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Principles of cultural heritage law

1. Introduction

Today cultural heritage law is recognised as an autonomous and complex branch of law.[1] Research is being carried out on cultural heritage law in the international arena both on theoretical and textual levels. Among the arguments for the discipline's autonomy, the following are most notable: the criterion of the object of regulations, the criterion of distinctive theory of its content, the criterion of its own sources of law, the institutional criterion, and finally – the criterion of its own distinct legal principles.[2]

The term "legal principle" is ambiguous and there are several different academic propositions as to its meaning and systematisation. The function of specific defining postulates of this concept is carried out by expressions resembling real definitions. In

[1] K. Zeidler, "Prawo ochrony zabytków jako nowa gałąź prawa" [in:] *Prawo ochrony zabytków,* ed. K. Zeidler, Wydawnictwo Uniwersytetu Gdańskiego – Wolter Kluwer, Gdańsk – Warszawa 2014, pp. 23–33; M.J. Węgrzak, K. Zeidler, "The principles of Cultural Heritage Law based on the Polish Law as an example", *Revista de Direito Internacional, Brasilia* [in print; planned edition: 2021, vol. 17, no. 3]; see also: K. Zeidler, *Prawo ochrony dziedzictwa kultury*, Wolters Kluwer, Warszawa 2007; K. Zeidler, *Zabytki. Prawo i praktyka*, Wydawnictwo Uniwersytetu Gdańskiego – Wolters Kluwer, Gdańsk – Warszawa 2017.

[2] C.R. Liesa Fernandez, "Cultura y Derecho International", *Cudernos de la Catedra de Democracia y Derechos Humanos, Alcala de Heranes* 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.

order to distinguish principles from other elements of the legal system one must examine not only their formal features (such as high position in the hierarchy of the legal system), but, more importantly, their substance (the importance of the issue being regulated). While formal analysis would focus on their role in application and interpretation of law by the courts, the examination of the merits must begin with the axiological justification and the approach based on value.

This concept of law was drawn up by Ronald Dworkin who argued that law, which is the ground for judicial judgements, consists of rules, principles and politics.[3] It must be noted that judges base their decisions on both legal rules and legal principles. In a case where there is conflict between two or more principles – a true conflict, not just an apparent one – the judge must neutralise all but one of these through weighing and balancing. This is, in practical terms, a choice rather than standard legal reasoning, and the choice is being made primarily on the basis of value. The assessment of values can be regarded as a kind of intellectual process similar to legal interpretation, perhaps a type of axiological interpretation. Examples of such assessments are numerous in the field of cultural heritage law, and the depth of reasoning required will vary from relatively the straightforward (as in cases about entry or deletion from the register of monuments) to the complex (as in restitution cases).

It has to be underlined that a symptom of permanence of a given principle in the system is when it is embraced by *opinion communis doctorum*. Scholars emphasise the "dynamism" of the principles of law, especially in the scope of their formation within the branch. In order for a rule of law to be considered a principle of law, it should meet specific conditions such as: 1) general acceptance of a given norm as a principle, both in the academia and in court jurisprudence; 2) the lack of any contrary opinion; 3) grounding in the legal texts, either directly (expressly) or indirectly, through interference rules.[4]

Extensive research is being conducted in the indicated scope to identify the principles of cultural heritage law and to formulate their suggested catalogue.[5] Among others principles the following may be highlighted: the principle of protection of cultural heritage, the principle of access to cultural heritage, the principle of integrity of cul-

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

[4] See: M. Kordela, *Zasady prawa. Studium teoretycznoprawne*, Wydawnictwo Naukowe UAM, Poznań 2014.

[5] See: K. Zeidler, "Zasady prawa ochrony dziedzictwa kultury – propozycja katalogu", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2018, no. 4; M. Wegrzak, *Zasady prawa ochrony dziedzictwa kultury w orzecznictwie sądów administracyjnych,* Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2020; M. Węgrzak, "Zasada ochrony dziedzictwa kultury w świetle wybranego orzecznictwa sądów administracyjnych", *Zeszyty Naukowe Sądownictwa Administracyjnego* 2017, vol. 13, no. 3(72).

tural heritage, the principle of property protection, the principle of social utility, the principle of control of preservation of cultural heritage, the principle of sustainable development, the principle of cultural heritage management, the principle of changing the utility value of cultural heritage over time, the principle of funding historical monument by the owner, the principle of funding from public resources, the principle of proportionality and others. The proposed list of principles is not exhaustive. This paper will discuss some of the principles listed above.

2. The principles of law and the development of Dworkin's theory of legal principles

According to Ronald Dworkin, who proposed an axiological approach to law, there are certain rules and principles of overriding nature and a significant meaning in the legal system. Dworkin argued that there are two basic premises for judicial rulings: firstly, rules and principles, and secondly – other standards. He therefore divided the legal principles *sensu largo* into principles and policies. The former are norms that are respected because of justice or morality, while the latter are structured in terms of programmatic norms, setting out the objectives to be achieved.

There are several important differences between norms-rules and norms-principles, that might be seen during their application. According to the first criterion for differentiation, the addressee of rules cannot fulfil their obligation "to a greater or lesser extent", because the existence of norms – rules in the legal system assume an "all-or-nothing" alternative. A rule – according to Dworkin – is a legal norm which determines a certain conduct in the circumstances indicated in it. The characteristic feature of Dworkin's rule is that they are either applicable or not, and the addressee has only two possible options: they can fulfil the obligation imposed on them or they can violate it if they behave differently. The rules can therefore either be respected or breached, and out of two incompatible rules, only one can be valid.

In turn, principles cannot be considered to be either applicable or not, because there is a gradation of the extent to which a rule is met under the assumption of "more or less" (the "more or less" model). Principles do not exclude other possibilities, for example – competitive principles are relevant for the considered case. In the specific case being examined by the court, it is often necessary to consider several principles in order to choose the principle that will be the basis for the judgment. In the event of a conflict of principles, the law applying body is therefore empowered to "balance" the incompatible principles in such a way as to implement them as far as possible. "Weighing up" the conflicting principles is to fulfil, in a specific case, the values they indicate as far as

possible. When referring to the principles of law, when deciding on a given case, these values are taken into account to the extent permitted by other principles, which require the realisation of some other values.

Another difference between rules and principles is that rules "apply" in particular because – according to Dworkin's terminology – they have passed the "origin test", that is, they have been duly established or recognised by those of legislative competence. They are either based on lawmaking acts or, in common law systems, the lawmaking practice of the courts. Each rule therefore becomes part of the system if it meets the "origin test" and from that moment on it becomes relevant and occupies the same position as all other rules. It is most often expressed directly in legal regulations or can be interpreted from them. In comparison, legal principles are not always directly expressed in legal regulations or court rulings. Their legal validity becomes independent of meeting the validity criteria contained in the "test of origin". Two criteria may determine the status of a principle in the legal system. One of them is acceptance by society and legal doctrine, which invokes a specific principle or principles as legally binding. Ronald Dworkin calls this "a feeling of adequacy" (sense of appropriateness). The principles can also be based on "institutional support", which manifests itself in the fact that the courts in their judgments invoke the rule or rules in question or that they are reflected in the legal act and influence its content. A set of principles is therefore reproduced on the basis of acts of lawmaking, and its validity derives from the fact that it expresses certain values and belongs to the sphere of public morality.[6] The legal principles become binding if they manifest themselves in court judgments' tendency. According to Dworkin, the principles that are formulated by the courts do not have to be precisely expressed in the text of judicial opinions, but nevertheless they need to be confirmed in practice by the decision-making bodies.

Among the rules and principles, Dworkin also distinguishes the so-called postulates of the system and political directives (policies). They include a set of diverse rules shaped in non-legal systems (hence the concept of "postulates"), and the subject of their influence becomes the public good, not the individual interest. There are, however, situations where it is not possible, at a linguistic level, to classify a given directive explicitly as a principle or a policy. In such a case, the assessment will be a matter for interpretation by the authority applying the law.

The model judge, called Hercules by Dworkin, must point to a principle which will meet certain criteria as the basis for a verdict in a difficult case. The principle, in order to become a proper basis for a court ruling, should be appropriate in terms of its formal

[6] See: S. Wronkowska, M. Zieliński, Z. Ziembiński, *Zasady prawa. Zagadnienia podstawowe*, Wydawnictwo Prawnicze, Warszawa 1974; M. Kordela, *Zasady prawa*…

"fit" with other standards in the legal system and the best moral justification. According to Dworkin, each principle, when expressing certain subjective rights of individuals, refers to social morality. A rule can often turn out to be insufficient to make a judgment from the point of view of justice, purpose or legal security. In such a situation a judge should seek a solution within the legal system based on principles and guidelines. As Dworkin emphasised, solving difficult cases does not, therefore, consist of creating new norms, but in "decoding" principles from the legal system. Legal principles then create a certain pattern which reflects the prevailing concept of justice in the society, and their legitimacy is based on values.[7] What is more, judges apply a process of "weighing up" very often and, as a result, one of the competing principles will be given the highest importance. The so called hard case resolution is not clearly based on a legal rule and there is a need, within the limits of the legal system, to seek a solution by referring to principles and guidelines.

It should be noted that there is no universally accepted definition of the principles of law in jurisprudence and multitude of concepts exist. As directive statements, they might be interpreted from legal acts and they assign their addressees in certain circumstances a given pattern of behaviour. The principles of law might also be seen as legal norms that protect an important good, express certain values and serve to implement specific ideas. Thus legal principles are understood as legal norms which order/forbid the realisation of a certain value.[8]

Dworkin's theory of legal principles was expanded by Manuel Atienza and Jose Manero, who stipulated that the difference between rules and principles, as far as the conditions for their application is concerned, seems gradual rather than discrete. It must be stressed that it is not the legal text that determines which category the legal norms fall into, but the way it is used in the law enforcement process. It is therefore not the law itself that assigns the status of rules or principles to the norms, but the interpreter who decides how he uses a legal text. The distinction of the catalogue of principles is strongly associated with case law and academia that determine which norms constitute principles of law. The normative basis for decisions is a specific legal provision in a normative act, and principles of law are used as arguments in favour of the decision that is taken.[9]

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[7] See: J. Zajadło, *Po co prawnikom filozofia prawa?*, Wolters Kluwer, Warszawa 2008.

[8] K. Zeidler, "Przestrzenie badawcze prawa ochrony dziedzictwa kultury", *Gdańskie Studia Prawnicze* 2015, vol. 32, pp. 147–154; see also: S. Tkacz, *O zintegrowanej koncepcji zasad prawa w polskim prawoznawstwie. Od dogmatyki do teorii*, Wydawnictwo Adam Marszałek, Toruń 2014.

[9] See: M. Atienza, J.R. Manero, *A Theory of Legal Sentences*, Springer Netherlands, Dordrecht 1998; M. Atienza, "Is Legal Positivism a Sustainable Legal Theory?" [in:] *Law and Legal Cultures in the 21st Century. Diversity and Unity*, *23rd IVR World Congress, August 1–6, 2007, Cracow, Poland*, eds. T. Gizbert-Studnicki, J. Stelmach, Wolters Kluwer, Warsaw 2007; M. Atienza, "On the

This article discusses the principles of the protection of cultural heritage. It demonstrates how the philosophical legal concepts are useful in studies on cultural heritage law and its principles. The extensive research conducted at present in the indicated scope exposed their existence in the cultural heritage law and this research became the basis for the proposed catalogue.[10] In the process of implementing cultural heritage law, there is also a need to weigh legal principles in relation to the values they protect. Conflicting values or legal requirements can make rationally deduced solutions unattainable and they need to be weighed in the process of implementing law and in search of equilibrium between them. There is controversy as to which values should be given priority in a particular case and it is common that the courts' decisions become discretionary. The decision concerning the "superiority" of one principle over another is connected with a court ruling in a concrete case and in another case a completing different "weighing up" of values might be made. The actual impact of the court jurisprudence on the interpretation of legal regulations concerning cultural heritage protection and explanation of the meaning of law becomes significant, however the greatest influence can be seen in establishing of its principles.[11]

3. Types of legal principles and their divisions

The feature that gives legal norm the status of a principle of law is its importance for the legal system. Legal principles deserve particular attention especially because of the fact that they have become the most important instrument of judicial activism. Legal cases are more or less difficult to solve, depending on the difficulty of finding a unique optimal equilibrium and the principles become a guidance for the courts to make a decent decision.[12]

Among the most important typologies of legal principles, the following should be distinguished: 1) legal principles explicitly formulated in legal texts (explicit principles);

Reasonable in Law", *Ratio Juris* 1990, vol. 3, no. 1; M. Atienza, J.R. Manero, "Permission, Principles and Rights. A Paper on Statements Expressing Constitutional Liberties", *Ratio Juris* 1996, vol. 9, no. 3, pp. 236–247.

[10] K. Zeidler, *Zasady prawa ochrony*…, p. 147; M. Wegrzak, *Zasady prawa ochrony*…, p. 107.

[11] 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; M. Węgrzak, "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.

[12] See: L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian,* Wydawnictwa Prawnicze PWN, Warszawa 2003.

2) those that might be interpreted from legal texts, although not explicitly expressed in them (implicit principles); 3) legal principles that are not expressed in legal acts but that are a part of the legal culture (implicit principles of a second degree).

The binding character of some principles may be based on the fact that it has been explicitly formulated in the legal text, or that might be decoded from the legal text in the process of applying the law. A binding nature of legal principles may also be based on an uncontested academic opinion regarding its legal validity (positive justification), in the absence of legal provisions that excludes this principle from being applicable in a particular legal system (negative justification). Principles that have such a justification for their validity are undisputed components of historically shaped political and legal culture and can be considered as a kind of customary norms.[13]

Based on another criterion of the division of legal principles, the following are distinguished: universal principles, understood as principles of the whole system of law, and particular principles, understood as the rules of a part of the legal system. Regarding this selection, more specifically, one can distinguish: 1) the general principles of the system of law that are usually constitutional principles; 2) the principles of particular branches of law; and 3) the principles that are specific for a particular legal act. In this case they are treated as the regulatory ideas of the legal system, its individual branches, and sometimes specific legal regulations. Moreover, principles of law play a special role in the construction of the legal system, branches of law or legal institutions.[14]

Finally, the typology of legal principles may concern their origin, and so there are: 1) principles of national law; 2) principles of European law; 3) principles of international law. However, due to the integration of these legal orders one and the same principle can be – and very often is – a principle of national law, European law and international law at the same time.

4. The principles of cultural heritage protection law and its catalogue

One of the criteria for separation between the branches of law is presence of unique principles of law. The principles of cultural heritage law meet the contemporary approach to law seen not only as a set of provisions contained in legal acts but also as a set of principles or guidelines existing in the legal system. "Decoding" these principles, and then confirming them in written reasons of courts' decisions causes the courts to legitimise the existence of these principles in the system and to affect the interpretation

[13] See: S. Tkacz, *O zintegrowanej koncepcji zasad prawa*…

[14] See: S. Wronkowska, M. Zieliński, Z. Ziembiński, *Zasady prawa*…

of legal regulations concerning a given subject.[15] An actual impact of the court jurisprudence on the interpretation of legal regulations concerning cultural heritage protection and explanation of the meaning of law becomes significant, however the greatest influence can be seen in mechanisms of establishment of its principles.

It should be noted that there is a significant number of general principles of the legal system and the principles of individual branches of law that are relevant for cultural heritage law. It seemed, however, that the principles that are unique only for this complex branch of law might be simultaneously general principles of law or principles of individual branches of law. Nevertheless, they specify their content on the basis of cultural heritage law. For example, given that the basic instruments for legal protection of monuments are provided by administrative law with a special regard to administrative procedure, all principles of the code of administrative procedure become principles of cultural heritage protection law. Similarly, certain principles of European law regarding the protection of European heritage are the principles of cultural heritage protection law, in particular the principle of subsidiarity, the principle of proportionality or the principle of sustainable development. Besides this, the general principles of the entire system of law, such as the principle of access to information or decentralisation, are of great importance.

Firstly, the principle of cultural heritage protection should be considered. This principle has the characteristics of the so-called meta-principle of cultural heritage law, which is to say that not only other principles of law must be interpreted in the light of this principle, but all provisions of national law must be, without exceptions, no matter which branch they happen to belong to.[16] It is the constitutional principle based on the preamble and on Article 5 of the Constitution of the Republic of Poland (*Journal of Laws* of 1997, no. 78, item 483, as amended). Article 5 stipulates that "The Republic of Poland shall (…) safeguard national heritage and shall ensure the protection of natural environment pursuant to the principles of sustainable development".

Another constitutional principle of cultural heritage law – the principle of access to cultural property – is expressed in Articles 6 and 73 of the Constitution. The first of these imposes an obligation on state authorities to provide conditions for equal access to cultural goods that are the source of the Nation's identity, continuity and development. The constitutional order to preserve and promote cultural heritage can be designated to public authorities. The society, however, is also involved in these obligations. Historical and artistic goods have special value because of their role as a link between the past, the present, and the future. As seen from the above example, Article 5 of the Constitution

[15] See: S. Tkacz, *O zintegrowanej koncepcji zasad prawa…*

[16] *Europa sędziów,* ed. Z. Brodecki, Lexis Nexis, Warszawa 2007.

of the Republic of Poland has a systemic meaning in the sense that its normative layer extends to the whole system of law and the direct addressee of the obligation is the State in its entirety, and consequently all its organs (although of course this task is carried out mainly by a specialised governmental administration overseen by the Ministry of Culture and National Heritage). It also must be considered that while the grounding for the principle of cultural heritage protection is in Article 5 of the Constitution, its content needs to be adjusted in the process of the interpretation of law, taking into account the meaning of other legal provisions, the Constitution as well as the broader systemic context. With regards to the principle of access to cultural heritage it must be stressed that cultural heritage property should be commonly available without imposing restrictions on the addressee of culture. However, the obligation to create conditions for the dissemination of cultural goods should be implemented by taking into account the principle of cultural heritage protection.

Another principle, the principle of integrity of cultural heritage, is said to be analogous to the principle of integrity of works in copyright. Its purpose is different however, because it is not about protection of the author's rights, but about protection of cultural heritage object itself from interference in its shape and form. Thus, it is directly connected with the recommendations developed on the basis of conservation theory. The preservation of the original is in the public interest, which is to maintain cultural heritage for the future generations, and remains in line with the concept of cultural heritage as a common good due to its special qualities and values.[17] Establishing the boundaries of compromise in the protection of cultural heritage becomes a challenge, especially the necessity to balance the public interest (general social interest) and the individual interest (investor and/or owner). The potential point of conflict here is between the principle of protection of cultural heritage (due to the social dimension of the protected value) and private property. This principle does not reject the existing achievements in the field of restitution and return of works of art, protection of monuments in the situation of war and it is not inconsistent with the solutions adopted in the European Union law concerning the return of illegally exported objects as well as the regulation of cross-border movement of cultural property.[18]

[17] 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, USA 2001; K. Zalasińska, "Interes indywidualny a interes publiczny – konflikt wartości w prawnej ochronie zabytków", *Ochrona Zabytków* 2008, no. 6/2(241), pp. 83–87.

[18] See: A. Jagielska-Burduk, *Zabytek ruchomy*, Wolters Kluwer, Warszawa 2012.

The principle of property protection is very important in the light of ownership of monuments. It is the owner's duty, above all, to provide the most effective protection of cultural objects that they own and to maintain them in a good condition.[19] It must be noted that the ownership of cultural heritage is constrained by many duties laid upon the owner and in fact the only party who is allowed to interfere by issuing a decision relating to a cultural heritage object is the state.[20] The principle of property protection and the right of ownership have to be balanced with the protection of integrity of cultural heritage and the principle of protection of cultural heritage. As the protection of cultural property is not just in the owners' interests but in that of the whole society, their entitlements to possession of cultural objects are limited. This leads to conflict between public and private good. It has to be stressed that currently, in light of the protection of human rights, the above-mentioned collision is not always resolved in favour of the public interest. All these values, rights and causes should be balanced.

Next, the principle of cultural heritage management includes both the protection and preservation of monuments, as well as the sphere of their utility value, i.e. contemporary use of a monument and the creation of access to it. Proper management of cultural heritage is most widely manifested in historical cities. This principle is connected with a change in approach to the issue of historical monuments' protection, where the idea of the protection, understood classically as being left unchanged, is abandoned in favour of the so-called "management of a change". One can notice that the interference with the substance of a historical monument, some changes in its function and its utility values is accepted so that it can be used at present and thus well preserved. As a result, the approach to management as a process involving local communities and individual local government prevails. An important element of this process is to ensure adequate public participation, including at the decision-making stage.

Another principle, the principle of change in the utility value of cultural heritage over time, is based on the assumption that the original function of a given object is likely to differ from its role today, when the object becomes a historical monument. To protect monuments effectively, this shift should be accepted, so that the monuments might continue to be used. To give an example, finding a new purpose for a historical building might entail its conversion into a cultural institution, a museum, a luxury hotel, or a restaurant. This counteracts the situation in which historical buildings could be destroyed or fall into disrepair. Even if a given cultural heritage object fulfilled cer-

[19] P. Dobosz, "Aspekty prawne systemu ochrony dziedzictwa w Polsce" [in:] *Zarządzanie miejscami wpisanymi na Listę Światowego Dziedzictwa UNESCO w Polsce i w Norwegii*, ed. J. Purchla, Międzynarodowe Centrum Kultury, Kraków 2011, p. 71.

[20] M. Drela, *Własność zabytków*, Wolters Kluwer, Warszawa 2006, p. 4; see also: K. Zalasińska, *Prawna ochrona zabytków nieruchomych w Polsce*, Wolters Kluwer, Warszawa 2010.

tain functions in the past, nowadays it may have a different use. Moreover, a historical site with a significant utility value can strengthen it over time, gaining additional value through synergy between historicity and its present purpose (and thus also gaining in economic value). On the other hand, an object presenting initially a specific property value might naturally lose it over time, only to regain it through present-day acknowledgement of its historicity.

The principle of social utility of cultural heritage is based on the thesis that historical monuments should be used well nowadays; one could say: they should be "socially useful". This principle, derived from the category of a historical monument as a common good, is combined with the principle of access to cultural heritage.[21] According to the content of this principle, cultural property should not be perceived as belonging only to the owner or disposer of this monument, and its protection and preservation in the best possible condition for future generations should be implemented, even if, as a result, effecting this principle may be at odds with the rights and freedoms of individuals.

The principle of financing historical monuments by the owner of the monument is linked to the ownership issue and the fact that owning a monument implies responsibility for financing the activities regarding the monuments. This principle is related to the principle indicated below, i.e. the principle of public funding. It is important to find appropriate proportions between the implementation of these two principles. However, it has to be considered that we recognise monuments as a common good, their preservation is in the interest of the whole community, not just the individual (owner or the holder of a monument). As a result, conservation authorities may interfere with the performance of owner's duties. Thus, the implementation of owners' obligations should be compensated and financially supported by the administrators of public funds. It is therefore important that the relationship between these principles regarding monuments' maintenance is properly arranged.

The general rule provided in the Act of 23 July 2003 on the protection and preservation of monuments (consolidated text: *Journal of Laws* of 2020, item 282, as amended) is the obligation to finance conservation, restoration and construction works on monuments by entities having legal title to them, including their owners. It follows from the content of Article 5 of this Act that stipulates that the preservation of the monument is of an individual nature, and the current legal owner or possessor of a monument is responsible for its implementation. This it is manifested, among others, in the use of the monument in a manner ensuring permanent preservation of its value and the obligation to finance conservation, restoration and construction works regarding the monument.

[21] See: K. Zeidler, *Restitution of Cultural Property. Hard Case. Theory of Argumentation. Philosophy of Law*, Wydawnictwo Uniwersytetu Gdańskiego – Wolters Kluwer, Gdańsk – Warszawa 2016.

The principle of financing from public funds, concerning in particular, the financing of the preservation of monuments, is inextricably linked to the previous principle, i.e. the principle of financing by the owners of the monument. It should be pointed out that these principles are opposite and the applicable law introduces solutions that give priority to one or to the other. However, it is recommend to consider one of them as *lex generalis*, the other as *lex specialis*, so that it is not necessary to weigh these principles every time, but only (once the legal prerequisites are met) apply given legal regulations.[22]

Another principle, the principle of proportionality, is procedural. It manifests itself in the fact that public administration bodies are obliged to protect cultural heritage if preservation is in the public interest. It might be necessary to limit the sphere of ownership of the owner of the monument, but only to the necessary extent, taking care of the selection of specific measures to protect both the interests of individuals and specific social interest. The interference in the area of individual rights must remain in a reasonable and appropriate proportion to the objectives justifying the restriction. Thus, the principle of proportionality is about balance, necessity and usefulness of restrictions that are to be imposed.

The principle of proportionality allows for settlement of a dispute between the common good and individual interests. In some circumstances these interests might be in collision with each other. The principle of proportionality is, therefore, extremely important if a conflict between legal principles arises: it allows for a way out by giving priority to one principle over another in a particular case. In case of a conflict of principles, the court applies the principle more relevant to a given situation, which does not mean that the other principle is not in force or that in all conceivable sets of facts the order of preference must be the same. If possible, the court should apply these principles taking into account the principle of proportionality. With regard to the law on the protection of cultural heritage, this principle therefore shows the relevance of the objectives and the measures needed to achieve a given aim, taking into account the obligation to preserve cultural heritage in the best possible condition for future generations, which is rooted in the principle of cultural heritage protection.

5. Conclusions

The principles of law are one of the most significant normative constructs and, at the same time, remain an important subject of legal research in both theoretical, textual, and pragmatic perspectives. Moreover, legal principles are guidance for the authorities

[22] See: K. Zeidler, *Zasady prawa ochrony*…, p. 147.

to make a correct decision and also might be understood as legal norms which prescribe arrangement of values and objectives in the process of applying law. Such axiological approach to law is visible while considering the cultural heritage law and its principles.

It should be pointed out that most of the principles outlined in the article apply jointly to the protection of immovable and movable cultural heritage. Moreover, they might be applied not only to historical monuments but also to museums, libraries, and archives. The majority of the principles mentioned above are rules of law, found in systemic, individual branches of law or directly in legislative acts. Only some of them – like, for instance, the meta-principle of protection of cultural heritage – are the specific for this particular branch of law. What is more, some of these principles have their origins in international law, as well as in the so-called international doctrinal documents (soft law).

Aside from the above, there is a noticeable amount of judicial activism in establishing and constant evaluation of principles of cultural heritage protection law. It has to be stipulated that as each case is different the courts have to find a solution for every one of them by weighing and balancing the values they protect. What is striking, in most cultural heritage law cases, the clash of principles is unavoidable.

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Summary

Principles of cultural heritage law

The aim of this article is to discuss cultural heritage law with emphasis on its principles. Currently, cultural heritage law is considered as a complex branch of law and one of the most important criteria of its autonomy is the existence of its own, unique legal principles. It has to be noted that one of the attributes that elevates a legal norm to the status of a principle is its strong axiological base, which implies its importance for the legal system.

The principles of cultural heritage law deserve particular attention because of the fact that, at present, they have become the most important instrument of judicial activism. This activism involves intensional (content-oriented) reasoning related to the principles formulated directly in the legal text (explicit principles), the principles interpreted from a legal text, although not expressed in the text explicitly (implicit principles), and the principles of law not expressed in legislative acts, but constituting an element of legal culture (second-degree implicit principles). The catalogue outlined in the article is a result of an analysis of legal regulations in force.

Keywords: cultural heritage law, cultural heritage, cultural property, protection of cultural heritage, principles of law

Streszczenie

Zasady prawa ochrony dziedzictwa kultury

Celem artykułu jest przybliżenie prawa ochrony dziedzictwa kultury poprzez omówienie jego zasad. Prawo ochrony dziedzictwa kultury jest uważane za kompleksową gałąź prawa, a wśród najważniejszych kryteriów wyodrębnienia go jako gałęzi należy wskazać unikalne, wyróżniające to prawo zasady. Jedną z cech definiujących normę prawną jako zasadę jest zabarwienie aksjologiczne, które nadaje znaczenie całemu systemowi prawa.

Zasady prawa dziedzictwa kultury zasługują na uwagę głównie dlatego, że stanowią obecnie ważną sferę aktywizmu sędziowskiego. Aktywizm ten przejawia się w rozumowaniach intensjonalnych (treściowych) co do zasad zawartych w tekście *explicite*, zasad dorozumianych (wyinterpretowanych z tekstu) oraz zasad dorozumianych drugiego stopnia (zasad niemożliwych do wyinterpretowania z tekstu, lecz funkcjonujących jako część kultury prawnej w szerszym znaczeniu). Przedstawiony katalog zasad powstał w wyniku analizy prawa aktualnie obowiązującego.

Słowa kluczowe: prawo dziedzictwa kultury, dziedzictwo kultury, dobro kultury, ochrona dziedzictwa kultury, zasady prawa