–21 September 2018.

Song J., "The Origin and Evolution of Urban Heritage Conservation in the Specified Block System in Tokyo", *Journal of the City Planning Institute of Japan* 2017, vol. 52, no. 2.

Veldpaus L., Pereira Roders A.R., Colenbrander B.J.F., "Urban Heritage: Putting the Past into the Future", *The Historic Environment*, April 2013, vol. 4, no. 1.

## Summary

*Dinara Garaeva*

**The application of the Recommendation on the Historic Urban Landscape in terms of the limits of acceptable change**

This article is a critical reflection on the application of the Recommendation on the Historic Urban Landscape adopted by UNESCO in 2011 as a basic concept for urban conservation in the

twenty-first century from a legal point of view. Despite the adoption of the recommendation and a few official reports on the implementation of it, there are still only a few countries that fully understand the crucial idea of the concept. The main purpose of this study is to illuminate the problematic points of the legal implementation of the Recommendation at the current stage, especially in terms of limits of changes that are equally acceptable at local and international levels. Standards remain unclear within the framework of existing international regulations concerning the protection of historic urban landscapes, and differences remain in particular terms that play significant roles in defining the scope of the influence of the Recommendation. Examining the text of the Recommendation and previous international tools related to the topic, reviewing the experiences of several countries that have already successfully started to implement the rules of the Recommendation based on official reports from UNESCO, and the study of current obstacles will help us to see clearly how the international community might start to move to achieve the universal goal of protecting historic urban landscapes.

**Keywords:** Recommendation on the Historic Urban Landscape, urban heritage, international law, implementation of international law

## Streszczenie

*Dinara Garaeva*

**Implementacja Rekomendacji UNESCO w sprawie historycznego krajobrazu miejskiego w kontekście granic dopuszczalnej zmiany**

Artykuł jest prawną analizą implementacji Rekomendacji w sprawie historycznego krajobrazu miejskiego, przyjętej przez UNESCO w 2011 roku jako podstawowej koncepcji ochrony obszarów zurbanizowanych w XXI wieku. Pomimo przyjęcia Rekomendacji i publikacji kilku oficjalnych raportów na temat jego wdrożenia, w rzeczywistości niewiele jest państw, które w pełni uchwyciły kluczową dla tego dokumentu ideę. Celem niniejszej analizy jest zwrócenie uwagi na najbardziej problematyczne kwestie prawne pojawiające się przy implementacji, zwłaszcza w odniesieniu do kwestii granic dopuszczalnej zmiany na poziomie lokalnym i międzynarodowym. Standardy wynikające z ogólnych reguł prawa międzynarodowego na temat zachowania krajobrazu miejskiego pozostają niejasne, a różnice co do znaczenia poszczególnych postanowień wpływają na rzeczywisty zasięg skutków, jakie Rekomendacja wywołuje. Analiza samej treści dokumentu w połączeniu z brzmieniem wcześniejszych instrumentów prawnych w tej dziedzinie, oszacowanie dotychczasowych doświadczeń państw, które według oficjalnych raportów UNESCO rozpoczęły implementację Rekomendacji, oraz prześledzenie aktualnych praktycznych problemów — wszystko to pozwoli na ocenę, jak społeczność międzynarodowa zamierza chronić historyczne krajobrazy miejskie.

**Słowa kluczowe**: Rekomendacja UNESCO w sprawie historycznego krajobrazu miejskiego, historyczny krajobraz miejski, prawo międzynarodowe, implementacja prawa międzynarodowego

**Aleksandra Guss**
University of Gdańsk
aleksandraguss@phdstud.ug.edu.pl
ORCID: 0000-0002-4157-6853

https://doi.org/10.26881/gsp.2021.2.15

# Cultural heritage law as one of three dimensions of the aesthetics of law

## 1. Introduction

The aesthetics of law covers the relations that exist between what is broadly understood as law and what is broadly understood as art. The latter is the source of aesthetic values and corresponding aesthetic experiences. Although the aesthetics of law in various approaches, contexts, and methods is widely described in foreign literature, e.g., English or German texts, in Poland it is a relatively recent and inspiring trend, falling within the scope of research into the philosophy of law. As Jerzy Zajadło notes, it is the fifth forgotten element of the philosophy of law, functioning alongside ontology, epistemology, logic, and ethics.[1]

Despite the fact that the popularity of this field is still growing, its individual manifestations can be found in various areas of life. Therefore, we can distinguish three different dimensions of the aesthetics of law – internal, external, and what Kamil Zeidler calls "law as a tool of aestheticization".[2] This division is made not from a subjective perspective, but from the perspective of the subject of research, which is law.[3] Consequently, the external dimension deals with various kinds of cultural goods, primarily works of fine art and literary works, which refer to the law and its phenomena and symbols. The internal dimension focuses on law as an object of aesthetics, which concerns both the shape and form of law and its content. The third dimension of the aesthetics of law – law as a tool of aestheticization – considers law in its functional aspect, when it becomes "a tool of aestheticization" of everyday life, largely by means of legal regulations. This article focuses on this third dimension.

Since the law is a bearer of certain values, it can also be a bearer of aesthetic values and, thus, it can perform the function of aestheticizing everyday life. This takes place

---

[1] J. Zajadło, "Estetyka – piąty zapomniany człon filozofii prawa", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2016, no. 4, pp. 17–18.

[2] K. Zeidler, *Estetyka prawa*, Gdańsk – Warszawa 2018, p. 40; also: *idem*, *Aesthetics of Law*, Gdańsk – Warsaw 2020, p. 40.

[3] K. Zeidler, *Aesthetics of Law…*

in three basic ways. First, it does so with the help of legal norms that set and promote certain aesthetic standards.[4] Second, legal norms can serve to protect and preserve aesthetic values.[5] Third, law as a political instrument can be used to combat certain aesthetic values.[6] Cultural heritage law is one of the areas that bring together the first two categories; this can be seen in the general principles of this branch of law, as well as in specific legal acts that constitute it. The aim of this article is to present how cultural heritage law can be perceived as a "tool of aestheticization" within the Polish legal system.

## 2. Aesthetics of law

The possibility of combining law and aesthetics results primarily from the changes that have taken place in contemporary concepts of perceiving aesthetics itself in the twentieth century. Aesthetics is no longer only associated with art and a work of art and the aesthetic experiences that accompany them. The leading theses of pragmatic aesthetics have become the de-aestheticization of art and the aestheticization of everyday life.[7] Pragmatic aesthetics suggests that aesthetic experiences, unsatisfied through art, will be satisfied in a different way, with the help of objects and phenomena surrounding the recipient. As a result, the law, omnipresent in our everyday life, has become the subject of aesthetics.

From the very beginning, the juxtaposition of law and aesthetics has raised many doubts and controversies, resulting mainly from the fact that aesthetics, associated primarily with art, shows remarkable plasticity and changeability, while the law is characterized by a certain rigidity and formalism. The issues of the aesthetics of law were earlier noticed by Gustav Radbruch, who in his *Rechtphilosophie* published in 1932 included a chapter on "Äesthetik des Rechts".[8] There he points out that the law, like other products of culture, needs means of expression – symbolism, language, gestures, insignia, and architecture – which, in turn, can be subject to aesthetic evaluation.[9] Hence, early authors distinguish aesthetic research into law, research that was later developed in various perspectives, contexts, and methods by Anglo-Saxon legal literature. A well-known verdict by Peter Schlag is that "law is an aesthetical enterprise",[10] and it is in this spirit that the relationship between law and aesthetics was very often seen in the past.

In the last decade, the concept of the aesthetics of law, thanks to the achievements of the Gdańsk school of theory and philosophy of law, has also attracted special

---

4 *Ibidem,* p. 74.
5 *Ibidem.*
6 *Ibidem*.
7 B. Dziemidok, *Główne kontrowersje estetyki współczesnej*, Warszawa 2012, p. 138; see: R. Shusterman, *Pragmatist Aesthetics: Living Beauty, Rethinking Art*, 2nd ed., Oxford 2000.
8 K. Zeidler, *Aesthetics of Law…*, p. 37.
9 G. Rabruch, *Filozofia prawa*, Warszawa 2009, pp. 116–117.
10 P. Schlag, "The Aesthetic of American Law", *Harvard Law Review* 2002, no. 115, p. 1049.

attention in Polish legal discourse. In this context, the work of J. Zajadło[11] in the area of legal-philosophical reflection, and of K. Zeidler[12] in the area of legal-theoretical considerations, are particularly important.

Jerzy Zajadło, juxtaposing the required features of law, that is that it be certain (*certa*), written down (*scripta*), strict (*stricta*), and prior (*praevia*), with the classic fields of philosophy, that is, ontology, epistemology, logic, and ethics, asks the question: "should *lex* not also be *pulchra* (beautiful)?".[13] This prompts him to suggest a fifth element of the philosophy of law – the aesthetics of law. In turn, K. Zeidler, drawing on Polish and foreign scholarly discussions developed over the last few years, systematically organizes them, thus dividing the aesthetics of law into an external dimension, an internal dimension, and what he calls "law as a tool of aestheticization". Zeidler also analyzes the entire matter in depth and proposes further possible directions for the development of the aesthetics of law.

The aesthetics of law uses a variety of research methods, characteristic of various scholarly approaches and fields of knowledge within the humanities and social sciences, as well as the entire instrumentation of legal studies and methods developed on the basis of aesthetics.[14] This allows us to see that the aesthetics of law is a very fertile interdisciplinary field, as is demonstrated below.

## 3. Three dimensions of the aesthetics of law

As mentioned above, the aesthetics of law includes three dimensions: an internal one, an external one, and what K. Zeidler calls "law as a tool of aestheticization". This division is made not from a subjective perspective, but from the perspective of the subject of research, which is law.[15] This means that the identification of the relationship between law and aesthetics and of law as a bearer of aesthetic values, and also of these values themselves, comes to the fore. Consideration how this affects the recipients of law and what aesthetic experiences are induced in them comes subsequently.[16]

The subject of the aesthetics of law from an internal perspective is law itself,[17] understood in a broad sense. This involves treating the law, not only in the form of legal acts, but also in terms of jurisprudence and legal activity, as a bearer of aesthetic

---

[11] See: J. Zajadło, "Graficzny obraz systemu prawa: prawo, estetyka, estetyka prawa?", *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji* 2016, vol. CIV; *idem*, "Prawo, estetyka, estetyka prawa?", *Edukacja Prawnicza* 2015, no. 3(159).

[12] See: K. Zeidler, "Estetyka prawa – ujęcie zewnętrzne i wewnętrzne" [in:] *Integracja zewnętrzna i wewnętrzna nauk prawnych*, part 2, eds. M. Król, A. Bartczak, M. Zalewska, Łódź 2014; K. Zeidler, "Estetyka prawa: ekslibris prawniczy", *Gdańskie Studia Prawnicze* 2017, vol. 38.

[13] J. Zajadło, "Estetyka – piąty zapomniany człon…", p. 18.

[14] K. Zeidler, *Aesthetics of Law*…, p. 11.

[15] *Ibidem*, pp. 21–22.

[16] *Ibidem*.

[17] *Ibidem*, p. 57.

values, and, consequently, as a source of corresponding experiences and assessments. This makes it possible to use aesthetic instruments to study law – both its individual branches[18] and, even, an entire legal system.[19]

If one starts with the issue of creating law and its effects in the form of a legal act, it can be seen that the law-making process is, in fact, a type of creativity. Since a requirement of creativity is the novelty of an action or work, the law-making process is, in fact, a creative activity, the result of which is a piece of work, with all its required features.[20] Such a piece of work, i.e., a legal act, may be a source of various impressions and aesthetic experiences, which, of course, is not the goal of the legislator in itself, but it testifies to the existence of wider manifestations of "legislative art". Simplicity of language, consistency of content, correct and harmonious structure, compliance with the formal conditions and rules of legislative technique – all these factors contribute to the beauty of a legislative act and evoke aesthetic experiences in the recipient.

A similar situation occurs in the process of applying the law – judges become creators creating their work, i.e., a judgment. In addition to the process of interpreting the law itself, aesthetic impressions can also be provided by a ruling, on the same principle as in the case of a legal act – through coherence, harmonious structure, or artistic language. The legal language of legal acts itself can also be a source of various aesthetic values. Characterized by specific vocabulary, stiffness, and roughness, it apparently seems to be devoid of any emotions. However, nothing could be further from the truth. The recipient dealing with legal language feels the importance of the legislator and the legislator's self-confidence, which puts him/her in a serious mood.

The aesthetics of law in its external dimension deals with the manifestations of law, its motifs, symbols, and signs that have been represented for centuries in the fine arts.[21] From antiquity, legal issues have inspired artists to include it in their works, regardless of whether they themselves had any experience with the law or were just passive observers. As G. Radbruch notes, law may be "material for art", and as such it certainly falls within the scope of aesthetic evaluation.[22] However, as J. Zajadło emphasizes, the subject of evaluation here is not the law (broadly understood), but the artist's work itself,[23] one in which legal elements help to make the final aesthetic effect. There are countless manifestations of law in culture – starting with its symbols, through pictorial signs, legal rhetoric, and ending with legal motifs that can be seen in art, literature, and cinematography. Indeed, film making arouses the most emotions and provides the most examples for the external perspective of the aesthetics of law.

Recurrent motifs inspiring painters over the centuries have been mainly: The Last Judgment (e.g., *The Last Judgment* by Hans Memling), human judgments (e.g., *The Court* and *A Famous Cause* by Honoré Daumier), the image of Themis (e.g., Raphael and

---

18 See: E. Morgan, *The Aesthetic of International Law*, Toronto 2007.
19 See: P. Schlag, "The Aesthetic…", pp. 1049–1118.
20 K. Zeidler, *Aesthetics of Law*… pp. 58–59.
21 *Ibidem*, p. 51.
22 G. Radbruch, *Filozofia prawa*…, p. 116.
23 J. Zajadło, "Estetyka – piąty zapomniany człon…", p. 25.

his *Iustitia,* and on many frescoes), crime, guilt, punishment, and its execution (e.g., *The Execution of Lady Jane Grey* by Hyppolite Delaroche), and lawyers themselves (e.g., *Les Avocats* by Honoré Daumier). Also noteworthy is Gustav Klimt's painting *Jurisprudenz*, in which he presents a shocking picture of the law, showing the ugliness of its crudeness and randomness, which is intended to be an expression of what the law really is.[24]

The most widespread studies in the field of the aesthetics of law in an external perspective concern the relationship between law and literature, which is expressed in a separate research trend known as law and literature.[25] As part of this, we can distinguish, on the one hand, an external frame of this field – law in literature, which focuses on the identification and analysis of legal motifs in literary texts.[26] On the other hand, we can note an internal frame – law as literature, which focuses on considerations regarding the literary value of legal acts and applies to them methods that have been developed by literary scholars. This also treats law as a form of narrative, and legislative activity as linguistic and literary creation.

Apart from the two above mentioned manifestations of the aesthetics of law, many more can be distinguished, such as legal cinematography,[27] which is considered as a special kind of law and literature, or the relationship between law and music.[28] However, describing each manifestation of the aesthetics of law goes beyond the scope of this article.

The third and the last dimension of the aesthetics of law refers to the law as "a tool of aestheticization" of everyday life. This focuses on the aesthetic function of law, implemented mainly by legal regulations and the legal norms they contain, which are the determinants of what is aesthetic. However, it should be emphasized that the law itself is not a bearer of aesthetic values here, but rather the phenomena that are regulated by the law. Thus, the description and criteria for aesthetic evaluation are derived from external sources.[29]

We can distinguish three basic fields in which the law can affect the aestheticization of everyday life: 1) legal norms that set and promote certain aesthetic standards;

---

[24] See: D. Manderson, "Klimt's *Jurisprudence* – Sovereign Violence and the Rule of Law", *Oxford Journal of Legal Studies* 2015, vol. 35, issue 35, pp. 515–542.

[25] See: I. Ward, *Law and Literature: Possibilities and Perspectives,* Cambridge – New York –Melbourne 1995; B. Cordozo, "Law and Literature", *Yale Law Journal* 1939, vol. 48, no. 3; R. Posner, *Law and Literature,* 3rd ed., Cambridge 2009; *Prawo i literatura. Parerga*, eds. J. Kamień, J. Zajadło, K. Zeidler, Gdańsk 2019; *Prawo i literatura. Szkice,* eds. J. Kuisz, M. Wąsowicz, Warszawa 2015.

[26] The works of Sophocles, William Shakespeare, Victor Hugo, Charles Dickens, Fyodor Dostoyevsky and Franz Kafka are of particular interest in this area.

[27] Among many popular legal films can be distinguished, for example, *Anatomy of a Murder* (dir. Otto Preminger, USA, 1959), *The Verdict* (dir. Sidney Lumet, USA, 1982), *My Cousin Vinny* (dir. Jonathan Lynn, USA, 1992), *The Shawshank Redemption* (dir. Frank Darabont, USA, 1994), *A Time to Kill* (dir. Joel Schumacher, USA, 1996), *Devil's Advocate* (dir. Taylor Hackford, USA, 1997), and *The Lincoln Lawyer* (dir. Brad Furman, USA, 2011).

[28] See: E. Łętowska, K. Pawłowski, *O operze i o prawie,* Warszawa 2014; E. Łętowska, "*Communicare et humanum, et necesse est* – o komunikacyjnej misji muzyków i prawników", *Monitor Prawniczy* 2005, no. 1, pp. 3–7.

[29] K. Zeidler, *Aesthetics of Law*…, p. 74.

2) legal norms that serve to protect and preserve aesthetic values; and 3) the field where law, as an instrument of politics, can be used to combat certain aesthetic values that are inconsistent with the ideology promoted by the ruling class. This last field is often discussed as art in the service of state power.[30]

The first group of norms is used to establish an overall concept of "the beautiful", but when one interprets these legal regulations, one sees that there is something more to it than this: the regulations promote aesthetic standards and values through legal norms.[31] A good example of the implementation of this function is the *Uchwała krajobrazowa Gdańska* [Gdańsk Landscape Resolution],[32] aimed at defining the rules for placing advertising media, elements of small-scale architecture, and fences in public space. The previous lack of uniform rules for the placement of such objects has led to the phenomenon of the marginalization, degradation, and often even disfigurement of many areas of the city. This resolution offers a kind of aesthetic concept for the city; it becomes a reference point in creating its aesthetic appearance and an instrument for creating a harmonious, clean, and aesthetic space. It also aims at the aesthetic unification of city districts, which through it are to become free from advertising chaos. The resolution contains specific guidelines regarding the size, color, construction, and type of building material for individual structures. For example, para. 5(2) of the Resolution prescribes for small-scale architectural structures, *inter alia*, the use of commonly accepted building materials, in particular glass, stone, concrete, plastics, wood, metals, and their composites. Further in para. 7(2) letter c), in relation to advertising boards, the use is required of lighting of constant intensity and white color when illuminating or backlighting advertising boards or advertising devices. As can be seen, the whole regulation aims to promote and highlight the aesthetic values of the city, by setting certain aesthetic standards for public space.

The second group of legal norms includes a number of legal regulations where aesthetic issues are very important: *inter alia*, the cultural heritage law, which will be discussed in more detail later in this article, but also the Act of 7 October 1999 on the Polish language (consolidated text: *Journal of Laws* of 2021, item 672) and the Act of 4 February 1994 on Copyright and Related Rights (consolidated text: *Journal of Laws* of 2019, item 1231, as amended). This category of standards is primarily aimed at providing protection to certain goods or objects, which, at the same time, are the source of certain aesthetic values, and, thus, the subject of protection is also these very values. For example the Act on the Polish language, in art. 1 point 1, regulates the protection of the Polish language, protection which, in accordance with art. 3 para. 1 point 1 consists, in particular, in attempting to ensure correct use of the language and to improve the linguistic proficiency of its users, as well as to create conditions for the

30 *Ibidem*, pp. 74–75.

31 *Ibidem*, p. 76.

32 Resolution No. XLVIII/1465/18 of the Gdańsk City Council of February 22, 2018 on establishing the rules and conditions for the location of small architectural objects, advertising boards, advertising devices and fences, their dimensions, quality standards and types of building materials from which they can be made, in the City of Gdańsk.

proper development of the language and to prevent its vulgarization. These are a kind of regulation aimed at maintaining appropriate language standards, including formal and, therefore, aesthetic standards. The issue of law as an instrument of politics is seen in the fact that law sometimes has served and, indeed, serves still to combat specific aesthetic values inconsistent with the ideology promoted by the ruling political party in the state. Art has been one of the tools of exercising power in authoritarian and totalitarian countries, and the aesthetics associated with this art has served a propaganda function. However, this, in turn, has often exposed the corruption of the power system, and so it has been, in fact, in a sense an anti-aesthetics.[33]

Among these three basic areas where the law can affect the aestheticization of everyday life, I would like to pay special attention to cultural heritage law as "a tool of aestheticization", and to consider its norms aimed at the promotion, protection, and preservation of aesthetic values.

## 4. Cultural heritage law as "a tool of aestheticization"

Cultural heritage law is actually recognized as a comprehensive branch of law,[34] i.e., a separate set of legal norms based on specific criteria, such as the purpose and subject of regulation, distinct regulatory methods, and distinct principles or forms of codification. A special feature of cultural heritage law is its interdisciplinarity and multidisciplinarity. This means that, on the one hand, there is no single act encompassing the entire content of the protection of cultural heritage. Thus, cultural heritage protection contains regulations in the field of constitutional law, criminal law, administrative law, and civil law, etc. On the other hand, cultural heritage law extends far beyond the scope of the law itself, and the issue of protection also requires drawing on the achievements of, *inter alia*, the history of art, aesthetics, architecture, science, and many more disciplines. For the purposes of this article, I would like to limit my discussion to legal issues, and, thus, indicate how the norms contained in the Polish legal acts regulating the protection of cultural heritage, but also the principles of cultural heritage law, can be a tool for the aestheticization of everyday life.

Starting with the principles of cultural heritage law, as with the foundation of every branch of law, it should be stipulated that the catalog of these principles covers: firstly, the general principles of the legal system; secondly, the principles of individual branches of law that are relevant to the protection of cultural heritage; and thirdly, the principles specific to this comprehensive branch of law alone, which, however, can also be general principles of law or the principles of its individual branches, although,

---

33 J. Zajadło, "Estetyka – piąty zapomniany człon…", pp. 22–23.

34 See: K. Zeidler, "Prawo ochrony dziedzictwa kultury jako nowa gałąź prawa" [in:] *Prawo ochrony zabytków*, ed. K. Zeidler, Warszawa – Gdańsk 2004, pp. 23–33; *idem*, "Zasady prawa ochrony dziedzictwa kultury – propozycja katalogu", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2018, vol. LXXX, no. 4, pp. 147–154.

nevertheless, they specify the content of these principles on the basis of cultural heritage law.[35]

First of all, the constitutional principles involved need to be indicated. Article 5 of the Polish Constitution introduces the principle of protection of cultural heritage and explicitly indicates that the Republic of Poland protects its national heritage. The term "national heritage" used here has a narrower scope of meaning than "cultural heritage", and, as K. Zeidler points out, it requires an interpretative correction, as its linguistic interpretation leads *ad absurdum*, concluding *a contrario* that there is no obligation to protect heritage that is not national heritage. Thus, it should be considered that this principle of protection is based on the Constitution, but its content requires a broader systematic approach.[36] Cultural heritage and national heritage, included in scope of cultural heritage, is defined by Jan Pruszyński as a composite of immovable and movable objects along with associated spiritual values, and historical and moral phenomena. These are considered as subject to legal protection for the good of a specific society and its development. They are considered worthy of transfer to future generations on the basis of understandable and accepted historical, patriotic, religious, scientific/scholarly, and artistic values, which are important for the identity and continuity of political, social, and cultural development, for expressing truths, for commemorating historical events, and for cultivating a sense of beauty and a civilized community.[37] There is no doubt, therefore, that cultural heritage is also a source of aesthetic values that are constitutionally protected along with the object they accompany. Moreover, the Constitution of the Republic of Poland, in art. 6, determines that the Republic of Poland creates conditions for the dissemination and equal access to cultural goods, and in art. 73 it grants a subjective right, stating that everyone is guaranteed the freedom to use cultural goods. This allows for a wide promotion of aesthetic values in society, by enabling equal access to the objects that are their source.

The principle of cultural heritage management involves a departure from the idea of protection understood as leaving an object of protection unchanged and accepts interference with the substance of a monument or changing its used properties, so that the object and its aesthetic values can be properly preserved and used. Preservation and conservation of aesthetic values are also related to the principle of supervising the condition of monuments, most often under the control of a monument conservation agency.

With regard to the issue of legal regulations, the basic legal act regulating cultural heritage protection is the Act of 23 July 2003 on the protection and preservation of monuments (consolidated text: *Journal of Laws* of 2021, item 710). The first references to aesthetic values can be seen in the definition of a monument. According to art. 3 point 1, a monument is real estate or movable property, their parts or units, which is the product of human work or is related to human activity, and bears testimony to

35 K. Zeidler, "Zasady prawa ochrony dziedzictwa kultury…", p. 149.
36 *Ibidem*, p. 150.
37 J. Pruszyński, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, vol. 1, Kraków 2001, p. 50.

a bygone era or events, the preservation of which is in the public interest due to the object's historical, artistic, or scientific/scholarly value. Although the legislator does not refer directly to aesthetic value, but rather to artistic value (which does not mean the same),[38] nevertheless, these two terms refer to a similar set of objects and their scope to some extent overlaps – for example, when a given object demonstrating originality in an artist's work is also able to evoke an aesthetic experience.[39]

The Act also indicates a number of activities that may be undertaken in relation to a monument. These include, among others: conservation work which, in accordance with art. 3 point 6, means activities aimed at securing and preserving the substance of the monument, stopping the processes of its destruction, and documenting those activities; restoration works (art. 3 point 7), i.e., activities aimed at exposing the artistic and aesthetic (*sic!*) values of the monument, including, if necessary, supplementing or recreating its parts, and documenting these activities; and conservation research (art. 3 point 9), i.e., activities aimed at recognizing the history and functions of a monument, determining the materials and technologies used for its construction, determining the state of preservation of this monument, developing a diagnosis, design, and work program for conservation experts, and establishing whether there is, indeed, a need for a restoration program. These activities are aimed at ensuring adequate protection and preservation of the monument, and, thus, also at securing its aesthetic values. This is confirmed by art. 4 point 2, pursuant to which public administration bodies take steps to prevent threats that may cause damage to the value of monuments, including, it can be assumed, also its aesthetic ones. In turn, according to art. 5, the care of a monument, exercised by its owner or possessor, consists in particular, *inter alia*, in securing and maintaining the monument and its surroundings in the best possible condition (point 3) and using the monument in a way that ensures the permanent preservation of its value (point 4).

Values, broadly understood, and therefore also aesthetic values, are also required when a monument is included in a given form of protection other than entry in the register of monuments – inscription in the List of Heritage Treasures, recognition as a historical monument, and as part of the creation of a cultural park. According to art. 14a of the Act of 2003 on the protection and preservation of monuments, The List of Heritage Treasures is intended only for movable monuments of special value for cultural heritage, those included in one of the exhaustively listed categories, including, *inter alia*, specified paintings, sculptures, statues, interior design elements, and works of artistic craftsmanship (i.e., objects that are a substantial source of aesthetic value). Article 15 of the Act indicates that an immovable monument entered in the register of monuments or as part of a cultural park and designated as of special value for culture

---

[38] See: R. Stecker, "Why Artistic Value is not Aesthetic Value" [in:] *idem*, *Intersections of Value: Art, Nature, and the Everyday,* Oxford 2019; A. Sauchelli, "Aesthetic Value, Artistic Value, and Morality" [in:] *The Blackwell Companion to Applied Philosophy*, eds. D. Coady, K. Brownlee, K. Lipper-Rasmussen, Oxford 2016, pp. 514–52; M. Żelazny, "Wartości artystyczne i wartości estetyczne" [in:] *idem*, *Estetyka filozoficzna*, Toruń 2009, pp. 89–95.

[39] K. Zeidler, *Aesthetics of Law*…, pp. 30–31.

may be recognized as a historical monument. In turn, according to art. 16, a cultural park can be established in order to protect the cultural landscape and to preserve the landscaped areas along with immovable monuments characteristic of local building and settlement traditions. In art. 17, the legislator adds what actions can be taken to preserve the aesthetics of a cultural park, pointing that there may be established prohibitions and restrictions on: 1) carrying out construction work and industrial, agricultural, animal breeding, commercial, or service activities; 2) changes in the use of immovable monuments; 3) placing boards, inscriptions, advertisements, and other signs not related to the protection of the cultural park, with the exception of road signs and signs related to the protection of public order and safety; 3a) the rules and conditions for the location of small architecture objects; and 4) waste storage or warehousing.

In further parts of the Act of 2003 on the protection and preservation of monuments, there are also many other regulations relating to the value of a monument. Additional examples are: in accordance with art. 25, development for commercial purposes of an immovable monument entered in the register requires its owner or holder to have, *inter alia*, agreed with the voivodeship monument conservation agency on a program for the development of the immovable monument with its surroundings and the further use of this monument, taking into account the exposure of its value. In this case, the value will be also, and perhaps even above all, an aesthetic value. Also the activities of social guardians of monuments, indicated in art. 102 of the Act, consist in taking actions related to the preservation of the value of monuments, keeping them in the best possible condition, and disseminating knowledge about such monuments. These activities are, therefore, aimed at the protection of aesthetic values and their promotion in society.

The second important legal act that I would like to consider is the Act of 21 November 1996 on museums (consolidated text: *Journal of Laws* of 2020, item 902). Article 1 of the Act defines a museum and sets forth its mission. In accordance with this article, a museum is a non-profit organizational unit, the purpose of which is to collect and permanently protect the tangible and intangible natural and cultural heritage of humanity, and to inform the public about the values and contents of the collections, disseminating the basic values of Polish and world history, science, and culture, shaping cognitive and aesthetic (*sic!*) sensitivity, and providing access to its collections. It cannot be denied that exhibits, i.e., movables and real estate owned by the museum and entered in the inventory of museum items, are objects that constitute a rich resource of aesthetic values; they are often works of art, sculptures, or naturalia. The protection of these values, as well as their dissemination, is therefore the goal of the museum. This goal is implemented, in particular by: collecting monuments (art. 2 point 1); storing collected monuments, in conditions ensuring their proper condition and safety, and storing them in a manner that makes them available for scientific/scholarly purposes (art. 2 point 3); and the protection and conservation of collections and, as far as possible, the protection of immovable archaeological monuments and other immovable objects of material culture and nature (art. 2 point 4). It is worth noting at this point

that aesthetics in its broader sense also applies to nature;[40] so naturalia, placed in the museum, will certainly also exhibit aesthetic values.

Another legal act related to the protection of aesthetic values is the Act of 25 May 2017 on the restitution of national cultural property (consolidated text: *Journal of Laws* of 2019, item 1591). A cultural good is considered to be a monument, a movable property that is not a monument, and their component parts or complexes, the preservation of which is in the public interest because of their artistic, historical, or scientific/scholarly value, or because of their importance for heritage and cultural development (art. 3 point 1). Thus, the legislator again refers to artistic values, but, as I mentioned earlier, in most cases, apart from an aesthetic value, cultural goods also represent what are usually high aesthetic values. Restitution of cultural property is aimed at recovering, including achieving the return of, cultural goods lost by a Polish citizen, legal person established in the territory of Republic of Poland, and other entities mentioned by the Act, or recovering cultural goods that were removed from the territory of the Republic of Poland in violation of the law. Therefore, these are coordinated activities, based on internal cooperation – both of public administration bodies, and external ones – of various countries, the purpose of which is to find, secure, recover, including achieving the return of, cultural goods. In terms of the aestheticization of everyday life, this is a very important issue. Firstly, restitution influences the expansion of the catalog of cultural goods located in the territory of the Republic of Poland by bringing them back. Secondly, society has a better chance of getting to know these cultural goods and the values they hold, including aesthetic ones. The general availability of such objects permits widespread aesthetic experiences by society and their promotion. Thirdly, it is a form of a justice, and as Michał Mutermilch points out, "if, apart from these purely aesthetic emotions, a work of art evokes in us other experiences which have anything in common with truth, good or benefit, then such a work is called a work of ideas".[41] The aesthetic values of a cultural goods recovered through restitution, are therefore accompanied by other values, such as good, morality, and truth (as part of justice), which may further emphasize its aesthetic value and intensify the aesthetic experience.

Cultural heritage law also includes a number of other acts, such as the already mentioned Act on the Polish language or the Act of 27 June 1997 on libraries (consolidated text: *Journal of Laws* of 2019, item 1479), which also contain norms aimed at setting and promoting certain aesthetic standards, inextricably linked with cultural heritage, as well as their protection and conservation. However, for the purposes of this article, I would like to end with only these three cited examples, which accurately and clearly illustrate the issue of cultural heritage law as "a tool of aestheticization".

---

[40] See: M. Budd, "Aesthetic of Nature", *Proceedings of the Aristotelian Society* 2000, vol. 100, pp. 137–157.

[41] M. Mutermilch, *Idea w sztuce*, Warszawa 1902, pp. 8–9.

## 5. Conclusions

Reflection on the aesthetics of law is a constantly developing the field in Polish legal studies. Legal-philosophical and legal-theoretical considerations constantly place it in a fresh light. There are many traces of the aesthetics of law in legal works, which we begin to notice when we begin to read legal acts, jurisprudence, and legal literature with a focus on searching for these elements, and then interpreting and developing them. This demonstrates how the aesthetics of law is an inspiring field offering very fertile ground for scholarship. Due to the ordering of this part of philosophy of law, it is important to divide it into three dimensions: external, internal, and the dimension that treats law as "a tool of aestheticization".

The last approach brings together a number of legal acts the norms of which set, promote, protect, and preserve aesthetic values. However, it should be emphasized that the law itself is not a bearer of aesthetic values here, but s rather the object that is the subject of legal norms; the criteria for assessing these values are external to the law.

Cultural heritage law is just one of "the tools for aestheticizing" everyday life. These tools are evident in its legal principles, which are the foundation of every branch of law. Further, the protection of aesthetic values appears at the level of constitutional norms, which indicate that the role of the Republic of Poland is to guard its national heritage and, more broadly, cultural heritage (thus, a rich source of aesthetic values), and also to create conditions for universal and equal access to cultural goods, and to guarantee the right to use them freely. These standards are further developed by acts of statutory rank.

The basic legal act is the Act on the protection and care of monuments, in which reference to artistic values (and, therefore, to some extent also aesthetic values) appears in the definition of a monument. The protection of monuments and the activities undertaken for that purpose aim at, on the one hand, preventing threats that may damage the value (including the aesthetic value) of monuments, and, on the other hand, at setting forth the artistic and aesthetic values of monuments. In accordance with the Act on museums, the mission of museums is also aimed at collecting and protecting the tangible and intangible natural and cultural heritage, informing the public about the values and contents of collections, shaping cognitive and aesthetic sensitivity, and enabling access to collections. The Act on the restitution of national cultural goods (also the restitution of cultural goods), which are objects of artistic, historical, or scientific/scholarly value, influences such anesthetization: it extends the catalog of cultural goods to include those objects that were previously unlawfully lost or seized, thanks to which society has a chance to become acquainted with such cultural goods. It is also a form of justice and it can enhance the aesthetic values of given goods.

This is just one of the many examples of legal acts in the field of protection of cultural heritage that, through their norms, contribute to the aestheticization of everyday life. Although the aesthetic values contained in legal norms, despite their institutional form, do not immediately dominate the consciousness of society, with time they

create new habits, becoming the basis for a new way of thinking and judging.[42] The law of cultural heritage is just such a factor that instills new values, consolidates and protects existing values, and, at the same time, shapes the awareness of society. It clearly demonstrates the aesthetic function of law.

## Literature


Budd M., "Aesthetic of Nature", *Proceedings of the Aristotelian Society* 2000, vol. 100.

Cordozo B., "Law and Literature", *Yale Law Journal* 1939, vol. 48, no. 3.

Dziemidok B., *Główne kontrowersje estetyki współczesnej,* Warszawa 2012.

Kamień J., Zajadło J., Zeidler K. (eds.), *Prawo i literatura. Parerga*, Gdańsk 2019.

Kuisz J., Wąsowicz M. (eds.), *Prawo i literatura. Szkice*, Warszawa 2015.

Łętowska E., "*Communicare et humanum, et necesse est* – o komunikacyjnej misji muzyków i prawników", *Monitor Prawniczy* 2005, no. 1.

Łętowska E., Pawłowski K., *O operze i o prawie,* Warszawa 2014.

Manderson M., "Klimt's *Jurisprudence* – Sovereign Violence and the Rule of Law", *Oxford Journal of Legal Studies* 2015, vol. 35, issue 35.

Morgan E., *The Aesthetic of International Law*, Toronto 2007.

Mutermilch M., *Idea w sztuce,* Warszawa 1902.

Posner R., *Law and Literature,* 3rd ed., Cambridge 2009.

Pruszyński J., *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, vol. 1, Kraków 2001.

Rabruch G., *Filozofia prawa*, Warszawa 2009.

Sauchelli A., "Aesthetic Value, Artistic Value, and Morality" [in:] *The Blackwell Companion to Applied Philosophy*, eds. D. Coady, K. Brownlee, K. Lipper-Rasmussen, Oxford 2016.

Schlag P., "The Aesthetic of American Law", *Harvard Law Review* 2002, no. 115.

Shusterman R., *Pragmatist Aesthetics: Living Beauty, Rethinking Art*, 2nd ed., Oxford 2000.

Stecker R., "Why Artistic Value is not Aesthetic Value" [in:] *idem, Intersections of Value: Art, Nature, and the Everyday*, Oxford 2019.

Ward I., *Law and Literature: Possibilities and Perspectives,* Cambridge – New York – Melbourne 1995.

Zajadło J., "Estetyka – piąty zapomniany człon filozofii prawa", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2016, no. 4.

Zajadło J., "Graficzny obraz systemu prawa: prawo, estetyka, estetyka prawa?", *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji* 2016, vol. CIV.

Zajadło J., "Prawo, estetyka, estetyka prawa?", *Edukacja Prawnicza* 2015, no. 3(159).

Zeidler K., *Aesthetics of Law*, Gdańsk – Warsaw 2020.

Zeidler K., *Estetyka prawa*, Gdańsk – Warszawa 2018.

Zeidler K., "Estetyka prawa: ekslibris prawniczy", *Gdańskie Studia Prawnicze* 2017, vol. 38.

Zeidler K, "Estetyka prawa – ujęcie zewnętrzne i wewnętrzne" [in:] *Integracja zewnętrzna i wewnętrzna nauk prawnych*, part 2, eds. M. Król, A. Bartczak, M. Zalewska, Łódź 2014.

Zeidler K., "Prawo ochrony dziedzictwa kultury jako nowa gałąź prawa" [in:] *Prawo ochrony zabytków*, ed. K. Zeidler, Warszawa – Gdańsk 2014.


[42] K. Zeidler, *Aesthetics of Law*…, p. 73.

Zeidler K., "Zasady prawa ochrony dziedzictwa kultury – propozycja katalogu", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2018, vol. LXXX, no. 4.
Żelazny M., "Wartości artystyczne i wartości estetyczne" [in:] *idem*, *Estetyka filozoficzna*, Toruń 2009.

## Summary

***Aleksandra Guss***

**Cultural heritage law as one of three dimensions of the aesthetics of law**

The aesthetics of law covers the relations that exist between what is broadly understood as law and what is broadly understood as art. The latter is the source of aesthetic values and corresponding aesthetic experiences. Kamil Zeidler divides the aesthetics of law into three dimensions: external, internal, and what he calls "law as a tool of aesthetization". The third dimension includes norms that affect the aesthetization of everyday life. The aim of this article is to present how cultural heritage law and its principles and standards contained in Polish legal acts can be perceived as a "tool of aestheticization".

**Keywords:** aesthetics of law, cultural heritage, cultural heritage law, philosophy of law, protection of cultural heritage

## Streszczenie

***Aleksandra Guss***

**Prawo ochrony dziedzictwa kultury jako jeden z trzech wymiarów estetyki prawa**

Estetyka prawa obejmuje relacje, jakie występują między szeroko rozumianym prawem a szeroko rozumianą sztuką. Ta ostatnia jest źródłem wartości estetycznych i odpowiadających im przeżyć estetycznych. Kamil Zeidler dzieli estetykę prawa na trzy ujęcia: zewnętrzne, wewnętrzne oraz to, co nazywa „prawem jako narzędziem estetyzacji". Trzeci wymiar to normy, które wpływają na estetyzację codziennego życia. Celem artykułu jest przedstawienie, w jaki sposób prawo ochrony dziedzictwa kultury oraz jego zasady i standardy zawarte w polskich aktach prawnych mogą być postrzegane jako narzędzie estetyzacji.

**Słowa kluczowe:** estetyka prawa, dziedzictwo kultury, prawo dziedzictwa kultury, filozofia prawa, ochrona dziedzictwa kultury

# Commentaries

# A crime against cultural heritage in the aspect of the intangible value of a monument

Judgement of the International Criminal Court from 27 September 2016 in the case of *Prosecutor v. Ahmad al Faqi al Mahdi*, ICC-01/12-01/15

**The Chamber considers that the fact that the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktuis relevant in assessing the gravity of the crime committed. Furthermore, all the sites but one (the Sheikh Mohamed Mahmoud Al Arawani Mausoleum) were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community.**

**Katarzyna Stanik-Filipowska**
Jan Zamoyski College of Humanities and Economics, Zamość
kstanik@lubelscyradcowie.pl
ORCID: 0000-0003-2349-5694

https://doi.org/10.26881/gsp.2021.2.16

## Commentary

1. On 27 September 2016, Trial Chamber VIII of the International Criminal Court (ICC) found Ahmad al-Fahdi al-Mahdi guilty of a war crime under art. 8 para. 2 subpara. (e) point (iv) of the Rome Statute. The crime was intentionally to direct attacks against ten buildings dedicated to religion and/or historical monuments in Timbuktu, Mali,[1] between approximately 30 June 2012 and 11 July 2012.[2]

The mausoleums of Sufi holy men and scholars (who lived in the fourteenth and the fifteenth centuries) and the mosques of Timbuktu played a very significant role in the spiritual life of the local people. Moreover, the mausoleums and mosques of

[1] From 1 July 2002 onwards, the ICC may exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Mali or by its nationals. Mali ratified the Rome Statute on 16 August 2000 and referred the situation on its territory since January 2012 to the ICC.

[2] International Criminal Court, *Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Judgement and Sentence*, 27 September 2016, https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF (accessed: 21.12.2020).

Timbuktu constitute a common heritage and represented values that identified the local community socially and culturally.

2. The attacks were directed against: (i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; (iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamad El Mikki Mausoleum; (vi) the Sheikh Abdoul Kassim Attouaty Mausoleum; (vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (viii) the Sidi Yahia Mosque door; and the two mausoleums adjoining the Djingareyber Mosque, namely (ix) the Ahmed Fulane Mausoleum and (x) the Bahaber Babadié Mausoleum.

In this matter, it is necessary to emphasize that the attack was conducted according to a pre-established plan. At the time, Ahmad al Faqi al Mahdi was "head of Hesba, one of the four command structures of the Ansar Dine group which was linked to al Qaeda in the Islamic Maghreb (AQIM) and had occupied northern Mali in 2012".[3] Having defeated fighters of the National Movement for the Liberation of Azawad, the Hesba began the occupation of Timbuktu. Its mission "was to 'promote virtue and prevent vice'";[4] the Hesba considered profane the ways in which the faithful in the Timbuktu shrines prayed, especially that those buildings were situated on burial grounds, over tombs.[5] Ahmad al Faqi al Mahdi undertook to demolish the buildings (the order to destroy them came from a higher level of command, from the leader of Ansar Dine, Iyad Ag Ghali) in order to eradicate superstitions, heresy, and all things or subterfuges which could, according to the Hesba, lead to idolatry.

3. At the same time, it is important to underline the fact that the buildings which were destroyed (including those which had been built on burial grounds) were pilgrimage destinations, places of spiritual retreat and reflection; what is more, the rituals performed there were considered crucial from a religious point of view. Therefore, the exact aim of the crime was the destruction of certain manifestations of spirituality as well as the monuments which served as sites of such manifestations. The attack was also directed at the door of the Sidi Yahia Mosque, which had particular religious significance: "legend had it that this door had not been opened for 500 years and that opening it would lead to the Last Judgment".[6] Those buildings were not military objectives; they were dedicated to religion and constituted historic monuments. Additionally, each of these buildings, except for the Sheikh Mohamed Mahmoud Al Arawani Mausoleum, had had the status of protected UNESCO World Heritage sites since 1988, and in 2012 they were included in the List of World Heritage in Danger.

---

[3] A. Al Faqi Al Mahdi: "I plead guilty," Interview by Anissa Barrak, *The Unesco Courier*, October–December 2017, https://en.unesco.org/courier/2017-october-december/ahmad-al-faqi-al-mahdi-i-plead-guilty (accessed: 21.12.2020).

[4] *Ibidem.*

[5] *Ibidem*.

[6] International Criminal Court, *Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15*, P- 38, pp. 20–23.

Al-Mahdi pleaded guilty and cooperated with the ICC, which had an impact on the severity of the punishment. He was sentenced by the ICC to nine years imprisonment.[7]

After the judgement was pronounced, the convict, aware of the gravity of his crime, said that he felt "remorseful about what [he had] caused to the international community as a whole".[8] He also admitted that he had known "that those sites were historic and sacred".[9] Thus, he was, indisputably, aware that the conservation of cultural heritage has great significance among all nations in the world, and his in-depth knowledge of Muslim theology[10] all the more accounted for his full understanding of the act that he had committed, which was aimed at the destruction of monuments of such great significance. Not only were they internationally protected, but also important in terms of their intangible value to the local community.

4. In my opinion, it is worth looking at the judgement of the ICC in relation to protection of the intangible value of monuments. The intangible value of a monument is based on the connection between the monument's tangible form and its related intangible dimension of an ideational or spiritual nature. Therefore, the intangible value of a monument, which is the focal point of the case being analysed, is not only expressed through its artistic or historic value, but it also consists of the spiritual heritage connected to the destroyed religious buildings. Thus, the process of creation of intangible values is two-fold: first is the materialisation stage, i.e. the design, the imagination of the creator; the second stage is the lifetime of the monument, which is understood as the bearer of the encoded intangible value. So striking is the significance of such a value that it may be considered superior to the conceptual scope of the intangible monument itself, and may even begin to be considered a monument of its own. The buildings destroyed by Ahmad al Mahdi were carriers of intangible values decipherable and comprehensible to the people of Timbuktu and Mali and to the international community alike. The order to destroy them caused not only the obliteration of monuments of a tangible nature, but also the eradication of intangible monuments as expressed in religion and rituals, and, in consequence, it was a crime that undermined the expression of the identity of a specific social group. Undeniably, it caused a measurable loss to all of humanity. As the victim of the crime,[11] humanity could lose its ability to pass on its intangible values to future generations.

---

[7] In a separate judgement from 17 August 2017, Trial Chamber VIII of the ICC issued a reparations order, "concluding that Ahmad Al Faqi Al Mahdi is liable for €2.7 million in expenses for individual and collective reparations for the community of Timbuktu for intentionally directing attacks against religious and historic buildings in that city"; International Criminal Court, *Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Judgement and Sentence,* 17 August 2017, https://www.icc-cpi.int/CourtRecords/CR2017_05117.PDF (accessed: 21.12.2020).

[8] A. Al Faqi Al Mahdi, "This was the first and last wrongful act I will ever commit," 22 August 2016, https://en.unesco.org/news/ahmad-al-mahdi-was-first-and-last-wrongful-act-i-will-ever-commit (accessed: 21.12.2020).

[9] A. Al Faqi Al Mahdi, "I plead guilty…"

[10] "Al Mahdi has a thorough knowledge of the Koran and gave lectures as an expert on religious matters"; International Criminal Court, *Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15*, P- 9, p. 6, more: Statement by Al Mahdi, MLI-OTP-0033-4511, 4523-25.

[11] K. Zeidler highlights the context of disservice to entire nations in the situation of loss of national and cultural heritage in: *idem*, K. Zeidler, "Prawa człowieka a normatywne podstawy ochrony

The basis for conviction by the ICC was the perpetration of a war crime within the scope of a serious violation of laws and regulations in respect of international law applicable to armed conflicts which are not international in nature: namely, intentionally directing attacks against buildings dedicated to religion and/or historical monuments (art. 8 para. 2 subpara. (e) point (iv) of the Rome Statute).

5. This judgement marked the first instance in which the ICC exclusively addressed intentional attacks against cultural heritage. This case can be considered groundbreaking, leading the way towards a more effective enforcement of international law in connection with offences related to cultural heritage.[12] Undoubtedly, it is necessary to analyse this judgement (especially in that it was pronounced by the ICC) in terms of the international protection of cultural heritage and individual criminal responsibility in relation to cultural genocide as affecting the identity of a group.[13]

At the same time, the protection of the destroyed buildings by UNESCO regulations illustrates the buildings' special importance for international cultural heritage; hence, the attack on the mausoleums and mosques was a violation of basic values, directed against cultural human rights as well.[14]

6. The international protection of monuments is predominantly focused on the formulation of a comprehensive system of heritage protection, and this tendency is attracting increasing public attention at present. In this regard, the role is notable of the Convention for the Safeguarding of the Intangible Cultural Heritage, adopted by UNESCO in 2003,[15] and the commentary on art. 15 of the International Covenant on Economic, Social and Cultural Rights.[16]

Additionally, it is necessary to underline that, having in mind the need to strengthen the protection of intangible cultural heritage, UNESCO has reflected on the role that intangible cultural heritage possesses in so-called emergencies. During the meeting which took place at the UNESCO headquarters between 21 and 22 May 2019, the op-

---

dziedzictwa kultury" [in:] *idem*, *Zabytki. Prawo i praktyka*, Gdańsk – Warszawa 2017, p. 108 (originally published by: *Gdańskie Studia Prawnicze* 2005, vol. 13).

[12] K. Wierczyńska, A. Jakubowski, "Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case", *Chinese Journal of International Law*, December 2017, vol. 16, issue 4, pp. 695–721, https://doi.org/10.1093/chinesejil/jmx029 (accessed: 22.12.2020).

[13] For more on this topic, see: H. Schreiber, "Cultural genocide – ludobójstwo kulturowe – kulturobójstwo: niedokończony czy odrzucony projekt prawa międzynarodowego?" [in:] *Kultura w stosunkach międzynarodowych*, vol. 1, *Zwrot kulturowy*, eds. H. Schreiber, G. Michałowska, Warszawa 2013, pp. 252–274.

[14] K. Wierczyńska, A. Jakubowski, "Individual Responsibility…", p. 699.

[15] UNESCO, *Basic Texts of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage*, 2008, https://ich.unesco.org/doc/src/2003_Convention_Basic_Texts-_2018_version-EN.pdf (accessed: 22.12.2020).

[16] United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights,* New York, 16 December 1966, https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf (accessed: 22.12.2020).

erational principles and modalities were adopted for strengthening UNESCO's efforts to safeguard and promote intangible cultural heritage during emergencies (i.e. armed conflict and natural disasters).[17] As was emphasized within the framework of those principles, intangible cultural heritage only exists when it is realized by the communities which practice it and pass it on. It constitutes an inseparable value which manifests itself in the daily, cultural, and economic life of those communities. The protection of intangible cultural heritage should be given the same level of importance as the protection of the life and welfare of the members of those communities.[18] Nevertheless, while the protection of intangible cultural heritage is required in times of emergency, it is also necessary to establish modalities which will allow for the harnessing of "intangible cultural heritage to support preparedness, response and recovery processes".[19]

7. This intangible cultural heritage, passed down from generation to generation, is continuously relived and re-enacted by communities and groups in their relations with the environment, with forces of nature, and with their history, and provides them with a sense of identity and continuity, thereby contributing to an increasing respect towards cultural diversity and human creativity (art. 2(1) of the UNESCO Convention 2003). Pursuant to art. 15 of the International Covenant on Economic, Social and Cultural Rights, each State Party is liable to respect and protect cultural heritage in all its forms, in peacetime and wartime alike. Cultural heritage must be preserved, developed and passed down from generation to generation as evidence of human experiences and achievements, while each community has the right of access and the possibility to benefit from its own heritage.[20]

Importantly, that includes the heritage that is central to everyday rituals, which form part of cultural identity in its intangible form. This approach is a tendency stemming from the ICC judgement commented on above. The approach is worth examining in the context of the above analysis of the ICC judgement.

## Literature

A. Al Faqi Al Mahdi: "I plead guilty," Interview by Anissa Barrak, *The Unesco Courier*, October–December 2017, https://en.unesco.org/courier/2017-october-december/ahmad-al-faqi-al-mahdi-i-plead-guilty (accessed: 21.12.2020).

Al Faqi Al Mahdi A., "This was the first and last wrongful act I will ever commit," 22 August 2016, https://en.unesco.org/news/ahmad-al-mahdi-was-first-and-last-wrongful-act-i-will-ever-commit (accessed: 21.12.2020).

Prażmowska K., "Sprawa Al Mahdiego przed Międzynarodowym Trybunałem Karnym: przełomowy wyrok czy stracona szansa?", *Studia Prawnicze KUL* 2019, no. 2.

[17] UNESCO, Item 13 of the Provisional Agenda: Intangible cultural heritage in emergencies, LHE/19/14.COM/13 Rev. Paris, 5 December 2019, p. 8.

[18] *Ibidem*, p. 3.

[19] *Ibidem*.

[20] K. Prażmowska, "Sprawa Al Mahdiego przed Międzynarodowym Trybunałem Karnym: przełomowy wyrok czy stracona szansa?", *Studia Prawnicze KUL* 2019, no. 2, p. 308.

Schreiber H., "*Cultural genocide* – ludobójstwo kulturowe – kulturobójstwo: niedokończony czy odrzucony projekt prawa międzynarodowego?" [in:] *Kultura w stosunkach międzynarodowych*, vol. 1, *Zwrot kulturowy*, eds. H. Schreiber, G. Michałowska, Warszawa 2013.

Wierczyńska K., Jakubowski A., "Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case", *Chinese Journal of International Law*, December 2017, vol. 16, issue 4.

Zeidler K., "Prawa człowieka a normatywne podstawy ochrony dziedzictwa kultury" [in:] *idem*, *Zabytki. Prawo i praktyka*, Gdańsk – Warszawa 2017.

## Summary

*Katarzyna Stanik-Filipowska*

**A crime against cultural heritage in the aspect of the intangible value of a monument**

It is worthwhile to look at the present judgement in the aspect of the protection of the intangible value of monuments. The buildings destroyed by Ahmad al Mahdi represented intangible values decipherable and comprehensible to the people of Timbuktu and Mali, and to the international community alike. Their destruction resulted in the obliteration of not only monuments of tangible nature, but also of intangible monuments which are expressed in religion and rituals; in consequence, it was a crime that undermined the expression of identity of a specific social group. Therefore, the intangible value of monuments, underlined in the case being analysed, is not only expressed through its artistic or historic value, but it also consists of the spiritual heritage connected to the destroyed religious buildings.

**Keywords**: the intangible value of a monument, the spiritual heritage, the international community

## Streszczenie

*Katarzyna Stanik-Filipowska*

**Zbrodnia przeciwko dziedzictwu kultury w aspekcie niematerialnej wartości zabytku**

W ramach komentowanego orzeczenia warto zwrócić uwagę na aspekt ochrony niematerialnej wartości zabytku. Zniszczone przez Ahmada al Mahdiego budynki stanowiły o czytelnych i zrozumiałych (zarówno dla ludności Timbuktu i Mali, jak i społeczności międzynarodowej) wartościach niematerialnych. Zniszczenie ich spowodowało unicestwienie nie tylko zabytków w sensie materialnym, ale także w sensie niematerialnych wartości, które one niosły, wyrażających się w religii i obrzędach. Co za tym idzie, była to zbrodnia dotykająca wyrazu tożsamości określonej grupy społeczeństwa. Wartość niematerialna zabytku, co jest wprost akcentowane w analizowanej sprawie, nie wyraża się zatem wyłącznie w wartości artystycznej czy historycznej, ale składa się na nią także dziedzictwo duchowe, którego nośnikiem były zniszczone budynki religijne.

**Słowa kluczowe:** niematerialna wartość zabytku, duchowe dziedzictwo, społeczność międzynarodowa

# Restoration of protected buildings can never return them to their original brilliance and originality

Trial Chamber VIII of the International Criminal Court in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order of the International Criminal Court of 17 August 2017, ICC-01/12-01/15

**Reparations orders are supposed to demonstrate that even though perpetrators have not been punished for damaging protected buildings on the national level, this does not mean that they will not be punished for crimes on the international level.**

**Olivia Koperska**
Gdańsk
olivia.koperska@gmail.com
ORCID: 0000-0002-8342-7629

https://doi.org/10.26881/gsp.2021.2.17

## Commentary

1. The analysis of the International Criminal Court's judgement, which has inspired the writing of this commentary, requires an outline of the facts on which the reparations order was based. With the judgment of 27 September 2016, Trail Chamber VIII (Chamber) of the International Criminal Court (ICC or Court) convicted Ahmad Al Faqi Al Mahdi of the war crime of attacking protected buildings as a co-perpetrator under articles 8(2)(e)(iv) and 25(3)(a) of the Rome Statute (Statute).[1] After his admission of guilt, the Chamber sentenced Al Mahdi to nine years of imprisonment. The destruction of the protected buildings occurred in Timbuktu, Mali, between approximately 30 June 2012 and 11 July 2012 and the following buildings were either completely destroyed or severely damaged: (i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; (iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamad El Mikki Mausoleum; (vi) the Sheikh Abdoul Kassim Attouaty

[1] Judgement and Sentence of the International Criminal Court of 27 September 2016, ICC-01/12-01/15-171.

Mausoleum; (vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (viii) the door of the Sidi Yahia Mosque; and the two mausoleums adjoining the Djingareyber Mosque, namely the (ix) Ahmed Fulane Mausoleum and (x) the Bahaber Babadié Mausoleum. One of the Chamber's appointed experts explained why the protected buildings were so unique was because the city of Timbuktu was inscribed on the UNESCO World Heritage List in 1988 because of its essential role in the early spread of Islam in Africa. Timbuktu also has three great mosques that were restored in the sixteenth century that are of significant historical value.[2] The protected buildings were regarded as a significant part of the cultural heritage in both Timbuktu and Mali. The community in Timbuktu protected these buildings and performed daily maintenance. The protected buildings were also religious objects, including cemeteries and the sacred shrines of ancestors. At the time of the attack, all cemeteries and all the buildings located within them in Timbuktu were classified as world heritage under the protection of UNESCO. Moreover, after the conflict in Mali broke out, UNESCO included the whole of the city of Timbuktu on the List of World Heritage in danger.[3] In justification of the actions undertaken by the ICC, it is worth mentioning that in 2012 the Malian authorities submitted a self-report to the Court providing it with serious allegations of crimes being committed in Mali as of January 2012.

2. After a preliminary examination of this information, the ICC prosecutor eventually decided to initiate pre-trial proceedings since no criminal proceedings in this matter had been initiated under national jurisdiction in Mali. After issuing the judgment, the Chamber set a reparations phase calendar and after almost a year the Chamber received final submissions on reparations. The reparations were received only from the local community of Timbuktu, and no application was submitted solely for the interests of either the national or international communities. On 17 August 2017 under art. 75(1) of the Statute, the Court issued the Reparations Order of International Criminal Court of 17 August 2017 (ICC-01/12-01/15; hereinafter: Reparations Order) concluding that Al Mahdi was liable for €2.7 million in expenses for individual and collective reparations (para. 135 Reparations Order). The Chamber also imposed symbolic fines in amount of €1 for the Malian State and the international community represented by UNESCO (paras. 106, 107 Reparations Order). In accordance with the provision of art. 75(1) of the Statute "the Court shall establish principles relating to reparations (…) including restitution, compensation and rehabilitation (…) Court may determine the scope and extent of any damage, loss and injury (…)."

3. The Chamber distinguished three kinds of harm suffered from the attacks on the protected buildings. First, the Chamber concluded that Al Mahdi was responsible for irreversible damage to the protected buildings. The Chamber considered that the most appropriate way to address the damage would be collective reparations that

[2] Second Expert Report, ICC-01/12-01/15-214-AnxII-Red2, para. 41.
[3] Pre-Trial Chamber I of International Criminal Court of 24 March 2016, ICC-01/12-01/15, para. 36.

further should be tailored individually to each of the protected buildings according to each one's requirements (para. 67 Reparations Order). The Chamber set Al Mahdi's liability for this damage at €97,000 (para. 118 Reparations Order). The destruction of the protected buildings also influenced the daily lives of the inhabitants of Timbuktu, some of who were partially or exclusively dependent on the protected buildings. The attacks deprived them of their livelihoods and the means necessary for life. The Chamber concluded that the Al Mahdi crime caused losses of tourism and economic activity that resulted in economic harm that the Chamber estimated at €2.12 million (para. 128 Reparations Order). The Chamber again considered that, as a general rule, collective reparations would be the most appropriate (para. 82 Reparations Order). Lastly, the Chamber considered the damage to the protected buildings as moral harm to the community of Timbuktu, and also within this scope the Chamber concluded that collective reparations would be the most appropriate (para. 89 Reparations Order). The moral harm was not less important than the economic loss, and, therefore, Al Mahdi's liability was set at €483,000 (para. 133 Reparations Order).

4. The main issue in the case is whether the reparations imposed were adequate to the crime committed. The damage and demolition of the protected buildings was concluded to be a violation of art. 8(2)(e)(iv) of the Statute. This crime was an intentional, direct attack against buildings of significant value to Timbuktu, Mali, and the international community. Furthermore, these buildings were not used for military objectives, so it was not accidental destruction, which would be partially included in military losses. The protected buildings were recognized as religious, educational, historical buildings that were much favored and cherished by the local community. When issuing its reparations order, the Chamber made a fair distinction between the three kinds of harm inflicted and awarded monetary reparations for each of them separately. The Chamber decided to impose a penalty of €97,000 for the damage to the protected buildings based on the report obtained from UNESCO in which it was presented how much was spent on reconstruction. According to UNESCO's report, the actual cost of the restoration work of the protected buildings was about €96,600 (para. 116 Reparations Order). On this point, the Chamber's reasoning was appropriate, as the imposed amount was actually a one-to-one sum. The situation is different with regard to the second kind of harm that was consequential economic loss. The imposed amount of €2.12 million is certainly a significant amount, yet it is still worth going back to the original proposal of the Chamber's appointed experts, who estimated the economic harm to be over €46.6 million. The Chamber noted reasonably that this would be an excessive amount of loss for which Al Mahdi might be held liable. The €44.6 million included losses to another damaged city, Bamako, and the harm suffered by the international community, but this event was beyond the scope of the case.

5. Assessing Al Mahdi's liability for economic loss was most challenging for the Chamber, which had to determine the basis for equitable punishment that would be proportional to the extent of the damage to the protected buildings. The remarkable part

of assessing Al Mahdi's liability is the fact that the Chamber recognized the convicted person's indigence as relevant to the case. This should not be a factor affecting whether reparations are imposed or enforced. If the convicted person's indigence was recognized, then the Chamber would have had to set Al Mahdi's liability to almost zero (para. 113 Reparations Order). However, indigence can affect how reparations are enforced, e.g., by payment in installments (para. 114 Reparations Order). The appointed experts also estimated that economic activity in Timbuktu decreased after the war and the damage to the protected buildings. The Chamber found this to be a reasonable starting point in setting Al Mahdi's liability for economic harm. The reason why tourism decreased in Timbuktu was not only because of the attack on the protected buildings; the decrease was also affected by a number of other factors that were beyond the scope of the case. Eventually, the Chamber set Al Mahdi's liability for consequential economic loss at €2.12 million, which the Chamber considered satisfied the scope of the destruction of the protected buildings. Whether this was really the case and whether this was a sufficient amount of money to cover the economic losses is difficult to determine. The economic loss was nothing more than the economic activity in Timbuktu, which dropped by 10% because of the attack. This happened because tourists were afraid of visiting Timbuktu in wartime. When tourism disappears, many people in numerous branches of business lose their incomes. In the reparations order the Chamber relied upon several decisions on reparations, yet the determining liability system was not indicated. The assessment of liability in this specific scope was actually the Chamber's discretionary decision. Nevertheless, awarding compensation for economic loss or compensation for damage to protected buildings was not surprising, but awarding compensation for moral harm might have been unusual in relation to damage to buildings on an international level.

6. However, the Chamber decided that moral harm should be measured even though the restoration of the buildings could never return them to their original their brilliance and originality since historically authentic features had been lost forever. The Chamber noted that there was not enough information to assess this at the same level as the economic losses (para. 130 Reparations Order). The Chamber sought another benchmark. With the assistance of the appointed experts, they referred to a similar case, in which the compensation awarded for a damaged object was $23,000.[4] Subsequently, the experts revised this amount so that the compensation corresponded to the number of the protected buildings and eventually the experts came up with the amount of $437,000. The Chamber was satisfied with the experts' approach and considered that it would be a justifiable starting point for determining the approximate amount for compensation. The Chamber advised that the amount should be adjusted for inflation and then converted it into euros. The ultimate amount of compensation for moral harm was estimated to be €483,000. It is worth emphasizing one thing here;

[4] See: Permanent Court of Arbitration in the Hague, Eritrea-Ethiopia Claims Commission, *The State of Eritrea v. The Federal Democratic Republic of Ethiopia,* case number 2001-02.

although the Chamber did not know how to assess liability for moral harm with the amount of evidence gathered, it did note the importance and necessity of determining Al Mahdi's liability for moral harm. While it is straightforward to measure and determine the extent of liability for damaged buildings or the loss of economic benefits, it is more complicated to determine liability for moral harm. It might seem that the Chamber took the easy route as it recalculated the compensation from another case, but with all the evidence that the Chamber gathered, it was the best decision. Even though the compensation for moral harm would not fully compensate for the harm suffered, the Chamber indicated that the modalities of reparations mutually reinforced each other (para. 139 Reparations Order).

7. The fact that collective reparations should prevail over individual reparations was essential for the Chamber in determining Al Mahdi's liability. The Chamber awarded individual compensation only for those whose livelihoods depended on the damaged protected buildings and for those whose ancestors' burial sites were destroyed in the attacks (para. 145 Reparations Order). Except for reparations for those who were the most affected by the attack, the Chamber decided, with respect to the exceptional nature of the protected buildings to award collective reparations in the first place. Since the protected buildings were the heritage of the entire international community, the actions undertaken by the Chamber were justified. Undoubtedly, the reparations order was influenced by the practice of the International Criminal Tribunal for the former Yugoslavia.

8. The destruction of cultural heritage continues to provoke outrage from the international community, and although international law provides ineffective tools to stop these kinds of attacks, rulings such as the one discussed here might contribute to preventing further destruction and discouraging prospective perpetrators. Reparations orders are supposed to demonstrate that even though perpetrators have not been punished on a national level, this does not mean that their crimes will go unpunished on an international level. The intentional destruction of cultural heritage is prohibited by international law today. This provided for, *inter alia*, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict along with the Geneva Conventions of 1949 and their Additional Protocols. In addition to the protection of cultural heritage under international law, the statutes of international criminal tribunals, including ad hoc tribunals, have also provided liability for the destruction of cultural heritage. In Al Mahdi's case, the prosecutor pointed out that the attacks were against historical objects that were places of religious worship and that this affected the entire international community. The decision to bring Al Mahdi's case to the Court proved the great determination of the prosecutor since charges were made based on the violation of one single provision of the Statute. There was no guidance on legal considerations since this is the first judgment of its kind, and the Court had never dealt with such a case before. I respectfully agree with the reasoning of the Court as the Court carefully considered all available information at the time. Certainly, the methods

adopted in this judgment and reparations order will influence future judgments on the protection of cultural heritage.

9. In conclusion, the total amount of the reparations was not only to satisfy the international community for non-pecuniary damages, but it was also meant to be a nuisance to Al Mahdi. Criminal law has other functions to fulfil. For instance, the protective function is prospective as the role of criminal law is to protect legal interests such as life, freedom, health, property, and assets of substantial value. The guarantee function determines which acts are forbidden under penalty and what the rules are of criminal liability. Thus, by assumption, criminal law assures that a person who has not committed a crime will not be held liable. The role of the compensatory function of criminal law has been emphasized for quite some time. The compensatory function is intended to have an impact on the perpetrator and on society while the court is exercising the applicable law. It seems that the Chamber in its ruling was primarily based on the compensatory function of criminal law with an emphasis on protection of society, because, after all, Al Mahdi was sentenced to nine years imprisonment, and his liability was set at €2.7 million. This proves that the Chamber recognized the importance of cultural heritage. There is no doubt that cultural heritage defines communities regardless of their location. Cultural heritage helps communities identify with their past and traditions that have been passed down in them for generations. The demolition of the cultural heritage of the community of Timbuktu was not restricted only to the damage to the protected buildings, it also damaged their identity. Whether the judgment and reparations order will deter others from destroying cultural heritage objects, will definitely be discussed in the future. With all certainty, the Chamber has laid the foundations for further rulings that will not be restricted to the international level.

## Summary

*Olivia Koperska*

**Restoration of protected buildings can never return them to their original brilliance and originality**

The destruction of cultural heritage continues to outrage the international community, and although the tools of international law are ineffective in stopping such attacks, rulings such as the one discussed in this commentary might provide a chance to prevent further destruction and discourage prospective perpetrators. Reparations orders are supposed to demonstrate that even though the perpetrators have not been punished at the national level, this does not mean that they will not by punished for crimes on the international level. Beyond any doubt, cultural heritage defines communities regardless of location and helps communities identify with their past and traditions that have been passed down in them for generations. In the case discussed below, for the community of Timbuktu the demolition of cultural heritage did not mean only the damage to protected buildings, it also damaged their identity.

**Keywords:** cultural heritage, International Criminal Court, protected buildings, reparations

## Streszczenie

*Olivia Koperska*

**Odbudowa zniszczonych chronionych budynków nie przywróci im nigdy dawnego blasku ani oryginalnego wyglądu**

Zniszczenia dziedzictwa kultury wciąż wywołują oburzenie wśród społeczności międzynarodowej i chociaż prawo międzynarodowe jest nieskuteczne w powstrzymywaniu takich ataków na obiekty chronione, to komentowane orzeczenie daje szansę i nadzieję na zapobieżenie podobnym atakom w przyszłości. Ma ono na celu zniechęcenie potencjalnych sprawców, a także uświadomienie, że nawet jeśli sprawca nie zostanie pociągnięty do odpowiedzialności na poziomie krajowym, to nie oznacza to, że nie będzie odpowiadać na poziomie międzynarodowym. Nie ulega wątpliwości, że dziedzictwo kultury stanowi tożsamość danego społeczeństwa i pomaga w identyfikowaniu się z przeszłością oraz tradycjami przekazywanymi od pokoleń. Dla społeczności Timbuktu zniszczenie jej dziedzictwa nie oznaczało jedynie zniszczenia chronionych budynków, ale przede wszystkich zniszczenie ich tożsamości.

**Słowa kluczowe:** dziedzictwo kultury, Międzynarodowy Trybunał Karny, obiekty chronione, odszkodowanie

# Trade mark protection after the expiration of copyright: The municipality of Oslo's controversial way to protect the work of Gustav Vigeland

Judgment of the EFTA Court of 6 April 2017 in Case E-5/16
"Municipality of Oslo" E-5/16

1. **The registration as a trade mark of a sign that consists of works for which the copyright protection period has expired is not in itself contrary to public policy or the accepted principles of morality within the meaning of art. 3(1)(f) of Directive 2008/95/EC.**
2. **Whether registration for signs that consist of works of art as a trade mark is refused based on accepted principles of morality within the meaning of art. 3(1)(f) of Directive 2008/95/EC depends, in particular, on the status or perception of the artwork in the relevant EEA State. The risk of the misappropriation or desecration of a work could be relevant in this assessment.**
3. **The registration of a sign can only be refused based on the public policy exception provided for in art. 3(1)(f) of Directive 2008/95/EC if the sign consists exclusively of a work pertaining to the public domain and registration of this sign would constitute a genuine, sufficiently serious threat to a fundamental interest of society.**
4. **Article 3(1)(e)(iii) of Directive 2008/95/EC can apply to two-dimensional representations of three-dimensional shapes, including sculptures.**
5. **Article 3(1)(c) of Directive 2008/95/EC must be interpreted as being applicable to two-dimensional and three-dimensional representations of the shape of a good.**
6. **Article 3(1)(b) of Directive 2008/95/EC must be interpreted as meaning that where a sign is descriptive within the meaning of art. 3(1)(c) that sign necessarily lacks distinctiveness under art. 3(1)(b). Should the referring body find that the sign at issue is not descriptive, it can assess its distinctiveness for the purposes of art. 3(1)(b) in relation to the goods and services covered by that mark and to the presumed expectations of an average consumer of the category of goods and services in question, who is reasonably well-informed, observant, and circumspect.**

**Ewelina Szatkowska**
University of Gdańsk
ewelina.szatkowska@prawo.ug.edu.pl
ORCID: 0000-0001-6449-4204

https://doi.org/10.26881/gsp.2021.2.18

## Commentary

The municipality of Oslo applied for trade mark protection for a number of the works of art by Gustav Vigeland, one of the most eminent of Norwegian sculptors. The judgment mentions six works by the artist, including *Sinnataggen* (The Angry Boy)*, Monolitten* (The Monolith), and the statue *Egil Skallagrimsson*. The municipality obtained the copyright to these works from Vigeland before his death. With the copyright protection period about to expire and anxious not to lose control over the artist's work, the municipality applied to the Norwegian Intellectual Property Office (NIPO) to register the works as trade marks. NIPO refused to register most of them on the grounds of the lack of distinctiveness and their being determined by shape. The municipality of Oslo appealed to the NIPO Board of Appeal, which in turn addressed the EFTA Court[1] with six questions; the following three are the most relevant to this analysis: 1) Can the trade mark registration of works, for which the copyright protection period has expired, under certain circumstances, conflict with the prohibition in art. 3(1)(f) of the Trade Marks Directive on registering trade marks that are contrary to "public policy or (…) accepted principles of morality"? 2) If Question 1 is answered in the affirmative, will it have an impact on the assessment that the work is well-known and of great cultural value? 3) If Question 1 is answered in the affirmative, do factors or criteria other than those mentioned in Question 2 have a bearing on the assessment, and, if so, which ones?

The other questions concern registration obstacles that are determined by shape, signs that consist only of elements that can serve in trade to designate the characteristics of goods or services, and the descriptive nature of a sign and the relationship between a descriptive sign and the lack of any distinctive character (articles 3(1)(e)(iii), 3(1)(c), and 3(1)(b), respectively, of Directive 2008/95/EC). Because of the limited

[1] The CJEU could not judge this particular case, because Norway is not a Member State of the EU, but, it is a member of the European Free Trade Association (EFTA). The Member States of EFTA (Iceland, Liechtenstein, Norway, Switzerland) were obliged to implement Directive 2008/95/EC of 22 October 2008 for the purpose of the approximation of the laws of the Member States relating to trade marks. A relevant agreement between the EFTA Member States gave the EFTA Court jurisdiction over the case. Since the judgment concerns institutions that apply to all EU Member States, it is of vital, practical importance and could set standards of behavior in the registration of works from the public domain as trade marks; nonetheless, because of the gravity of the issues in question, the judgment of the CJEU is awaited impatiently.

length of this paper and the precedential effect of the judgment stating that conflict with public policy or accepted principles of morality could serve as a basis to refuse registering works from the public domain as trade marks, only the first three questions will be analyzed here. The judgment is based on the provisions of Directive 2008/95/EC, a text with European Economic Area (EEA) relevance. It should be noted that, although the above directive was fully replaced with Directive 2015/2436,[2] the judgment in question remains valid, since both directives set forth the same grounds for the refusal to register trade marks. In the part of the judgment discussed in this paper, the NIPO Board of Appeal intended to determine whether the registration as trade marks of works of which the copyright protection period has expired could conflict with public policy or accepted principles of morality, and if so, what criteria and circumstances could have an impact on negative decisions.

The Court stated that the protection of copyright and the protection of trade marks pursue different aims, apply under distinct legal conditions, and entail different legal consequences. Directive 2008/95/EC does not make any distinctions as to the legal nature of a sign of which a trade mark consists[3]. Thus, in principle, nothing prevents a sign from being protected under both trade mark and copyright law. Meanwhile, the expiry of the copyright protection period serves the principle of legal certainty by establishing a specific time framework, after which it is possible to legally profit from the creations of others. In this way, creative works previously protected by individual copyright enter the public domain.

The Court claimed that the basic function of a trade mark is to enable a consumer to distinguish goods supplied by one entrepreneur from goods supplied by another entrepreneur. Thus, the protection of trade marks ensures market transparency and assumes an essential role in a system of undistorted competition. In the case of trade marks, the period of protection is indefinite, since, even though it is granted for 10 years from application, compliance with certain formalities makes it possible to endlessly extend protection for subsequent 10-year periods, which, given the brand building process, is fully justified. Thus, given the potentially perpetual exclusivity granted to trade mark proprietors, there are certain conditions regarding absolute obstacles to registration or invalidation of trade marks. Concerning conflict with public policy or accepted principles of morality as the grounds to refuse registration as trade marks of works of art the copyright protection of which has expired, the Court quoted the opinion of Advocate General Ruiz-Járabo Colomer in the Shield Mark case. The opinion rightly observed that a trade mark based entirely on copyright protected work carries a certain risk of monopolization of the sign for a specific purpose, as it grants the mark's proprietor such exclusivity and permanence of exploitation that not even the author of the work or his estate enjoyed.

---

[2] Directive (EU) 2015/2436 of the European Parliament and Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, OJ L 336, 23.12.2015, p. 1.

[3] The same in Directive 2015/2436.

As to the refusal to register trade marks on the grounds of a lack of distinctiveness and descriptiveness (art. 3(1)(b) and (c)), the Court rightly observed that they are not permanent. The Court stated that they are an initial obstacle that could be subsequently overcome through use. A sign can acquire secondary distinctiveness through appropriate targeted marketing campaigns and the creation of a strong link between a work and goods (services), then an averagely informed, reasonably aware, perceptive consumer would recognize the work not as an expression of the creativity of the author or as part of the public domain common to all mankind, but merely as an indication of commercial origin. Furthermore, considering the above circumstances, it should be noted that a trade mark can be refused registration with regard to one category of goods or services, while being granted registration for another category.[4] Consequently, the refusal to register on the grounds of these circumstances does not guarantee that the work remains within the public domain.

Considering conflict with public policy or accepted principles of morality (art. 3(1)(f)), the Court observed that this provision covers two alternatives, each of which can serve as grounds for refusal. In some cases the two alternatives overlap. According to the Court, refusal based on grounds of conflict with public policy must be based on objective criteria whereas "accepted principles of morality" concern subjective values. Undoubtedly, the fact that a work used to be protected under copyright cannot in itself serve as grounds for refusal of registration. The Court noted that art. 3(1)(f) applies to marks that are considered offensive by consumers with average sensitivity and tolerance thresholds. Meanwhile, certain works of art enjoy a particular status as parts of a nation's cultural heritage. Moreover, the registration of such trade marks can even be considered a misappropriation or a desecration, in particular if it is granted for goods (services) that contradict the values of the artist or the message communicated through their artwork. Therefore, the Court stated that the possibility cannot be ruled out that registration of such a trade mark could be perceived by the average consumer in the EEA State in question as offensive and therefore as contrary to the accepted principles of morality. However, such an assessment must be carried out on a case-by-case basis and it must take into account the status or perception of the artwork in the relevant State, considering the risk of misappropriation and desecration. Meanwhile, as regards contradiction with public policy, the principles and standards that are of fundamental concern to the state and the whole of society must be considered. These circumstances can only be relied on if there is a genuine and sufficiently serious threat to a fundamental interest of society. Meanwhile, it is necessary to grant the competent national authorities some discretion since standards and principles differ among countries.

To sum up, the Court concluded that: 1) the registration of works pertaining to the public domain as trade marks is not in itself contrary to public policy or accepted principles of morality; 2) whether registration for signs that consist of works of art as

[4] Cf. Nice Classification (https://euipo.europa.eu/ohimportal/pl/nice-classification) (accessed: 31.12.2020).

trade marks is refused based on accepted principles of morality depends, in particular, on the status or perception of the artwork in the relevant EEA State, and the assessment can be influenced by the risk of misappropriation or desecration of a work of art; 3) the registration of signs can only be refused based on the public policy exception if the signs consist exclusively of works pertaining to the public domain and if the registration of these signs would constitute genuine, sufficiently serious threats to the fundamental interests of society.

As concerns this conclusion, it should be noted that, as the Court rightly observed, the refusal to register a trade mark on the grounds of a lack of distinctiveness or descriptiveness does not guarantee that a work will remain in the public domain. Both the EU and national legislations[5] have the institution of secondary distinctiveness that enables the registration of marks that were not originally eligible for protection. Thus, if distinctiveness can be acquired by color *per se*,[6] then, undoubtedly, through effective marketing, the work of time can also, over time, become associated with a specific product (service). Note should be taken of the risk associated with a growing number of trade mark applications concerning works of art that enable the unique visual identification of goods or services offered for sale. On the one hand, museums, or other entities that own works of art, try to register them as trade marks in order to protect them from being used in an unauthorized or improper manner or in a manner that does not harmonize with the person of the creator (or their creation).[7] On the other hand, entrepreneurs use recognizable works of art as trade marks for *stricte* marketing purposes.[8] The key question is the legal evaluation of such endeavors. Undoubtedly, intellectual property laws offer cumulative protection of intellectual creations, which is the case with works of art and trade marks. However, Martin Senftlenen notes that Vigeland's case and the prejudicial questions that it triggered differed markedly from typical cases of copyright and trade mark rights cumulation.[9] The practice of regis-

---

[5] Cf. art. 130 of the Polish Industrial Property Law Act of 20 June 2000 (consolidated text: *Journal of Laws* 2021, item 324), art. 4(4) of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks and art. 7(3) of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ L 154, 16.06.2017, p. 1).

[6] Cf., for example, a European Union trade mark consisting solely of the color black, registered to a Portuguese toilet paper manufacturing company (004899233), and Polish trade marks of the color purple registered to Play3GNS sp. z o.o. s.k. (R.310678), and the color orange registered to Orange Brand Services Ltd. (R.271601).

[7] Cf. the following patent application numbers in the Patent Office of the Republic of Poland: Z.236052 (*Czwórka* [Team of Four] by Józef Chełmoński), Z.235061 (*Pochodnie Nerona* [Nero's Torch] by Henryk Siemiradzki), Z.236957 and Z.403998 (*Dama con l'ermellino* [Lady with an Ermine] by Leonardo da Vinci).

[8] Cf. EU trade marks: 010625143 (*Het melkmeisje* [The Milkmaid] by Jan Vermeer registered for Nestle S.A) and 01136364 (*Meisje met de parel* [Girl with a Pearl Earring] by Jan Vermeer registered for Food Investments Group B.V.).

[9] M. Senftleben, "Vigeland and the Status of Cultural Concerns in Trade Mark Law – The EFTA Court Develops More Effective Tools for the Preservation of the Public Domain," *IIC – International Review of Intellectual Property and Competition Law* 2017, vol. 48, issue 6, pp. 683–720.

tering as trade marks works of art the copyright of which has expired purportedly in order to protect them from unauthorized use as well as *stricte* marketing registrations intended to build positive associations raises serious concerns.

What is groundbreaking about the judgment in question is that it protects the public domain from being diminished by the registration of said trade marks by analyzing possible conflict with public policy or accepted principles of morality.[10] It should be noted that the judgment concerned works of art that have only just entered or were about to enter the public domain. Nonetheless, it is of no relevance here whether we discuss works of art that have only just entered the public domain or belonged to the public domain before there were copyright regulations. Having determined that the registration of works pertaining to the public domain as trade marks is not in itself contrary to public policy or accepted principles of morality, the Court simultaneously admitted that this could possibly be an obstacle for registration in such cases, making a distinction between the contradiction with public policy as objective grounds for refusal because of a serious threat to the public interest, and, in contradiction with accepted principles of morality as subjective grounds, measured by the average sensitivity of consumers.[11] The clear distinction made by the Court between the two circumstances is seen as positive. A mark is contrary to public policy if it is in conflict with legal norms or principles that are fundamental and crucial for a society in a given territory to be able to function in a way that ensures its maintenance and development. Meanwhile, a trade mark is contrary to principles of morality if it is in conflict with the overall accepted and preserved principles of morality practiced in a given society, including customs that exist both in the public sphere and among members of a society that are considered to be positive and desirable.[12] Insofar as conflict with public policy has its origin in a mark itself and concerns its content, conflict with accepted principles of morality can involve not only the form of the mark but also the consequences it triggers in legal transactions in the broad meaning of the term, which includes the consequences of its exploitation.[13] In this particular case, the consequences are reduced public domain and limited access to cultural heritage.

The Court's analysis does not state explicitly that the registration of works of art pertaining to the public domain by entities that possess them cannot be seen as the protection of cultural heritage. Insofar as the intention is right – to protect a work of art from private commercial exploitation – the means to that end are wrong as they

---

[10] S. Stanisławska-Kloc, "Rejestrowanie utworów jako znaków towarowych" [in:] *100 lat ochrony własności przemysłowej w Polsce. Księga jubileuszowa Urzędu Patentowego Rzeczypospolitej Polskiej*, ed. A. Adamczak, Warszawa 2018.

[11] The Government of the United Kingdom claims to the contrary that this provision cannot be relied upon to prevent the registration of works pertaining to the public domain and adds that registration can be denied on the grounds of a lack of distinctiveness or bad faith if the registration is sought merely to obtain a monopoly.

[12] M. Trzebiatowski, "Znaki towarowe i prawa ochronne" [in:] *Prawo własności przemysłowej. Komentarz*, ed. J. Sieńczyło-Chlabicz, Warszawa 2020, pp. 757–758.

[13] *Ibidem*; cf. Judgment of the Polish Supreme Administrative Court of 13 September 2006, II GSK 113/06.

limit access to cultural heritage. The Court failed to analyse this issue even though the municipality of Oslo claimed it needed to control Vigeland's heritage because of its efforts to protect and promote his work.

It should be noted that the registration obstacle of contradiction with public policy or accepted principles of morality is founded on general clauses, which are imprecise and open-ended. They are supposed to enable case-based decision making. General clauses leave some room for discretion in decision making to enable the competent authority to make the best decision. The argument of contradiction with public policy or accepted principles of morality constitutes, the same as the argument of bad faith, *quasi* open grounds for the refusal to grant trade mark protection. This could be seen as an attempt to make limitations on exclusive rights more flexible.[14] The final question is whether the argument is proper and acceptable in the international forum, or perhaps, considering attempts to register works of art pertaining to the public domain as trade marks, the catalog of registration obstacles should be revised and a new obstacle directly addressing this type of registration should be added.[15] It is worth mentioning here the decision of the Patent Office of the Republic of Poland (UPRP) rejecting the application of the National Museum in Krakow to register Jan Matejko's painting *Bitwa pod Racławicami* (Battle of Racławice) as a trade mark.[16] The decision was justified by the fact that the work constitutes national heritage and as such, it should not be used for commercial purposes; national heritage must not be appropriated by a single entity as this is against public interest and contrary to social standards.

In these kinds of cases, the argument of contradiction with public policy or accepted principles of morality can be based on evaluating the status of a work of art and its public reception. While this should not be problematic for famous works that are important for cultural heritage and are of historical, patriotic, or religious significance, there can be some doubt as to less popular or unknown works that are important, for example, for a local community. The question is then whether it is up to patent office experts to evaluate how famous a work is in a given country and to analyse the potential risk to the fundamental public interest of registering that work as a trade mark. The municipality of Oslo commented on this problem in its appeals. I believe that, insofar as the evaluation of works of major cultural significance and the refusal to register on the grounds of contradiction with public policy should not be particularly problematic, contradiction with the principles of morality and the sensitivity of an average person may be quite difficult to evaluate. The open question is then whether contradiction is supposed to concern only the content of a trade mark or also the consequences of

[14] For example, Łukasz Żelechowski presented this opinion in a talk entitled "Conflict with Public Policy or Accepted Principles of Morality as an Obstacle to Trade Mark Registration" delivered at an academic meeting of the Department of Intellectual Property Rights, Faculty of Law and Administration, Jagiellonian University on 4 December 2020.

[15] An example of contradictory decisions concerning the same form of a trade mark is the registration of Rembrandt's painting *De Nachtwacht* (The Night Watch), which was denied by the Benelux Organization for Intellectual Property but successfully completed before the EUIPO; cf. Filing number: 016613903.

[16] Decision of the UPRP of 23 November 2005, case DT – 8/05.

its presence in legal trade. Thus, the judgment of the EFTA, although extremely valuable and precedential, triggers numerous questions and doubts, and the way we solve them will have serious practical consequences for both trade mark law and cultural heritage protection.

## Conclusions

1) Contradiction with public policy or accepted principles of morality can constitute an effective registration obstacle for works in the public domain.
2) Contradiction with public policy as objective grounds for refusal due to a serious threat to the public interest should be distinguished from contradiction with the accepted principles of morality as subjective grounds measured by the average sensitivity of consumers, and it should be noted that the former basically relates to the content (form) of a trade mark, while the latter concerns not only the content (form) of the mark but also the consequences of its use in trade.
3) The registration of works of art pertaining to the public domain as trade marks by museums and other entities under the authority of which these works remain cannot be regarded as a form of cultural heritage protection and should be unacceptable.
4) The registration of works pertaining to the public domain diminishes the public domain and limits free access to art that is supposed to inspire future generations.

## Literature

Senftleben M., "Vigeland and the Status of Cultural Concerns in Trade Mark Law – The EFTA Court Develops More Effective Tools for the Preservation of the Public Domain," *IIC – International Review of Intellectual Property and Competition Law* 2017, vol. 48, issue 6.

Stanisławska-Kloc S., "Rejestrowanie utworów jako znaków towarowych" [in:] *100 lat ochrony własności przemysłowej w Polsce. Księga jubileuszowa Urzędu Patentowego Rzeczypospolitej Polskiej*, ed. A. Adamczak, Warszawa 2018.

Trzebiatowski M., "Znaki towarowe i prawa ochronne" [in:] *Prawo własności przemysłowej. Komentarz*, ed. J. Sieńczyło-Chlabicz, Warszawa 2020.

## Summary

*Ewelina Szatkowska*

**Trade mark protection after the expiration of copyright:
The municipality of Oslo's controversial way to protect the work of Gustav Vigeland**

This commentary analyzes the judgment of the European Free Trade Association (EFTA) Court of 6 April 2017 in Case E-5/16 concerning trade mark protection of works pertaining to the public domain. The judgment relates to the intention of the municipality of Oslo to register multiple works of art by Gustav Vigeland, one of the most eminent of Norwegian sculptors, as trade marks. The Court thoroughly analyzed the grounds for refusing the registration and focused on the contradiction with public policy or accepted principles of morality and the issue of cultural heritage.

**Keywords:** Copyright, principles of morality, public domain, public policy, trade mark

## Streszczenie

*Ewelina Szatkowska*

**Prawna ochrona znaku towarowego po wygaśnięciu autorskich praw majątkowych – kontrowersyjny sposób miasta Oslo na ochronę twórczości Gustawa Vigelanda**

W glosie poddano analizie orzeczenie Trybunału Europejskiego Stowarzyszenia Wolnego Handlu z dnia 6 kwietnia 2017 r. w sprawie E-5/16 (EFTA Court), które dotyczy uzyskania prawnej ochrony znaków towarowych, obejmującej utwory znajdujące się w domenie publicznej. Glosowane rozstrzygnięcie odnosi się do zamiaru rejestracji przez miasto Oslo wielu dzieł Gustava Vigelanda, jednego z najsłynniejszych norweskich rzeźbiarzy, jako znaków towarowych. Trybunał dokonał bardzo szczegółowej analizy podstaw odmowy takiej rejestracji, biorąc pod uwagę przede wszystkim sprzeczność z porządkiem publicznym lub dobrymi obyczajami oraz kwestie związane z dziedzictwem kultury.

**Słowa kluczowe:** dobre obyczaje, domena publiczna, porządek publiczny, prawo autorskie, znak towarowy

## The rules for imposing a financial penalty for the offence of destruction of a historical monument

Judgement of the Regional Court in Toruń of 29 March 2018, IX Ka 688/17

**"However, the claim of glaring incommensurability of the financial penalty imposed on the defendant turned out to be justified. Taking into account the nature and the circumstances in which the criminal offence was committed, the degree of guilt and social harmfulness of the Act, and the defendant's financial capacities, the Court of Appeal concluded that the amount of the day fine unit (50 PLN) imposed by the court *meriti* will not ensure adequate execution of all the goals of punishment, in particular considerations pertaining to specific and general prevention. The punishment imposed could not be deemed onerous, which, after all, is one of its goals, because punishment should also have a deterrent effect and discourage the perpetrator from breaching the legal order again.**

**(…)**

**Both the educational objectives concerning the defendant as well as the needs related to the shaping of the society's legal awareness made it necessary – in the view of the Court of Appeal – to condemn the defendant to a hefty fine. Therefore it was necessary to increase the amount of each day fine unit to 400 PLN. This amount is adequate to the defendant's financial capacities – in other words: 200 instalments of financial penalty (which the court of first instance rightfully deemed to be a justified punishment for the offence committed by the defendant) will constitute an adequate sanction for a person as wealthy as the defendant, provided that the above-specified amount of each day fine unit is accepted. The amount of fine at the rate hitherto in force would not meet the preventive objectives of this punishment.**

**(…)**

**The fine imposed by the court *meriti* amounting to 10,000 PLN was so low that it actually made the defendant's lawlessness profitable because if the defendant had to meet the requirements of the historic monument inspector, he would have to spend a much larger sum; therefore, failure to increase the level of the burden in this fine would encourage similar lawless behaviour in the future, both as regards the defendant and any potential imitators".**

**Bartłomiej Gadecki**
Regional Court in Olsztyn
gadek82@poczta.onet.pl
ORCID: 0000-0001-9542-3919

https://doi.org/10.26881/gsp.2021.2.19

## Commentary

In the case which is the object of the present commentary, by the judgment of the Regional Court, the defendant was found guilty of "having destroyed, between March and September 2016, in the locality of O., within the area of the palace and park complex, a stable building together with the partly preserved equipment for horse stalls, which were listed in the register of historical monuments by the decision of the Voivodship Conservation Officer of Historical Buildings and Monuments in T. of 3 March 1997 (...), through the execution of construction work which consisted in the demolition of the roof, the ceiling, walls, and foundations of the building, and the subsequent reconstruction, without prior notification of the work to the relevant institution and without the authorisation of the (...) Conservation Officer of Historical Buildings and Monuments in T.", i.e. committing the criminal offence covered by art. 108 para. 1 of the Act of 23 July 2003 on the protection and preservation of monuments (consolidated text: *Journal of Laws* of 2021, item 710) in conjunction with art. 90 of the Act of 7 July 1994, Construction law (consolidated text: *Journal of Laws* of 2020, item 1333, with amendments) in connection with art. 11 para. 2 of the Act of 6 June 1997 – Criminal Code (consolidated text: *Journal of Laws* of 2020, item 1444), and on the basis of art. 108 para. 1 of the Act of 2003 on the protection and preservation of monuments in connection with art. 11 para. 3 of the Criminal Code, on the application of art. 37a of the Criminal Code the defendant was sentenced a fine of 200 daily instalments, whereby a single day fine unit amounted to 50 PLN.[1]

Having considered the appeal, the Regional Court in Toruń changed the contested sentence in such a way that the specified amount of each day fine unit was increased to the amount of 400 PLN. In its justification of the sentence, the Regional Court pointed out the following: "However, the claim of the glaring incommensurability of the financial penalty imposed turned out to be justified. Taking into account the nature and the circumstances in which the criminal offence was committed, the degree of guilt and social harmfulness of the Act, and the defendant's financial capacities, the Court of Appeal concluded that the amount of the day fine unit (50 PLN) imposed by the court *meriti* will not ensure adequate execution of all the goals of punishment, in particular those considerations pertaining to specific and general prevention. The punishment imposed could not be deemed onerous, which, after all, is one of its goals,

[1] The sentence of the Regional Court in Toruń of 29 March 2018, IX Ka 688/17, Portal Orzeczeń Sądów Powszechnych, http://orzeczenia.ms.gov.pl/search/advanced (accessed: 20.03.2021).

because punishment should also have a deterrent effect and discourage the perpetrator from breaching the legal order again".[2] The Court further argues that "both the educational objectives concerning the defendant as well as the needs related to the shaping of the society's legal awareness made it necessary – in the view of the Court of Appeal – to condemn the defendant to a hefty fine. Therefore it was necessary to increase the amount of each day fine unit to 400 PLN. This amount is adequate to the defendant's financial capacities – in other words: 200 instalments of financial penalty (which the court of first instance rightfully deemed to be a justified punishment for the offence committed by the defendant) will constitute an adequate burden for a person as wealthy as the defendant only provided that the above-specified amount of each day fine unit is accepted. The amount of the fine at the rate hitherto in force would not meet the preventive objectives of this punishment".[3]

It is impossible to agree with the view expressed in the sentence and with the level of the fine imposed by the court. According to art. 33 para. 1 of the Criminal Code a fine is imposed in day fine units, by specifying the number of instalments and the amount of a single day fine unit; unless the Act states otherwise, the lowest number of instalments amounts to 10, while the highest number amounts to 540. At the same time art. 33 para. 3 of the Criminal Code indicates that while specifying the day fine unit the court takes into account the perpetrator's income, his or her personal and family situation, property relations, and earning potential; a day fine unit cannot be lower than 10 PLN, nor can it exceed 2,000 PLN.

Therefore, a financial punishment is imposed in the instalment system in two stages. In the first stage, the number of day fine units is specified taking into account the directives mentioned in the articles 53 and 54 of the Criminal Code (i.e. the number of day fine units reflects the degree of lawlessness of the criminal offence ascribed to the perpetrator); whereas in the second stage, the amount of a single day fine unit is specified taking into account the recommendations pointed out in art. 33 para. 3 of the Criminal Code reflecting the perpetrator's financial status (i.e. the amount of a single day fine unit reflects the perpetrator's financial status).[4]

---

[2] *Ibidem*.

[3] *Ibidem*.

[4] See: the sentence of the Court of Appeal in Wrocław of 3 December 2014, II AKa 358/14, Lex; K. Buchała [in:] K. Buchała, A. Zoll, *Kodeks karny. Część ogólna. Komentarz do art. 1–116 kodeksu karnego*, Kraków 1998, pp. 313-314; M. Melezini [in:] *System Prawa Karnego*, vol. 6, *Kary i inne środki reakcji prawnokarnej*, ed. M. Melezini, Warszawa 2016, p. 122; *idem*, "System wymiaru grzywien w nowym Kodeksie karnym", *Monitor Prawniczy* 1998, no. 3, p. 90; J. Majewski, "O niektórych wątpliwościach związanych z wykładnią przepisów dotyczących orzekania grzywny w nowym kodeksie karnym", *Palestra* 1998, no. 3–4, p. 7; *idem* [in:] *Kodeks karny. Część ogólna. Komentarz*, vol. 1, *Komentarz do art. 1-116 k.k.*, ed. A. Zoll, Kraków 2004, pp. 613–615; Z. Sienkiewicz, "Z rozważań o celach kary grzywny i dyrektywach jej wymiaru" [in:] *Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Tomasza Kaczmarka*, ed. J. Giezek, Kraków 2006, pp. 575–576; A. Marek, *Kodeks karny. Komentarz*, Warszawa 2005, p. 184; V. Konarska-Wrzosek [in:] *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Warszawa 2016, pp. 208–209; J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa 1998, p. 90; J. Wojciechowska [in:] *Kodeks karny. Część ogólna. Komentarz*, ed. G. Rejman, Warszawa 1999, p. 847.

Jarosław Majewski is correct in his view that "the basic idea behind the instalment model (…) is a diligent and clear division of the process of imposing a fine into two stages: the stage of specifying the number of day fine units and the stage of specifying the amount of a single day fine unit. The objectives of the procedure in those two stages are diametrically different. In the first one, deciding on the severity of the sanction in a strict sense is the key issue, whereas the second stage involves a purely technical procedure which aims at ensuring that the given fine, consisting of a specific number of day fine inits, is, in fact, equally severe for all perpetrators upon whom it is imposed, regardless of the differences in their financial status".[5] In addition, Majewski emphasizes that art. 33 para. 3 of the Criminal Code offers a closed catalogue of circumstances which are intended to delimit the amount of the day fine unit.[6]

In the case which is the object of the present commentary, the Regional Court in Toruń was wrong to indicate that such circumstances as the nature and circumstances of the criminal offence committed, the degree of guilt, social harmfulness, and considerations pertaining to specific and general prevention make it impossible for the amount of the day fine unit (50 PLN) to ensure adequate execution of all the goals of punishment, and that, thus, they warrant an increase in each day fine unit to the amount of 400 PLN. Existing case law was right to establish that "the measure of the severity of the fine is the number, not the amount of day fine units. Hence, specifying the day fine unit imposed by the court is not a procedure aimed at executing directly a penal function, but its objective is to establish the real fiscal burden of that sanction for the individual perpetrator, in accordance with the directives included in art. 33 para. 3 of the Criminal Code".[7] On the other hand, there were circumstances, indicated also by the Regional Court in Toruń,[8] that justified the increase of the day fine unit, such as the defendant's financial capacities – the defendant was an entrepreneur and as a result of his business activity earned a high income; his financial situation was above average.

Therefore, bearing in mind the facts of the case at hand, and taking into account the directives concerning the degree of sanction, as specified in art. 53 paras. 1 and 2 of the Criminal Code, the Regional Court should have changed the contested sentence by increasing the number of day fine units and – taking into account the content of art. 33 para. 3 of the Criminal Code in connection with the defendant's financial capacities – by also increasing the amount of the day fine unit rather than merely increasing the amount of each day fine unit.

It is evident that the ratio of the number of day fine units and the specified amount of a single day fine unit will yield the amount of the fine that the convicted person is

---

[5] J. Majewski [in:] *Kodeks karny. Część ogólna. Komentarz*, vol. 1, *Komentarz do art. 1–116 k.k.*…, pp. 611–612.

[6] *Ibidem*, p. 616.

[7] The sentence of the Supreme Court of 16 April 2015, V KK 407/14, Baza Orzeczeń Sądu Najwyższego, http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx (accessed: 13.03.2021).

[8] See: The sentence of the District Court in Toruń of 29 March 2018, IX Ka 688/17.

supposed to pay.[9] Nevertheless, it is not possible to treat the amount of the fine to be paid by the convicted person (calculated by multiplying the number of day fine units by the specified amount of a single day fine unit) as the basis for assessing whether a punishment is glaringly incommensurable to the criminal offence committed by the defendant. It runs counter to the principle of imposing the fine in two stages, which is established in the Criminal Code. Therefore, it is not possible, either, to agree with the standpoint of the Regional Court in Toruń that "the fine decreed by the court *meriti* amounting to 10,000 PLN was so low that it actually made the defendant's lawlessness profitable because if the defendant had to meet the requirements of the historic monument inspector, he would have to spend a much larger sum; therefore, failure to increase the level of the burden of this fine would encourage similar lawless behaviour in the future, both as regards the defendant and his potential imitators".[10]

Finally, it should be emphasized that "the circumstance which constitutes an indication of committing an act which is forbidden by penal act and has already been taken into account by the lawmaker in the process of outlining the boundaries of legal threat (penal sanction) cannot be treated as an additional circumstance influencing the amount of punishment within this very sanction, unless it is subject to degrees as regards its intensity or quality".[11] Therefore, while justifying the imposition of a more severe sentence, it is necessary to indicate that, for instance, the destruction involved a unique historical monument, having an exceptional historical, artistic, and scientific value etc.

## Literature

Buchała K., Zoll A., *Kodeks karny. Część ogólna. Komentarz do art. 1–116 kodeksu karnego*, Kraków 1998.

Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, Warszawa 2016.

Majewski J., "O niektórych wątpliwościach związanych z wykładnią przepisów dotyczących orzekania grzywny w nowym kodeksie karnym", *Palestra* 1998, no. 3–4.

Marek A., *Kodeks karny. Komentarz*, Warszawa 2005.

Melezini M., "System wymiaru grzywien w nowym Kodeksie karnym", *Monitor Prawniczy* 1998, no. 3.

Melezini M. (ed.), *System Prawa Karnego*, vol. 6, *Kary i inne środki reakcji prawnokarnej*, Warszawa 2016.

Rejman G. (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 1999.

Sienkiewicz Z., "Z rozważań o celach kary grzywny i dyrektywach jej wymiaru" [in:] *Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Tomasza Kaczmarka*, ed. J. Giezek, Kraków 2006.

Wojciechowski J., *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa 1998.

Zoll A. (ed.), *Kodeks karny. Część ogólna. Komentarz*, vol. 1, *Komentarz do art. 1–116 k.k.*, Kraków 2004.

[9] The sentence of the Court of Appeal in Wrocław of 3 December 2014, II AKa 358/14.

[10] The sentence of the Regional Court in Toruń of 29 March 2018, IX Ka 688/17.

[11] The sentence of the Court of Appeal in Wrocław of 9 September 2009, II AKa 228/09, Lex.

## Summary

*Bartłomiej Gadecki*

**The rules for imposing a financial penalty for the offence of destruction of a historical monument**

The author does not agree with the standpoint of the Regional Court in Toruń that circumstances such as the nature and the circumstances in which a criminal offence was committed, the degree of guilt and social harmfulness of an act, as well as considerations pertaining to specific and general prevention warrant an increase in each daily rate of financial penalty imposed on the perpetrator of the destruction of a historical monument. It has been emphasized that the criminal code imposes a financial penalty according to the rate system in two stages. In the first stage, the number of day fine units is specified (taking into account the directives mentioned in articles 53 and 54 of the Criminal Code); in the second stage, the amount of a single day fine unit is specified (taking into account the recommendations pointed out in art. 33 para. 3 of the Criminal Code reflecting the perpetrator's financial status). Therefore, the circumstances indicated by the Regional Court in Toruń warranted the increase of the number of daily instalments, whereas the perpetrator's financial status warranted an increase in the day fine unit.

**Keywords:** criminal code, financial penalty, historical monument

## Streszczenie

*Bartłomiej Gadecki*

**Zasady wymiaru kary grzywny za przestępstwo zniszczenia zabytku**

Autor nie zgadza się ze stanowiskiem Sądu Okręgowego w Toruniu, że takie uwarunkowania, jak charakter i okoliczności popełnienia przestępstwa, stopień winy i społecznej szkodliwości czynu oraz względy prewencji szczególnej i ogólnej przemawiają za podwyższeniem wysokości każdej stawki dziennej grzywny orzeczonej wobec sprawcy przestępstwa zniszczenia zabytku. Podkreślono, że w kodeksie karnym kara grzywny orzekana jest w systemie stawkowym dwuetapowo. Na pierwszym etapie następuje określenie liczby stawek dziennych (przy uwzględnieniu dyrektyw wymienionych w art. 53 i 54 k.k.); natomiast na drugim następuje ustalenie wysokości jednej stawki (mając na uwadze wskazania określone w art. 33 § 3 k.k., obrazujące sytuację majątkową sprawcy). Zatem okoliczności wskazane przez Sąd Okręgowy w Toruniu przemawiały za podwyższeniem liczby stawek dziennych. Natomiast za podwyższeniem wysokości stawki dziennej grzywny przemawiała sytuacja materialna oskarżonego.

**Słowa kluczowe**: kodeks karny, kara grzywny, zabytek

# Denial of restitution in the United States Court of Appeals' verdict in case of *Marei von Saher v. Norton Museum of Art at Pasadena and Norton Simon Art Foundation*

*Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 16-56308 (9th Cir. 2018), 30 July 2018

**The act of state doctrine requires that the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid, it should not violate the foreign affairs doctrine, and the federal government's exclusive power to make and resolve war, including the resolution of war claims.**

**Paula Chmielowska**
Gdańsk
paula.chmielowska@gmail.com
ORCID: 0000-0002-4708-2504

https://doi.org/10.26881/gsp.2021.2.20

## Commentary

## 1. Factual and legal status

This case centers on the two Renaissance masterworks *Adam* and *Eve* painted by Lucas Cranach the Elder, referred to below as the paintings or the Cranachs. In 1931, Jacques Goudstikker, a Dutch art dealer, purchased the Cranachs from the Soviet Union at an auction in Berlin of what was known as the Stroganoff Collection.[1] The paintings then became the property of the art dealership in which Goudstikker was principal shareholder, referred to below as the Goudstikker firm or the firm.

Goudstikker specialized in paintings by Dutch and Flemish Masters.[2] He was married to Désirée von Halban-Kurz, a Viennese opera singer. On 14 May 1940, as the war progressed and the Germans invaded the eastern Netherlands, the Goudstikker family

[1] The U.S. district court found that the Stroganoff family "never owned" the Cranachs, a fact that was contested by the museum and muddied by the record of evidence that never appeared in court.

[2] B. Dermasin, *Art and Cultural Heritage Law: Developments and Challenges in Past and Presents*, Conference, Maastricht, 27–28 March 2011.

decided to flee to England. Goudstikker died during the sea voyage, but his wife and son made the passage safely. The trustee of the art dealership who was appointed by Goudstikker to manage the art collection and business died the day following Goudstikker's death. Goudstikker's other employees, Arie Ten Broek and Jan Dik, requested that Alois Miedl, a German banker and businessman, assume the management of the firm. On 1 July 1940, Miedl purchased the Goudstikker firm by a sale agreement that included all assets together with the trading name of the firm. Shortly afterwards, Miedl concluded another sale agreement with Hermann Göring. These two sale agreements were concluded on 13 July 1940. The first was between Goudstikker, represented by his employee Ten Broek, who was temporarily overseeing the business in the wake of the death of the previous trustee, and Miedl, regarding Goudstikker's real estate (family villa, castle), company name, and co-ownership of the meta-paintings,[3] for just NLG 550,000. The second agreement was between between Miedl and Göring, Commander-in-Chief of the German Luftwaffe, who was very interested in the collection, for all art objects belonging to Goudstikker's company that were located in the Netherlands on 26 June 1940 for NLG 2,000,000 (the equivalent of over $20 million at today's value). He subsequently acquired 13 of the meta-paintings, and transferred most of the collection to his mansion near Berlin.

After the Second World War, the Allied Forces in Germany assembled hundreds of art objects formerly owned by Göring that had been taken from Goudstikker, including the Cranachs. The process of restitution for all looted items was organized according to the policy of external restitution, which meant that looted art objects were not returned directly to the dispossessed owners but to their country of nationality. In 1946, the Allies turned the paintings over to the Dutch government. The return of art was administrated by the Netherlands Art Property Foundation (Stichting Nederlands Kunstbezit – SNK).

In 1966, the Dutch government sold the two Cranach paintings to George Stroganoff-Sherbatoff, referred to below as Stroganoff, after Stroganoff filed a restitution claim alleging that he was the rightful owner of the paintings since the Soviets had stolen the paintings from his family in 1931. Stroganoff later sold the paintings to the Norton Simon Art Foundation in 1971 and the Norton Simon Museum of Art in Pasadena, referred to below as the museum, is where the paintings have been on display ever since. In the late 1990s, von Saher tried to recover all the Goudstikker paintings from the Dutch government including the ones from the forced sale. The Dutch Court of Appeals published its final decision denying von Saher's petition for the restoration of her rights to the paintings.[4] However, a few years later, the Dutch government decided to return the paintings that were still in its possession to von Saher, but it did not return the two paintings it had already sold to Stroganoff because

[3] The paintings Jacques Goudstikker referred to in his documents as "meta-paintings" were those (21 in number) which he co-owned with others at the time he fled to England.

[4] *Marei von Saher v. Norton Simon Museum of Art at Pasadena and Norton Simon Art Foundation* (D.C. No. 16-56308), https://www.courtlistener.com/opinion/4521921/marei-von-saher-v-norton-simon-museum-of-art/ (accessed: 20.04.2021).

they were already in California. Hence, von Saher decided soon after to sue the museum in federal court.[5]

## 2. Decision and argumentation

The court applied the act of state doctrine that requires the acts of foreign sovereigns taken within their own jurisdictions be deemed valid. The court held in its decision that von Saher's application of restoration would require the court to make null and void some official acts of the Dutch government concerning both restoration and contract law.

The Allies were surprisingly and openly aware of its officers looting art and decided in early 1942–1943 that all plundered property would be returned shortly after the war to its country of origin; however, no compensation was to be made to the then current owners. As a matter of fact, some art was returned to the countries of origin and not necessarily to the factual owner. Each country established separate bodies responsible for coordinating and supervising these acts. The Americans established the Monuments, Fine Arts and Archives program and in 1945, the Netherlands government set up the SNK. Anyone who was aware of his/her family's art having been stolen during the war could complete an SNK form requesting its restitution.

The Hague Convention No. IV (1907) on the laws and customs of war defines what is forbidden during armed conflict as acts that "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".[6] President Truman admitted an external restitution policy concluded at the 1945 Potsdam Conference under which both the U.S. and the other Allies would restore objects to the countries from which they had been taken.[7]

Despite its long history and vast legal regulations, the U.S. court decided to base its verdict in this case on Dutch law. In 1940, the Dutch government enacted Royal Decree A6 just after the Nazis invaded the Netherlands. The decree prohibited and automatically nullified agreements with the enemy. Decree A6 vested authority in a special committee known as *Commissie Rechtsverkeer in Oorlogstijd*, or CORVO. In 1944, Royal Decree E100 was enacted that established a separate Council for the Restoration of Rights (Raad voor het Rechtsherstel) with broad and exclusive authority to declare null and void, modify, or revive "any legal relations that originated or were modified during enemy occupation of the [Netherlands]." The last important decree worth mentioning

[5] Opinion by Judge McKeown; Concurrence by Judge Wardlaw, Appeal from the United States District Court for the Central District of California, Argued and Submitted February 14, 2018, Pasadena, California.

[6] Hague Convention No. IV, Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, sec. II, ch. I, art. 23(g), Oct. 18, 1907, 36 Stat. 2277, T.S. 539.

[7] Report, Art Objects in US Zone, July 29, 1945, NACP, RG 338, USGCC HQ, ROUS Army Command, Box 37, File: Fine Art [313574-575].

is Royal Decree E133 enacted in 1944, which permitted expropriating some enemy assets in order to be able to compensate the Netherlands for losses it suffered during the Second World War. Article 3 of Decree E133 provided specifically that within the Netherlands, all "[p]roperty, belonging to an enemy state or to an enemy national, automatically passes in ownership to the State with the entering into force of this decree." The Act of expropriating enemy properties was conducted automatically until July 1951, when the Netherlands ceased all hostilities with Germany.

The Goudstikker firm decided to pursue restitution for the Miedl transaction and included other artworks and real estate. On 1 July 1951, before the E100 deadline, the Goudstikker firm filed a petition with the council for the restoration of rights concerning only the Miedl transaction and not the subsequent transaction. By August 1952, the firm and the Dutch government settled the firm's restitution claims by fully exploiting restitution channels for this transaction.[8] With regard to the art delivered to Göring in 1940 after the first transaction, a ruling was handed down by the court of appeals of The Hague on 16 December 1999 denying the Goudstikker heir's petition and concluding that the firm had already "made a conscious and well considered decision to refrain from asking for the restoration of rights with respect to the Göring transaction".[9]

The district court conducted over a year of discovery in this case and considered the parties' cross-motions for summary judgment. After deciding to apply the Dutch law, the district court granted summary judgment to the museum, concluding that:

1) because CORVO revoked the automatic invalidity of the Göring transaction in 1947, this transaction was recognized as "effective" and so the Cranachs were considered to be Göring's rightful property;
2) because Göring was recognized as an enemy within the meaning of Dutch Royal Decree E133, the ownership of all his property that was located in the Netherlands, including the Cranach paintings, automatically passed to the state of the Netherlands according to art. 3 of this decree;
3) until and if the council annuls the Göring transaction under Royal Decree E100, all of the Cranach paintings remain the property of the Dutch State;
4) and lastly because the second transaction between Miedl and Göring was never annulled using Royal Decree E100, the Netherlands was the rightful owner of the Cranachs when it sold the paintings to Stroganoff in 1966;
5) the U.S. court would have to change Dutch law to allow for the restitution of the Cranach paintings from the museum.[10]

---

[8] United States Court of Appeals for the Ninth Circuit Marei von Saher, Plaintiff-Appellant, v. Norton Simon Museum of Art at Pasadena; Norton Simon Art Foundation, No. 16-56308 D.C. No. 2:07-cv-02866- JFW-SS OPINION, p. 10.

[9] Decision of the Court of Appeals of The Hague, Amsterdams Negotiatie Campagnie N.V. v. Von Saher-Langenbein et al., No. 98/298, 16 December 1999.

[10] United States Court of Appeals for the Ninth Circuit in the case of Marei von Saher v Norton Simon Museum of Art at Pasadena; Norton Simon Art Foundation (D.C. No. 16-56308).

## 3. Assessment of the court's position

For the first time, American judiciary decided to ignore decades of efforts made by Congress, the executive branch, and the courts to resolve particular problems create by the Nazis, especially those connected with the looting of art. The district court decided in its ruling that the Nazi art looter Göring rightfully acquired the title to paintings he received through a forced sale (the sale entailed the promise of security and safety together with the quick purchase of the art after the end of the invasion in the Netherlands for a price that was never fully paid). This odd decision stands both U.S. law and standards on their heads with the ruling that Göring, who is recognized as one of the worst Nazi art looters and who once said "I intend to plunder and to do it thoroughly",[11] acquired the title to the property. Both parties concluded that the paintings were the subject of a forced sale (after case recognition in both the Netherlands and the USA, the courts admitted the coercion), and, thus, every sale thereafter was also null and void, including that to the Norton Simon Museum. However, the lower court concluded that the Dutch government received the ownership title from Göring rightfully, despite post-war restitution policies and practices that emphasized the need to return looted objects to the rightful owners who were victims during the difficult times of war. In the case of Marei von Saher v Norton Simon Museum, there were no doubts as to who the victim of the alluded contract was.[12] There was also no mystery about applicable U.S. law or policy; victims of Nazi art looting should receive fair, just resolutions of their claims. However, the district court was only able to rule in the defendant's favor in its disappointing decision.

Von Saher sought relief from an American museum in Pasadena that, at first view, had no connection to the wartime injustices that were committed against the Goudstikkers. Earlier, von Saher sought relief from the Dutch government itself. A letter from the Dutch Minister for Education, Culture, and Science of 2006 claimed that "the State of the Netherlands is not involved in this dispute" between von Saher and the museum; however, the fact that the claimant is of Dutch origin and the first restitution was made in the Netherlands involved this country in the case.[13]

The United States supposedly determined that the Dutch state provided the Goudstikker family with an adequate opportunity to recover the artwork that was the subject of the litigation in the U.S. They decided that according to foreign policy their duty is to respect the finality of previous Dutch restitution proceedings, and, thus, it decided to avoid any involvement in the ownership dispute over the Cranachs, which is quite disappointing.

---

[11] W.L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany*, Simon & Schuster, New York – London – Toronto 1960.

[12] A. Roet, "The Netherlands is Still Hoarding a Massive Collection of Art Looted From Jews by Nazis", Haaretz, 7 September 2017, https://www.haaretz.com/world-news/europe/.premium.MAGAZINE-netherlands-still-hoards-massive-collection-of-nazi-looted-art-1.5449074 (accessed: 16.04.2021).

[13] *Von Saher v. Norton Simon Museum of Art at Pasadena*, https://caselaw.findlaw.com/us-9th-circuit/1669025.html (accessed: 12.04.2021).

## 4. Conclusions

The decision made by the Dutch court in 2006 concerning the Goudstikker case was supposed to have had international repercussions and to have opened an avenue for the reclamation of other looted artworks from Goudstikker's collection. However, in these legal proceedings the case was completely turned upside down.

In addition to this legal case, von Saher has made claims on many others paintings that are either in litigation or have been settled. Her latest triumphs include settlements with the Cummer Museum of Art and Gardens (a still life by Jacques Adolphz. De Claeuw) and the settlement with Harald Hein (owner of the paining *Portrait of a Hunter With Dog* by Aelbert Cuyp). Working with her team of experts, von Saher has undertaken extensive efforts to retrieve other missing works that were recorded on the list of Goudstikker's business holdings. Artworks looted from Goudstikker because of the two first null transactions have been located in many institutions in over a dozen countries, including in some U.S. museums. The efforts of Von Saher and her legal team have led to numerous voluntary restitutions made by governments, private collections, museums, dealers, and also, extraordinarily, auction houses.

## Literature

Dermasin B., *Art and Cultural Heritage Law: Developments and Challenges in Past and Presents*, Conference, Maastricht, 27–28 March 2011.

Roet A., "The Netherlands is Still Hoarding a Massive Collection of Art Looted From Jews by Nazis," Haaretz, 7 September 2017, https://www.haaretz.com/world-news/europe/.premium.MAGAZINE-netherlands-still-hoards-massive-collection-of-nazi-looted-art-1.5449074 (accessed: 16.04.2021).

Shirer W.L., *The Rise and Fall of the Third Reich: A History of Nazi Germany*, Simon & Schuster, New York – London – Toronto 1960.

### Summary

***Paula Chmielowska***

**Denial of restitution in the United States Court of Appeals' verdict in case of *Marei von Saher v. Norton Museum of Art at Pasadena and Norton Simon Art Foundation***

In a disappointing ruling that rejected the appeal of Holocaust claimant Marei von Saher, the United States Court of Appeals for the Ninth Circuit decided on 30 July 2018 that the Norton Simon Museum in Pasadena (respondent) can keep Lucas Cranach the Elder's works *Adam* and *Eve*. Von Saher is the sole heir of the Jewish art dealer Jacques Goudstikker, who died in 1940 leaving behind a vast art collection that was then sold to German officer. The family has been trying to regain these items as they were sold in a very peculiar manner. This was von Saher's third attempt at obtaining the restoration of the paintings. The district court in 2007 dismissed the

action with prejudice. Von Saher appealed, and the court of appeals affirmed the sentence. After von Saher appealed for the last time, the court gave its final decision.

**Keywords:** artworks, restitution, judicial claim, ownership, war plunder, institutional facilitator

## Streszczenie

***Paula Chmielowska***

**Odmowa restytucji w orzeczeniu Sądu Apelacyjnego Stanów Zjednoczonych w sprawie *Marei von Saher przeciwko Norton Museum of Art w Pasadenie i Norton Simon Art Foundation***

W bardzo rozczarowującym orzeczeniu, w którym sąd odrzucił apelację Marei von Saher, Dziewiąty Obwód Sądu Stanów Zjednoczonych zdecydował 30 lipca 2018 r., że Norton Simon Museum w Pasadenie (pozwany) może zatrzymać prace Lucasa Cranacha Starszego pt. *Adam* i *Ewa*. Von Saher jest jedyną spadkobierczynią żydowskiego handlarza dziełami sztuki Jacquesa Goudstikkera, który zmarł w 1940 r., pozostawiając po sobie ogromną kolekcję dzieł sztuki, zakupionych przez niemieckiego oficera. Rodzina próbowała odzyskać te rodzinne dobra, ponieważ zostały sprzedane w bardzo specyficzny sposób. Była to trzecia próba restytucji malowideł przez von Saher. Sąd rejonowy w 2007 r. oddalił powództwo na podstawie meritum sprawy, co spowodowało, że powód nie mógł w przyszłości wytoczyć powództwa, używając tych samych argumentów. Von Saher wniosła jednak apelację, a sąd apelacyjny utrzymał w mocy poprzedni wyrok. Po ostatniej apelacji von Saher sąd wydał ostateczną decyzję.

**Słowa kluczowe:** dzieła sztuki, restytucja, roszczenie sądowe, własność, grabież wojenna, pośrednik instytucjonalny

# The impact of natural heritage protection on the principles of unfair competition on the example of the Russian Natural Reserve Shulgan-Tash

The verdict of the Arbitration Court of the Republic of Bashkortostan, Case No. A07-19495/19

**The uniqueness and the obligation to protect cultural heritage objects exclude the possibility of competition among institutions established to protect them.**

**Żaneta Gwardzińska**
University of Economics and Human Sciences in Warsaw
zanetagwardzinska@gmail.com
ORCID: 0000-0003-2055-7466

https://doi.org/10.26881/gsp.2021.2.21

## Commentary

The Shulgan-Tash Nature Reserve (Russian: заповедник Шульган-Таш) is a strict nature reserve (*zapovednik*) run by the Ministry of Natural Resources and the Environment of the Russian Federation. It is located on the western slopes of the southern Urals in the Republic of Bashkortostan in Russia. Some of the oldest caves to have been inhabited by humans (e.g., Kapova Cave) are located here, and 13 full-time practitioners of the ancient art of beekeeping wild bees (also known as *bortevikov*) are also here. In 2012, the reserve was included in the UNESCO Bashkir Ural Biosphere Reserve specifically to protect the burzyuan bee, which has been cultivated since ancient times by the local people of Bashkortostan. In the 1990s, development began on a museum and excursion complex near the reserve, and the local population began to have dealings with tourism.

The most valuable objects in the reserve are the rock paintings from the Paleolithic Age in Shulgan-Tash (Kapova) Cave that were discovered in 1959 by the zoologist A.V. Ryumin and are known as Abei-Batkan-Tash (Russian: Абей-Баткан-Таш – надпись-рисунок). Scientists have determined the paintings to be from 14,000 to 17,000 years old, and the discovery has become famous worldwide. According to Russian federal law, the Abei-Batkan-Tash is an archaeological monument listed in the

Unified State Register of Cultural Heritage Monuments of the Russian Federation (Russian: Единый Государственный Реестр Объектов Культурного Наследия) under the number 021640728350006, and it is a strictly protected federal history monument.[1] According to art. 4 of the Federal Law of 25 June 2002 N 73-FZ On objects of cultural heritage (historical and cultural monuments) of the nations of the Russian Federation,[2] monuments are defined as objects of cultural heritage of federal, regional, and local importance. They also have to be objects of historical, architectural, artistic, scientific, and memorial value of special importance to the history and culture of the Russian Federation. This makes the pre-historic rock paintings a monument within the meaning of Russian law.

However, the subject of this judgement is not the definition of a monument, but the possibility of reserving the name of a monument for promotional purposes of the institution. The case began in June 2019 when the Federal State Budgetary Institution of the Shulgan Tash State Biosphere Reserve filed a lawsuit in the Arbitration Court of the Republic of Bashkortostan against the State Budget Institution of the Republic of ashkortostan.[3] The basis of the lawsuit was the federal institution's request to stop using the short name Shulgan-Tash in the name and documentation of the Bashkortostan institution. On 17 March 2020, the Arbitration Court of the Republic of Bashkortostan dismissed the lawsuit, stating that the defendant's actions did not violate the exclusive rights of the federal institution to the brand by the Republic of Bashkortostan institution. The judgment was appealed by the federal institution. On 12 August 2020, the 18th Arbitration Court of Appeal upheld the decision of the court of the first instance, which entered into force as required by law. As a result, the Shulgan-Tash Historical and Cultural Museum-Reserve, established in 2016, will retain its full name.

To date, no one has commented on the legal doctrine of the protection of the heritage in the abovementioned judgement. In my opinion, the judgment raises a key issue concerning the marketing of cultural institutions. Can proper names of historical objects be reserved by a budgetary unit? Raising awareness about heritage and popularizing heritage excludes the possibility of reserving its name to a particular entity. The name must be commonly known so that the average person is able to identify it with the proper place. Hence, the names of numerous institutions, companies, and enterprises are associated with a particular place in the case of historical buildings. The names of historical buildings are regarded as tourist products and have an undeniable effect on the environment of the monuments. It should be remembered that cultural tourism[4] began to develop in the 1990s, and in the 2000s it has become the main source of income for many inhabitants of small towns where monuments are located.

---

[1] https://opendata.mkrf.ru/opendata/7705851331-egrkn/ (accessed: 1.11.2020).

[2] http://www.consultant.ru/document/cons_doc_LAW_37318/f33075ca7d257c05bb88b0909565de7ecf2755d7/, (accessed: 1.11.2020).

[3] https://okn.bashkortostan.ru/presscenter/news/298224/ (accessed: 11.11.2020).

[4] Ł. Gaweł, *Szlaki dziedzictwa kulturowego. Teoria i praktyka zarządzania*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2011, pp. 66–68.

Many towns have developed because of the designation of cultural routes on which monuments are located. In Poland, thanks to EU programs, funds, and other subsidies, regions began to be promoted based on their tangible and intangible heritage. On the other hand, a major change occurred in the approach of managing heritage monuments, which is to avoid destroying them. Numerous local initiatives to protect them have arisen, and entrepreneurs have ceased treating them as obstacles to the implementation of their projects. This approach is not purely European, but global, while the problem of insufficient public funds for the protection of monuments is also global. This is also why cultural institutions obtain funds for their basic activities from sources other than subsidies from their founders.

In the Russian legal system, as well as in that in Poland, the majority of cultural institutions are public institutions financed by public funds. The struggle for adequate funds urges some institutions to find alternative financing, including income derived from the dissemination of knowledge in a given field, the commercialization of research results, and tourism.

Commenting on the judgment, which is the subject of this article, it should also be noted that the nature reserve and the museum are not in competition. According to art. 26 of the Federal Law on the Museum Fund of the Russian Federation and Museums in the Russian Federation of 5 May 1996 N 54-FZ,[5] "Museums in the Russian Federation are created in the form of institutions implementing the functions of cultural, educational, scientific, and non-commercial nature." The purpose of establishing a nature reserve is to protect natural heritage. In addition, museum-reserves (Музеи-заповедники),[6] i.e., museums, established in areas with interesting places related to reserves or historical and cultural complexes, can be established in Russia. Museums such as these are not nature reserves, and they are under the supervision of the Ministry of Culture of the Russian Federation (Министерство Культуры Российской Федерации). Consequently, they are independent of the Ministry of the Environment. Additionally, museum reserves can, in particular, provide excursion and information services, create tourism infrastructure, and conduct environmental protection activities.

This has become the grounds for the conflict with the authorities managing the nature reserve, which also provides tour services for tourists. In the opinion of the nature reserve authorities, there was potentially unfair competition between the two institutions, and, as a result, revenues from the excursions conducted by reserve employees were potentially lower. In this matter, one of the state budgetary institutions wanted to change its nature, but heritage protection is one of the state's own tasks that is subsidized by the state budget, therefore public institutions are not in competition.

[5] http://www.consultant.ru/document/cons_doc_LAW_10496/3c21587614a2bcdabac66819c51cc057d2d42ec5/, (accessed: 1.11.2020).

[6] Article 26(1) of the Federal Law on the Museum Fund of the Russian Federation and Museums in the Russian Federation of 5 May 1996 N 54-FZ.

They are not entrepreneurs so provisions regarding unfair competition do not apply to them.

In conclusion, it should be stated that using tools applied in the tourism trade is also an element of the heritage management process. Consequently, the name of historic buildings cannot be reserved solely as component names of institutions established to protect them. Unfair competition does not exist when cultural objects are promoted by two separate public institutions established to protect them and educate the public about them. Institutions of this type should cooperate to best perform their statutory tasks. Only if the management model adopted by directors of cultural institutions is based on the principle of interdisciplinary cooperation will the aims of tasks performed by them be fully implemented. Currently, directors should apply innovative, creative thinking to adapt to new realities, which is extremely difficult during the pandemic because everyday life is now online.

## Literature

Gaweł Ł., *Szlaki dziedzictwa kulturowego. Teoria i praktyka zarządzania*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2011.

## Summary

***Żaneta Gwardzińska***

**The impact of natural heritage protection on the principles of unfair competition on the example of the Russian Natural Reserve Shulgan-Tash**

Issues of heritage protection are interdisciplinary and are not limited only to the legal protection of monuments. Often, the legal problems of heritage protection institutions are related to the current affairs of everyday life, such as labor law, contract enforcement, or public procurement. In the judgment commented on here, the court resolved the issue of unfair competition in terms of naming public institutions. Can the name of the cave be reserved for the nature reserve? Is the museum a competitive institution for the nature reserve? The author of this commentary on the judgment of the Arbitration Court of the Republic of Bashkortostan has attempted to answer these and many other questions.

**Keywords:** Shulgan-Tash, unfair competition, heritage protection, nature reserve, museum

## Streszczenie

*Żaneta Gwardzińska*

**Wpływ ochrony dziedzictwa naturalnego na zasady nieuczciwej konkurencji na przykładzie rosyjskiego rezerwatu przyrody Shulgan-Tash**

Ochrona dziedzictwa kultury jest zagadnieniem interdyscyplinarnym i nie ogranicza się tylko do prawnej ochrony zabytków. Często problemy prawne instytucji ochrony dziedzictwa związane są z bieżącymi sprawami życia codziennego, takimi jak prawo pracy, egzekwowanie umów czy zamówienia publiczne. W komentowanym wyroku Sąd Arbitrażowy Republiki Baszkortostanu rozstrzygnął kwestię nieuczciwej konkurencji w zakresie nazewnictwa instytucji publicznych. Czy nazwę jaskini można zarezerwować dla rezerwatu przyrody? Czy muzeum może być instytucją konkurencyjną dla rezerwatu przyrody? W niniejszej glosie do przedmiotowego wyroku podjęto próbę odpowiedzi na te i wiele innych pytań badawczych.

**Słowa kluczowe:** Shulgan-Tash, nieuczciwa konkurencja, ochrona dziedzictwa, rezerwat przyrody, muzeum

# A state's claim of ownership over a cultural object as a sovereign act and a question of jurisdiction

Decision of the United States Court of Appeals for the Second Circuit of 9 June 2020, No. 19-2171-cv

**Greece's claim of ownership over an ancient horse figurine was not in connection with any commercial activity by Greece outside of the United States, and accordingly there is no jurisdiction pursuant to the Foreign Sovereign Immunities Act.**

**Agnieszka Plata**
University of Gdańsk
plata.agnieszka@gmail.com
ORCID: 0000-0002-3682-4787

https://doi.org/10.26881/gsp.2021.2.22

## Commentary

The complexity of cultural property issues and raising awareness about art trafficking expose the challenges of litigation before domestic courts in international cases. The subject of this commentary is the case of *Howard J. Barnet, Saretta Barnet, Peter L. Barnet, Saretta Barnet, Jane L. Barnet, Saretta Barnet, Sotheby's, Inc. (Sotheby's) v. the Ministry of Culture and Sports of the Hellenic Republic (Greece)* in which the United States Court of Appeals focuses on the issue of the jurisdiction of the U.S. domestic court over a suit against a foreign state regarding the ownership of a cultural object.

As a rule, foreign states remain immune from the jurisdiction of the courts of the Unites States and of the States except as enumerated in sections 1605 to 1607 of the United States Code (USC). According to USC title 28 para. 1605 (a)(2), created by The Foreign Sovereign Immunities Act (FSIA) of 1976, a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Therefore, the FSIA enumerates three circumstances connected with commercial activity under which a foreign state is not immune from suit before U.S. courts. Additionally, under USC title 28 para. 1603 (d), the legal definition of such a "commercial activity reserves that the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose".[1]

For the purpose of further commentary, it needs to be emphasized that under USC title 28 para. 1605(a)(2) actions taken by a foreign state outside the territory of the United States fall under the jurisdiction of the U.S. courts only when: a) that act is in connection with a commercial activity of that state elsewhere; b) that act causes a direct effect in the United States, given that the commercial character of that activity is established by assessing its nature rather than its purpose.[2]

The abovementioned sections of the USC constitute the scope of analysis for the procedural issues of the case. Nevertheless, mentioning the substantive legal aspects of the factual background permits one to analyze the idea of commercial activity further on. And so, according to Greece's domestic Law on Antiquities of 1932, all antiquities movable or immovable found in Greece and in any State land, in rivers, lakes and at the bottom of the sea, and in municipal, monasterial and private estates from ancient times onwards, are the property of the State (the Act N.5351 with Respect to Antiquities of 1932, art. 1).

Furthermore, the Act provides legal regulations on becoming in any way an owner of an antiquity and its procedural consequences.[3]

Another Greek domestic legal instrument, the Law on the Protection of Antiquities and Cultural Heritage in General of 2002,[4] establishes that in the context of international legal regulations, the Greek State applies for the protection of cultural assets originating from Greek territory, regardless of when these assets were taken abroad (art. 1 sec. 3). This provision is extended to cultural assets that are linked historically to Greece wherever they are located. Furthermore, as noted in the judgment, under art. 21 sec. 1 movable ancient monuments dating up to 1453 belong to the State in terms of ownership and possession and are in fact imprescriptible and *extra commercium*.

Additionally, Greece and United States are parties to the bilateral Memorandum of Understanding between the Government of the Hellenic Republic and the Government of the United States of America concerning the imposition of import restrictions on categories of Archaeological and Byzantine Ecclesiastical, Ethnological material

---

[1] See: M. Mofidi, "The Foreign Sovereign Immunities Act and the Commercial Activity Exception: The Gulf between Theory and Practice," *Journal of International Legal Studies* 1999, vol. 5, pp. 95–97.

[2] See: J.E. Donoghue, "Taking the Sovereign Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception," *Yale Journal of International Law* 1992, vol. 17, pp. 489–538.

[3] See: D. Voudouri, "Greek legislation concerning the international movement of antiquities and its ideological and political dimensions" [in:] *A Singular Antiquity: Archaeology and Hellenic Identity in Twentieth-Century Greece*, eds. D. Damaskos, D. Plantzos, Athens 2008, pp. 125–139.

[4] See: https://wipolex.wipo.int/en/legislation/details/6947 (accessed: 5.01.2021).

through the fifteenth century A.D. of the Hellenic Republic of 2011.[5] As declared by the parties, its aim is to reduce the incentive for pillaging the irreplaceable archaeological material of Greece representing the Upper Paleolithic Period through the fifteenth century A.D. and of Byzantine ecclesiastical ethnological material through the fifteenth century A.D.

The factual situation of the commentary is as follows. In May 2018 a Greek bronze horse figurine of the Corinthian type, 14 cm tall, circa eighth century BC[6] was to be auctioned by Sotheby's in New York City. On 25 April 2018, Sotheby's posted an auction catalog online that included a description of said figurine with an estimated auction price of $150,000 to $250,000. Three days before the planned auction, the Greek Ministry of Culture emailed a letter to Sotheby's claiming that a) the object intended to be auctioned is of Greek origin; b) photos of this object are included in the Symes-Michaelides photo archive, which is believed to document cultural goods trafficked by Robin Symes and Christo Michaelides;[7] c) there are no known records to prove that the object left Greece legally; d) under Greek national law, compliant with relevant international treaties, all movable ancient monuments belong to the State, while the illegal acquisition and trading of cultural objects of great value constitute criminal offences. In this letter the Greek government asked Sotheby's to remove the ancient figurine from the list of items to be auctioned, to refrain from any activity resulting in delivery of the object to any third party, and to contact the Greek Ministry of Culture on the subject of further cooperation for the repatriation of the object and its return to Greece.

Subsequently to receiving Greece's statement, Sotheby's withdrew the object from the scheduled auction and, after attempting to continue dialogue with Greece on the issue of the ownership of the object, Sotheby's and the trustees of the Trust sued Greece in the Southern District of New York. The plaintiffs sought solely the declaration of ownership over the object in question.

In response to that claim Greece filed a motion to dismiss, arguing that Greece was immune from suit as the Plaintiffs had not satisfied any exception justifying limiting its sovereign immunity under the FSIA. On 21 June 2019, the district court denied said motion, stating that Greece's act of sending the abovementioned letter was commercial and that it had a direct effect in the United States, and therefore that the exception provided by USC title 28 para. 1605(a)(2) applied. As seen by the district court, Greece's Act of claiming ownership of historical artifacts scheduled to be auctioned is not uniquely sovereign, and therefore is commercial. Greece filed an interlocutory appeal of that order, which resulted in a unanimous decision of the United States Court of

[5] Full text of the memorandum published in: *International Journal of Cultural Property* 2012, vol. 19, no. 4, pp. 487–490.

[6] See more on Greek geometric period: J. Carter, "The Beginning of Narrative Art in the Greek Geometric Period," *The Annual of the British School at Athens* 1972, vol. 67, pp. 25–58.

[7] See: *Trafficking Culture. New Directions in Researching the Global Market in Illicit Antiquities*, eds. S. Mackenzie, N. Brodie, D. Yates, Ch. Tsirogiannis, London 2019.

Appeals for the Second Circuit to reverse the district court's decision and remand with instructions to dismiss this action for lack of subject-matter jurisdiction.

The Court of Appeals shared the view of the district court that sending the demand letter from Greece to Sotheby's should be identified as the act establishing the basis for Sotheby's claim. It was found that the letter asserted an ownership interest in the object by the demand that Sotheby's remove the figurine from the auction. This precise action is believed to be the core act that the plaintiffs hoped to challenge.

Further findings of the Court of Appeals focused on whether said core predicate act was indeed taken in connection with a commercial activity by Greece outside the United States, which would satisfy the exception to foreign State immunity enumerated in the FSIA.

First, the Court of Appeals criticized the thesis treating Greece's act of sending the demand letter both as the predicate act and the related commercial activity as understood in USC title 28 para. 1605(a)(2). Moreover, the Court of Appeals stated that a single act cannot be undertaken in connection with itself, therefore the plaintiffs failed to argue that direct-effect clause was applicable in this case.

Nevertheless, the Court of Appeals agreed that the plaintiffs properly decided to argue for the application of the direct-effect clause as Greece's letter was not a separate activity and it was carried out outside of the United States. Therefore, Sotheby's correctly focused on the claim of ownership over the figurine that was expressed in the letter. In the view of Court of Appeals, Greece undertook the act of sending the letter in connection with its claim of ownership over the figurine pursuant to its patrimony laws.

Furthermore, the Court of Appeals emphasized that one needs to assess the act of sending of the letter in connection with the nature of the claim as it reveals that this action is in fact of sovereign nature. Indeed, Greece claimed ownership over the ancient object by adopting its own legislation that nationalizes historical artifacts and by enforcing that domestic law. Both Greek National Law 5351/1932 on Antiquities and Law 3028/2002 on the Protection of Antiquities and Cultural Heritage in General were invoked in the letter to Sotheby's. As noted by the Court of Appeals, these acts also regulate the export of artifacts such as the object in question and, in certain cases, establish criminal liability.

Perceiving Greece's act as an enforcement of its patrimony laws completely changes the perspective, distinguishing such an indirect restitution claim made by a state from the claims of ownership normally raised by private parties in the marketplace. As argued by the Court of Appeals, nationalizing property is a distinctly sovereign act, therefore Greece, by sending the demand letter, was acting in a sovereign capacity by enacting its laws on the ownership and export of nationalized artifacts.

As signalized before, the FSIA indicates that the commercial or sovereign character of an activity should be determined by reference to the nature of the activity rather than its purpose. Given that Greece's action resulted from the will to enforce the laws declaring the ancient object to be state property, it is reasonable to state that this kind of action is not the type by which a private party engages in trade, traffic, or commerce or any analogous transaction as understood under USC title 28 para. 1603(d). And so,

the Court of Appeals argued that adopting the state's domestic laws and enforcing compliance with those laws is sufficient to assume that its activity was sovereign rather than commercial.

Furthermore, analyzing the nature of Greece's act, the Court of Appeals firmly stated that Greece is not buying or selling historical artifacts in any traditional sense and does not otherwise compete in the marketplace like a private antiquities dealer again addressing the definition of commercial activity under USC title 28 para. 1603(d) interpreted in the case of *the Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

What is also worth mentioning is that the Court of Appeals indirectly argued that the unclear provenance of the ancient object is irrelevant to the question of jurisdiction over the case. In fact, the Court mentioned that the issue of provenance confirms that the issue in this case, the ownership of the figurine, is inextricably bound up with the sovereign activity of the Greek State.

In view of the argumentation applied by the Court of Appeals, one should approve the decision reached in the case of *Sotheby's v. Greece*. Sotheby's response to the Greek claim undoubtedly created a model of action in the event of receiving an invitation to the debate over the restitution of a cultural object intended to be sold by an auction house. And so, a suit pursuant to that claim tested the efficiency of seeking judicial recourse before the U.S. domestic court when dealing with such claims. By interpreting the procedural character of the issue of jurisdiction over a whole group of cases, the decision of the United States Court of Appeals for the Second Circuit established a great precedent for situations in which a state acts on enforcing its patrimony laws regarding the ownership of cultural objects.

The Court correctly found that a state's action connected to the sovereign activity of claiming ownership through nationalization and the enforcement of patrimony laws is not of a commercial character. Practically, it seems that ownership or restitution claims raised by states should invoke domestic legislation on the protection of cultural heritage in order to preserve sovereign immunity from suit before U.S. domestic courts. It also rightly acknowledged that complex issues of the chain of ownership and provenance are inextricably linked to the sovereign activity of a state. The specific character of the trade in cultural goods, in which objects often emerge on the market years after they were lost, as well as the issue of trafficking cultural property, call for clarity in the interpretation of legal norms, enabling effective litigation.

However, one should accentuate that the decision commented upon naturally does not address the substantive legal aspects that are bound to arise before a competent judicial authority if Sotheby's seeks the declaration of ownership over the bronze horse in the future. As noted by Stamatoudi, "even if issues of jurisdiction and applicable law are overcome, it is not always easy for the parties to produce the necessary proof needed to establish that a cultural object has been illegally alienated".[8] With this in mind, risks of entering the process involving many uncertainties in the factual

[8] I.A. Stamatoudi, *Cultural Property Law and Restitution. A Commentary to International Conventions and European Union Law*, Cheltenham – Northampton 2011, p. 191.

background may prove problematic for both parties. Therefore, one should deem reasonable how Greece in the demand letter invited Sotheby's to participate in an alternative dispute resolution method, which limits both costs and the uncertainty of the final outcome of the case.[9]

Additionally, the decision commented upon does not indicate what outcome of litigation should be expected when a state claiming ownership of a cultural object originating from its territory or linked to its history does not act upon a domestic law nationalizing the cultural property the same way as it is enforced by Greek domestic law. In this sense it remains to be decided whether the nature of the act of reclaiming the ownership of a state's heritage changes from sovereign to commercial when the expropriating domestic legal norms are non-existent and how this issue should be weighed within the complexity of questions arising when dealing with cultural objects.[10]

Finally, the evaluation of the decision from the point of view of international law instruments should lead to positive conclusions. Above all, the decision remains in compliance with the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, which acknowledges the significance of patrimony laws in protecting cultural heritage.

To summarize, the decision commented upon justly recognizes the sovereign character of the claim of ownership raised by a state. The claim of ownership and subsequent demand for restitution or return should be distinguished from the actions usually undertaken by private parties in the marketplace. This conclusion is justified both by the significance of enforcing the laws on protection of cultural heritage but also the special character of the objects in question and their unique relation to the state or community.[11] On the other hand, the decision of the Court of Appeals demonstrates the challenges brought by litigation in cases regarding cultural property. The complex argumentation presented in the decision addresses only one of many possible procedural issues, clearly making it impossible to deduce any hypothetical final outcome of the case before the competent court in the future.

## Conclusions

1. A State's claim of ownership over a cultural object is a sovereign act when performed as an enforcement of domestic legislation nationalizing cultural property.
2. The provenance of a cultural object is irrelevant to the procedural issue of jurisdiction of the U.S. domestic court over the subject of ownership of that object.

---

[9] See more: A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford 2014, pp. 138–145.

[10] See: K. Warren, "A philosophical perspective on the ethics and resolution of cultural property issues" [in:] *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?*, ed. P.M. Messenger, Albuquerque 2003, pp. 1–26.

[11] See: K. Zeidler, *Restitution of Cultural Property. Hard Case – Theory of Argumentation – Philosophy of Law*, Gdańsk – Warsaw 2016, pp. 105–107.

3. Ownership or restitution claims raised by states should invoke domestic legislation on the protection of cultural heritage in order to preserve sovereign immunity from suit before U.S. domestic courts.

## Literature

Carter J., "The Beginning of Narrative Art in the Greek Geometric Period," *The Annual of the British School at Athens* 1972, vol. 67.

Chechi A., *The Settlement of International Cultural Heritage Disputes*, Oxford 2014.

Donoghue J.E., "Taking the Sovereign Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception," *Yale Journal of International Law* 1992, vol. 17.

Mackenzie S., Brodie N., Yates D., Tsirogiannis Ch. (eds.), *Trafficking Culture. New Directions in Researching the Global Market in Illicit Antiquities*, London 2019.

Mofidi M., "The Foreign Sovereign Immunities Act and the Commercial Activity Exception: The Gulf between Theory and Practice," *Journal of International Legal Studies* 1999, vol. 5.

Stamatoudi I., *Cultural Property Law and Restitution: A Commentary to the International Conventions and European Union Law*, Cheltenham – Northampton 2011.

Voudouri D., "Greek legislation concerning the international movement of antiquities and its ideological and political dimensions" [in:] *A Singular Antiquity: Archaeology and Hellenic Identity in Twentieth-Century Greece*, eds. D. Damaskos, D. Plantzos, Athens 2008.

Warren K., "A philosophical perspective on the ethics and resolution of cultural property issues" [in:] *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?*, ed. P.M. Messenger, Albuquerque 2003.

Zeidler K., *Restitution of Cultural Property: Hard Case – Theory of Argumentation – Philosophy of Law*, Gdańsk – Warsaw 2016.

## Summary

***Agnieszka Plata***

**A state's claim of ownership over a cultural object as a sovereign act and a question of jurisdiction**

This commentary deals with issue of the jurisdiction of the U.S. domestic courts over the matter of ownership of a cultural object claimed by a private party as a result of an action undertaken by a state. The commentary also raises certain questions connected with the nature of the claim of ownership raised by a state. The ultimate conclusion of the commentary is approving of the standpoint expressed in the decision, evaluating it as a valuable precedent for cases involving cultural property.

**Keywords:** cultural property, jurisdiction, restitution, auction

## Streszczenie

*Agnieszka Plata*

**Roszczenie państwa dotyczące prawa własności dobra kultury jako suwerenny akt władzy a problem jurysdykcji krajowej**

Glosa dotyczy problemu jurysdykcji krajowej sądów amerykańskich w sprawach dotyczących własności dóbr kultury, wszczętych z powództwa jednostki na skutek interwencji państwa obcego w rozporządzanie rzeczą. Przedmiotem rozważań jest również prawny charakter działań państwa w zakresie dochodzenia uprawnień wynikających z prawa własności dobra kultury. Komentowane orzeczenie stwierdza brak jurysdykcji sądów amerykańskich co do roszczeń wynikających z interwencji państwa obcego w zakresie realizowania jego suwerennych uprawnień związanych z prawem własności dóbr kultury danego państwa zgodnie z właściwym prawem krajowym. Wnioski glosy są aprobujące co do argumentacji przytoczonej w treści orzeczenia i wskazują, że stanowi ono istotny precedens w sprawach dotyczących restytucji dóbr kultury zidentyfikowanych na amerykańskim rynku sztuki.

**Słowa kluczowe**: dziedzictwo kultury, jurysdykcja, restytucja, aukcja

# Varia

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

# Seventh Seminar on Cultural Heritage Protection Law for young scholars, PhD students, and students held in honor of Professor Jan Pruszyński, 17–19 September 2020, Lubostroń, Poland

From 17 to 19 September 2020 the Seventh Seminar on Cultural Heritage Protection Law for young scholars, PhD students, and students in honor of Professor Jan Pruszyński was held online at the Palace in Lubostroń, Poland. The conference was organized by the University of Gdańsk (UG), the UNESCO Chair on Cultural Property Law (University of Opole – UO), Adam Mickiewicz University of Poznań (UAM), and the Palace in Lubostroń under the honorary patronage of the Rector of the University of Opole. The partners of the conference were the Gdańsk University Press and National Institute for Museums and Public Collections. The media patrons of this academic event were the following publications that promote cultural heritage protection: *Spotkania z Zabytkami* (Encounters with Historical Monuments), *Santander Art & Culture Law Review,* and the series Biblioteka Prawa Ochrony Zabytków (Library of Cultural Heritage Law). Scholars representing many academic disciplines, including lawyers, historians, and architectural conservators, participated in the conference.

On the first day, after the ceremonial opening of the seminar by Professor Kamil Zeidler (UG) and Dr. Alicja Jagielska-Burduk (UO), Professor Ryszard Nowicki (Kazimierz Wielki University) described the Bydgoszcz City Library in the interwar period. Next, Professor Luis Javier Capote Perez (University of La Laguna) discussed private ownership and public interest issues in his talk entitled "The Picasso Case: Cultural Property Export Regulations."

The next day, after a speech delivered by Andrzej Budziak, the director of the Palace of Lubostroń, the participants had the opportunity to listen to the opening lecture delivered by Professor Piotr Stec (UO) who raised the issue of access to cultural goods in the Covid-19 era. Next, Dr. Jagielska-Burduk outlined the achievements of the *Santander Art and Culture Law Review*. The seminar was organized in four discussion panels. The first panel, chaired by Dr. Mateusz Pszczyński (UO), was begun by Paula Chmielowska (UG), who discussed issues of the protection of cultural heritage in ancient Egypt. Krzysztof Gregorczyk (University of Warsaw – UW), discussed the succession board of a private collection following the collector's death. Then,

Olivia Koperska (UG), discussed the role of Building Information Modelling (BIM) in the protection of histori cal monuments. This panel was concluded by Inga Owczarek (UG), who analyzed the rights to artistic creations. The second panel, chaired by Dr. Małgorzata Węgrzak (UG) and Dr. Jakub Chowaniec (UW), began with Katarzyna Kruszewska (UAM) raising the issue of cultural and natural heritage with a special focus on historical forests. Next, Katarzyna Frątczak (UAM) focused on aspects of the value of the cultural heritage of architecture and design that was created in the twentieth century. Last, Agata Lizak, MA (University of Rzeszów) characterized spatial forms of the protection of cultural heritage.

During the third panel, chaired by Professor Wojciech Szafrański (UAM), Dr. Żaneta Gwardzińska (UO), explored the legal aspects of museums and discussed the need for implementing new legal act on museums. Next, Dr. Chowaniec drew attention to taxes in the cultural sector. In turn, Dr. Szymon Krajnik (Leon Koźmiński Academy) analyzed the problem of the ownership of stolen or misappropriated movable monuments when acquired from an unauthorised person in his presentation based on historical numismatists. The concluding address was from Dr. Katarzyna Schatt-Babińska (University of Łódź), who summarized her investigation on the protection and care of private monuments. The session ended with a presentation and the promotion of DigiCONFLICT—the Digital Heritage in Cultural Conflicts project implemented under the Joint Programming Initiative on Cultural Heritage.

Professor Anna Frankiewicz-Bodynek (UO) and Dr. Pszczyński co-chaired the proceedings of the last day, which began with a talk by Maria Hałasa (UAM), who discussed the activities of transnational entities and actions at the level of individual countries aimed at regulating the trade in cultural goods. Next, Aleksandra Guss, MA (UG), described the Heritage Treasure List.

Professor Kamil Zeidler and Dr. Alicja Jagielska-Burduk summarized the seminar, and selected papers will be published in the *Santander Art and Culture Law Review*. The papers delivered by representatives from seven academic institutions emphasized the importance of cultural heritage protection and its interdisciplinary nature. The seminar provided an opportunity in the Covid-19 era for the exchange of knowledge and experiences among specialists from the academic fields of law, museology, architecture, and the history of art.

**Aleksandra Guss**
University of Gdańsk
aleksandraguss@phdstud.ug.edu.pl
ORCID: https://orcid.org/0000-0002-4157-6853

# International Conference "The 1995 UNIDROIT Convention: Cultural objects of the crossroad of rights and interest" to celebrate the 25th anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 8–9 October 2020, Rome, Italy

In 1995 the International Institute for the Unification of Private Law (UNIDROIT) drafted one of the most important documents that laid the legal framework for the restitution and return of cultural objects – the Convention on Stolen or Illegally Exported Cultural Objects[1]. The main goal of the 1995 Convention was to equate private and public law in the pursuit of establishing a framework for cross-national cooperation in the field of returning stolen or illegally exported cultural objects. Simultaneously, the UNIDROIT Convention strengthened the provisions of the 1970 UNESCO Convention[2] by addressing its weaknesses on issues of private law.

Now, in 2020, UNIDROIT organized an international conference to celebrate the 25th anniversary of the Convention that was held at the UNIDROIT headquarters in Rome and remotely via Zoom. The objective of the conference was to take stock of the achievements of the 1995 Convention, raise awareness of the importance of uniform laws for the restitution and return of cultural objects, strengthen synergies among other international instruments and other areas of UNIDROIT's work, and present future steps and projects to be developed.

## Day 1, Session 1

Welcoming speakers and participants, Maria Chiara Malaguti, President of UNIDROIT and chairman of the opening session, summed up 25 years of the 1995 UNIDROIT Convention. Short speeches about the 25th anniversary and the current problems the international community has to deal with were presented by Webbe Ndoro (ICCROM), H.E. Salim AlMalik (ICESCO), Ernesto Ottone Ramirez (UNESCO), and Alberto Garlandini (ICOM).

---

[1] Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457.

[2] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.

The first session was chaired by Manlio Frigo (University of Milan) and concerned the issue of the protection and circulation of cultural objects. Toshiyuki Kono (Kyushu University and ICONOS) gave a short introduction on the issue of the restitution and return of cultural goods and the strength of uniform law. The speaker focused on the problem of notable tensions between private international law and uniform law in the case of restitution of cultural goods and sought an answer as to which scheme, uniform law or private international law, is more beneficial for the protection of cultural property. He also added another layer of uniform law, mentioning the possibility of making private international law uniform in the field of cultural heritage according to the 1995 UNIDROIT Convention.

Marie-Sophie de Clippele (Saint-Louis University, Brussels) spoke about striking a fair balance between the protection of cultural heritage and private ownership through shared responsibility. She began her considerations by weighing up interests and rights in two cases: in the case of theft and in the case of illicit export. The speaker also referred to the problem of treating cultural object as a common good when several rights and interests coexist with regard to one object. She postulated a transition from an exclusive model of cultural heritage interest vs. ownership right to an inclusive model of "cultural property of shared interest" and "shared responsibility toward cultural heritage."

Marc-André Renold (University of Geneva) provided an analysis of the core question of due diligence. As he explained, pursuant to art. 4 of the 1995 Convention the possessor, to exercise due diligence, has to read any reasonably accessible register of stolen cultural objects and any other accessible documentation, which can be difficult in the case of private collections, because registering and documenting such collections is a fairly rare phenomenon. The measures according to which due diligence exists and is interpreted in various legal systems are not universal. The issue of determining the ultimate solution to establishing due diligence proves to be most controversial and should be unified, and since due diligence is treated as a key determinant of good faith, it is desirable to provide a clear definition encompassing the differences in each State.

Ana Filipa Vrdoljak (University of Technology, Sydney) introduced the regulation of online sales of cultural goods and the role of cooperation on the international arena in this field, because the 1995 UNIDROIT Convention entered into force before the changes made by the development of the Internet and the advent of online space.

Andrzej Jakubowski (Institute of Law Studies and University of Opole) spoke about making the resolution of cultural heritage disputes more effective in relation to the issue of time limitations under the UNIDROIT Convention. The speaker provided an in-depth analysis of provisions in this regard and also focused on special categories of objects distinguished by the Convention, especially indigenous and tribal cultural objects that are sacred or communally important cultural objects. A notable contribution of the 1995 UNIDROIT conventional regime for these objects was raised, resulting in, among other aspects, provisions of qualified time limitations and the protection of living cultures.

Patty Gerstenblith (DePaul University College of Law) discussed state ownership of undiscovered cultural objects from the perspective of the UNIDROIT Convention and model provisions. Model provisions are intended to assist national legislative bodies in adopting effective legislation for the establishment and recognition of the State's ownership of undiscovered cultural objects with a view to facilitating restitution in cases of unlawful removal and thus protect the archeological cultural heritage of origin countries. Unique to the 1995 UNIDROIT Convention, model provisions on state ownership of undiscovered cultural objects were demonstrated to provide steps that can be taken to fill potential gaps between the countries of origin and market countries in the field of ownership, which the speaker discussed briefly.

**Day 1, Session 2**

The second session was moderated by Marina Schneider and focused on the interplay and interdependence of rules and cultural instruments between the 1995 UNIDROIT Convention and various international actors and legal solutions.

First, Lazare Elondou Assomo (UNESCO) and Folarin Shyllon (Ibadan University) discussed relations between the 1995 UNIDROIT Convention and the 1970 UNESCO Convention on Illicit Traffic in Cultural Property. The speakers presented some differences between the two conventions. The UNESCO Convention is founded on the philosophy of Government action and therefore requires cultural objects to have been designated as such by the State requesting return, while the UNIDROIT Convention as a scheme under private law, does not require a cultural object to have been designated by the State for it to be covered by the Convention. African states are among the most vulnerable to the illicit trade in cultural property, but still the majority of African states are not parties to either convention. Becoming a party to both conventions is an important step toward combating illicit trade; therefore, all African countries should sign and implement the provisions of the conventions. This is also important for the repatriation of African cultural objects that were looted in colonial times.

Hans Ingels (EU Commission) and Sophie Vigneron (University of Kent) provided a rich presentation of EU legal instruments that can be used against the illicit trafficking of cultural property in connection with the 1995 UNIDROIT Convention. Ingles emphasized not only the European but even the global significance of the Convention. The most important were Council Directive 93/7/EEC, which established a mechanism for the return of cultural objects that had been unlawfully removed from the territories of European Union countries, and Directive 2014/60/UE, which recast Directive 93/7/EEC and introduced many innovative provisions. Currently, the European Union is focusing on stronger cooperation among Member States and the implementation of common good practices through modern solutions such as a digital cultural goods platform. Vigneron spoke on the differences between the UNIDROIT Convention and UE regulations, such as dealing with issue of ownership of cultural objects, time limitations, adoption of the return of cultural objects, and the limited concept of due diligence.

Matjaž Gruden (Council of Europe) and Jérôme Fromageau (ISCHAL) introduced some Council of Europe cultural conventions and their links to the 1995 UNIDROIT Convention. Gruden spoke on the Nicosia Convention of 2017, which is a new international instrument to fight against the illicit trade of cultural objects by obliging its State Parties to implement common standards in their domestic criminal law in relation to cultural property. The effectiveness of the Nicosia Convention's provisions depends on the readiness of States to sign and implement its regime, which is why cooperation plays a central role, not only for the protection of cultural property, but also for people and their identity. Fromageau stressed the active role of the Council of Europe in fighting against cultural heritage crimes, even before the European Union implemented its policy, which is founded, among others, on the Florence Convention, the Faro Convention, and the Nicosia Convention and also many soft law instruments. As the speaker said, the idea of the important Nicosia Convention was born to address the problem of existing differences in criminal legislation regarding illegal trafficking in cultural objects, and since the 1995 UNIDROIT Convention could not solve all the problems posed by the unlawful transfer of these goods, this is why the international community had to search for a new, more effective mechanism of cooperation in criminal matters in this field.

Angela Martins (Social Affairs Department African Union Commission) spoke on the relationship between the 1995 UNIDROIT Convention and African Union instruments. African States appear to be the most vulnerable of any group of countries to the illicit trade in cultural property; however, not a single African country is a State Party to the 1995 UNIDROIT Convention. National legislation in the African Union for the protection and preservation of cultural goods are either general or particular, depending on the country. For example, Egyptian Law 117 prohibits the private ownership, possession, or trade in antiquities and imposes sanctions for violations including prison terms with hard labor. Most of these countries operate the Convention's provisions through other acts without the implementation of the 1995 UNIDROIT Convention.

Irini Stamatoudi (University of Nicosia) discussed the place of the UNIDROIT Convention in out-of-court settlements of cultural property disputes. As the speaker pointed out, cultural property disputes differ from other types of disputes, because these are usually interstate with special legislation (including national, EU, international, and also bilateral agreements), they involve not only legal but also ethical and moral issues, and they concern cultural objects that are unique and carry special values, and often they have no substitutes. The 1995 UNIDROIT Convention provides for parties agreeing to submit disputes to any court or other competent authority or to arbitration. The speaker presented the remaining types of arbitration and also discussed the advantages and disadvantages of these forms of dispute resolution.

Jorge Sanchez Cordero Davila (International Academy of Comparative Law) spoke on the work that remains to be done regarding private collections. The 1995 UNIDROIT Convention confers to private collectors the active legal right to claim within international jurisdictions the return of stolen cultural objects. This provision broke the cultural hegemony that the UNESCO Convention conferred on national states by granting

them the power to determine which objects should be protected according to their cultural importance. Private collections and the engagement of private actors are at the core of the future cultural heritage protection model and only by involving private actors in equal dialogue in the cultural property debate can it lead to success. UNIDROIT has a very important role to play in enhancing and encouraging this arena of cooperation.

**Day 2, Session 3**

On the second day of the conference, the third session was chaired by Ignacio Tirano (UNIDROIT). The first speaker, Austin Lazar (University 1 Dicembrie 1918), spoke about the impact of the 1995 UNIDROIT Convention on Romanian access to justice in the case of the so-called Romanian Treasure, which is a continuing problem for this state to recover the gold that Romania sent to Russia for safekeeping during the First World War. The speaker stressed that UNIDROIT provides official international instruments that can be applied to fight illicit trafficking and can be used not only by states but also by individuals.

Maria Chiara Malaguti (UNIDROIT, Università Cattolica Sacro Cuore Milan/Rome) moved to the notion of temporary transport of cultural goods and four different approaches to immunity from seizure. The speaker also presented some examples of specific issue of immunity from the United Kingdom, Germany, the United States, and Australia, which, she said, had introduced the best solutions in this field by addressing two important issues for the Australian community, namely protecting cultural objects while they are on temporary exhibition in Australia and introducing classes that enjoy immunity.

Wand Yunxia (Renmin University of China) presented the application and enforcement of the 1995 UNIDROIT Convention in China. The legal status of international treaties is not clear in China's legal system since the Constitution does not mention the relationship between international and domestic law, and there is no principle provision on how international treaties should be implemented in China. This results in some degree of randomness in the implementation of the 1995 convention. The speaker mentioned which rules have been introduced into China's domestic laws (e.g., the prohibition of trading cultural objects of illegal origin) and which have not (e.g., the rule of the *bona fide* possessor).

Joanna van der Lander reflected on the antiquities trade over the past 25 years. She focused on the imprecise definitions of antiquities, cultural goods, legitimate, illicit, and provenance in relation to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. The speaker also underscored the current problems of the lack of provenance and the lack of the Convention's definition of archeological artifacts, which are objects on the antiquities market, and how to regulate the antiquities market legally to serve both past and present owners.

Martin Wilson (General Counsel, London) spoke on the impact of legal measures in the fight against illicit trade according to the conventions and the law in the United

Kingdom. The 1970 UNESCO Convention bore some compromises and signing the provisions by market countries was a milestone in fighting illegal trade, but in fact the 1995 UNIDROIT Convention was a more significant step in this field as it built on what UNESCO initiated. The speaker also presented the UK's achievements in fighting illegal trade and previewed possible future solutions.

Lynda Albertson (ARCA) focused on the role of civil society in the adoption of the 1995 UNIDROIT Convention and the promotion of its ratification and implementation globally. Civil society organizations can bring citizens' concerns to public authorities, monitor policy and program implementation, play the role of watchdog, as well as contribute to the achievement of greater transparency and accountability in the governance of culture. Actions taken by civil society, among others developing and publishing information tools to facilitate the understanding of the Convention and raising the visibility of the Convention by organizing training and forums or disseminating information to stakeholders play key roles in strengthening the international legal framework for the protection of cultural heritage.

Marina Schneider presented the role of UNIDROIT and the oversight mechanism. The speaker provided examples of actions taken by UNIDROIT, many in cooperation with UNESCO and ICOM, such as creating working groups in Egypt and Lebanon, organizing many capacity building workshops, engaging the European art market in the fight against the illicit traffic of cultural property, and training the European judiciary and law enforcement officials in this field. Activities for the near future were also announced, such as launching the process for strengthening the conventional body and founding the legal Advisory Group of UCAP.

Gilles de Kerchove (EU Counter-Terrorism Coordinator) spoke on tragic episodes of destruction, looting, pillage, and the trafficking of cultural property in recent years, particularly in countries affected by armed conflicts, such as Iraq and Syria, which have exposed the links between damage to cultural sites, organized crime, and financing terrorism. The fight against illicit trafficking is a key element in any strategy to eliminate sources of financing terrorism, and implementing international instruments such as the 1995 UNIDROIT Convention by most states is crucial to effectively fight illicit trafficking in cultural property.

The final speech was delivered by Ignacio Tirado, who stressed the important role of collaboration to achieve this common goal and the effort to strike a balance between domestic and international frameworks in the fight against illicit trafficking.

The end of the conference featured two statements by a representative of the Greek Ministry of Foreign Affairs and a representative of China's National Cultural Heritage Administration, who presented the impact of the 1995 UNIDROIT Convention on these two countries. The significance of the Convention was also emphasized in short speech made by the Ambassador of Mongolia and Yashar Huseynli, the Head of the Cultural Property Supervision and Registers Division at the Ministry of Culture of the Republic of Azerbaijan.

During the closing session, Ingrida Velitute (Vice-Minister of Culture, Lithuania) shared the story of the successful retrieval of a Gothic sculpture smuggled in 2000–01

following a ten-year legal struggle between Austria and Lithuania. Giorgio Marrapodi (Ministry of Foreign Affairs and International Cooperation, Italy) spoke about the effective role of UNIDROIT and the balance between protecting and maintaining a fair place for the art trade. The Italian commitment to protecting cultural heritage was also appreciated in the field of fighting the illegal trade and safeguarding galleries and museums. Marina Schneider expressed her gratitude to the conference participants and stressed that 25 years is a very important moment for UNIDROIT and still many things must be done. Ignacio Tirado thanked all the participants for joining the conference and guaranteed continued cooperation with benefits for the world.