

**Bartłomiej Gadecki**

Regional Court in Olsztyn

e-mail: gadek82@poczta.onet.pl

ORCID: 0000-0001-9542-3919

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The over thirty-five-year duration period  
of the penal provisions contained  
in the Act on national archive holdings and archives:  
A commentary on the direction of legal amendments

## 1. Introduction

Cultural heritage does not merely concern monuments. Various definitions of the term “cultural heritage”<sup>1</sup> have been proposed in academic discourse, but there is little doubt that apart from monuments of history<sup>2</sup> this heritage consists of *musealia* (museum exhibits<sup>3</sup>), library materials,<sup>4</sup> or archive materials,<sup>5</sup> the latter of which will be the focus of the following commentary.<sup>6</sup> Two factors influenced the choice of the topic of the present article. The first one is connected with the observation that archive materials tend to attract less attention in discussions on the issues of protecting cultural heritage. The

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<sup>1</sup> See e.g.: J. Pruszyński, “Dziedzictwo kultury w świetle Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 roku” [in:] *Konstytucja i władza we współczesnym świecie. Doktryna. Prawo. Praktyka*, eds. M. Kruk, J. Trzeciński, J. Wawrzyniak, Warszawa 2002, pp. 132–133.

<sup>2</sup> As regards the definitions of terms such as “monument”, “immovable monument”, “movable monument”, “archaeological monument”, see Article 3 paras. 1–4 of the Act of 23 July 2003 on the protection and preservation of monuments (consolidated text: *Journal of Laws* of 2020, item 282, as amended).

<sup>3</sup> As regards the definition of the term “musealium”, see Article 21 paras. 1–1a of the Act of 21 November 1996 on museums (consolidated text: *Journal of Laws* of 2020, item 902).

<sup>4</sup> As regards the definition of the term “library materials”, see Article 5 of the Act of 27 June 1997 on libraries (consolidated text: *Journal of Laws* of 2019, item 1479).

<sup>5</sup> As regards the definition of “archive materials”, see Article 1 of the Act of 14 July 1983 on national archive holdings and archives (consolidated text: *Journal of Laws* of 2020, item 164).

<sup>6</sup> See: K. Zeidler, *Restitution of Cultural Property: A Hard Case – Theory of Argumentation – Philosophy of Law*, Gdańsk – Warszawa 2016.

second factor proceeds from the fact that the penal provisions contained in the Act on national archive holdings and archives have been in force for more than 35 years and it seems that the time is right to take stock of the situation and to offer remarks concerning the amendments in the widely understood cultural heritage protection legislation. This study aims to establish whether archive materials have been granted adequate protection by criminal law. To answer this question, the present protection of archive materials will be compared with the protection granted to other elements of cultural heritage (historical monuments, *musealia*, library materials).

## 2. Entry into force of the Act on national archive holdings and archives

The Act of 14 July 1983 on national archive holdings and archives entered into force on 1 January 1984, and, on the same day, the Act on national archive holdings and archives, the Decree of 29 March 1951 on state archives (*Journal of Laws* of 1951, no. 19, item 149, as amended) expired. Admittedly, the Act on national archive holdings and archives offered a wider range of provisions than the Decree on state archives. What is particularly noteworthy is not only the inclusion of penal provisions in the Act on national archive holdings and archives, but also the attempt to offer a comprehensive regulation of the problems of archives and archive materials within one legal act. It should be pointed out that the Decree on state archives did not offer a comprehensive regulation of those problems because several regulations concerning archive materials were contained in the Act of 15 February 1962 on the protection of cultural property and museums (*Journal of Laws* of 1962, no. 10, item 48, as amended; hereinafter: the Act on the protection of cultural property). Therefore, the entry into force of the Act on national archive holdings and archives made it necessary to introduce amendments to the Act on the protection of cultural property. Chapter 6 of the Act on national archive holdings and archives, titled “Amendments to the existing provisions” contained regulations excluding issues related to archive materials from the Act on the protection of cultural property. As a result of the amendments made with the entry into force of the Act on national archive holdings and archives, Article 4 of the Act on the protection of cultural property was worded as follows: “Legal protection, as stipulated by the provisions of the present Act, is granted to the following cultural assets, referred to as ‘monuments’: 1) those entered in public registers of monuments of history, 2) those belonging to museums and libraries, with the exception of archive materials constituting a part of national archive holdings, whose protection is covered by separate regulations, 3) others, provided their historic nature is evident, unless they are subject to protection on the basis of separate regulations”.

The above amendment of Article 4 of the Act on the protection of cultural property meant that the legal protection stipulated in this Act was no longer extended to archive materials constituting a part of national archive holdings, whose protection was covered by separate regulations. At the same time, the wording of this provision does not justify the assumptions that archive materials constituting a part of national archive holdings ceased to be treated as cultural assets. Archive materials constituting a part of national archive holdings ceased to be cultural assets protected by the Act on the protection of cultural property. Consequently, it was necessary to change the existing regulations. Hence, in Article 5 point 9 of the Act on the protection of cultural property, specifying the object of protection, it was pointed out that from the point of view of substantive law, the object of protection includes, in particular, holdings and collections of artistic and historic value, regardless of the kind and value of their individual items, unless they constitute a part of the national archive holdings. Before the change resulting from the entry into force of the Act on national archive holdings and archives, the Act on the protection of cultural property stipulated clearly that, in substantive law terms, the object of protection include, in particular, archive materials – “regardless of their manufacturing technique (manuscripts, typescripts, prints), such as files, documents, books, letters, artistic, technical and financial documentation, as well as photographs, films, sound recordings and other documentations recorded by mechanical means” (Article 5 point 8).

Perhaps the most significant novelty, at least from the point of view of legal protection by criminal law, came with the change of Article 83 of the Act on the protection of cultural property, whose original wording was as follows: “The protection of cultural assets stored in public archives and libraries is covered by separate regulations, nevertheless, the provisions of Article 18, Articles 41–44 and Articles 73–81 of the Act shall also apply”. Under Article 83 of the Act on the protection of cultural property, as regards the protection of cultural assets stored in public archives, the provisions of Articles 73–81 of the Act (i.e. the provisions contained in chapter XIII of the Act and titled “Penal provisions”) shall also apply. The protection of cultural assets stored in public archives, as stipulated by Articles 73–81 of the Act, took place in the time period from the date of the entry into force of the Act on the protection of cultural property to 31 December 1983 (i.e. until the amendment of the Act, made as a result of the entry into force of the Act on national archive holdings and archives). Before the amendment was made, under the provisions of the Act on the protection of cultural property, cultural assets stored in public archives were subject to protection from damage or destruction (Article 73); intentional offence was subject to the penalty of imprisonment for up to 5 years and a fine (para. 1), while unintentional offence – to the penalty of imprisonment for up to 6 months or a fine up to 20.000 PLN (para. 2). If intentional, illicit exportation abroad or not returning the given asset to the country of origin by the date established in the

permission were subject to the penalty of imprisonment for up to 5 years and a fine (Article 74 para. 1 of the Act on the protection of cultural property), and if unintentional – to the penalty of imprisonment for up to 6 months or a fine up to 20.000 PLN (Article 74 para. 2). The Act on the protection of cultural assets also included the offence of obstructing the exercise of duties by organs of conservation services (Article 75) and facilitating exportation of a monument abroad (Article 76). Apart from crimes, chapter XIII of the Act on the protection of cultural assets also included petty offences (Articles 77–79), which were to be adjudicated in accordance with the regulations of penal-administrative procedure (Article 80).

The Act on national archive holdings and archives included chapter 5 entitled “Penal provisions”, containing 4 articles (Articles 52–55) laying down offences such as damage and destruction of archive material (Article 52), illicit exportation of archive material abroad (Article 53), facilitating the exportation of archive material abroad (Article 54), not securing archive material and not notifying of relevant events (Article 55).

Undoubtedly, penal provisions contained in the Act on national archive holdings and archives were inspired by the penal provisions included in the Act on the protection of cultural property.<sup>7</sup> Prior to the enactment of the Act on national archive holdings and archives, cultural assets stored in public archives were covered by chapter XIII of the Act on the protection of cultural property, titled “Penal provisions” (Articles 73–81). Since the adoption of the Act on national archive holdings and archives, the provisions in Articles 73–81 of the Act on the protection of cultural property no longer applied to archive materials belonging to the national archival holdings and criminal law protection of archive materials was provided for in the Act on national archive holdings and archives only.<sup>8</sup> The question arises therefore whether the inclusion of penal provisions in the Act on national archive holdings and archives, and the related non-application of the penal provisions of the Act on the protection of cultural property<sup>9</sup> to protect archive materials, strengthened or weakened the penal and legal protection of archive materials.

The offence of damaging or destroying an archive material (Article 52 of the Act on national archive holdings and archives) was worded as follows: “1. Whoever, having a special responsibility to protect archive materials, damages or destroys them, shall be

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<sup>7</sup> W. Radecki [in:] *System Prawa Karnego*, vol. 11, *Szczególne dziedziny prawa karnego. Prawo karne wojskowe, skarbowe i pozakodeksowe*, ed. M. Bojarski, Warszawa 2014, p. 1013.

<sup>8</sup> I am leaving aside the protection of archive materials by the provisions contained in the Act of 19 April 1969 – Penal Code (*Journal of Laws* of 1969, no. 13, item 94, as amended), and subsequently by the provisions of the Act of 6 June 1997 – Penal Code (consolidated text: *Journal of Laws* of 2020, item 1444; hereinafter: the Penal Code).

<sup>9</sup> As applicable on the 1<sup>st</sup> of January 1984.

subject to the penalty of imprisonment for up to 3 years. 2. If the perpetrator acts unintentionally, they shall be subject to the penalty of restriction of liberty or a fine”.

On the other hand, the offence of damaging or destroying a monument (Article 73 of the Act on the protection of cultural property) was worded as follows: “1. Whoever damages or destroys a monument shall be subject to the penalty of imprisonment for up to 5 years and a fine. 2. If the perpetrator acts unintentionally, they shall be subject to the penalty of imprisonment for up to 6 months or a fine up to 20.000 PLN”.

While comparing these two offences, it is possible to see similarities in terms of regulating the responsibility for both intentional offence (Article 52 para. 1 of the Act on national archive holdings and archives, Article 73 para. 1 of the Act on the protection of cultural property) and unintentional offence (Article 52 para. 2 of the Act on national archive holdings and archives, Article 73 para. 2 of the Act on the protection of cultural property), and their objective features (“damages”, “destroys”). However, there are significant differences as well because the offence of damaging or destroying archival material can only be perpetrated by a person who has a special responsibility to protect archive materials, thus making it a so-called individual offence.<sup>10</sup> On the other hand, damage or destruction of a monument is a common offence and anyone can perpetrate it. There are also differences as regards the severity of the sanction: intentional damage or destruction of archive materials is subject to the penalty of imprisonment for up to 3 years, while intentional damage or destruction of a monument – to the penalty of imprisonment for up to 5 years and a fine. Unintentional damage or destruction of archive materials is subject to the penalty of restriction of liberty or a fine, whereas unintentional damage or destruction of a monument – to the penalty of imprisonment for up to 6 months or a fine up to 20.000 PLN. It should also be observed that sanctions for the offence of damaging or destroying archive material were significantly lower than for the offence of damaging or destroying a monument.

As regards the offence of illicit exportation of archive material (Article 53 of the Act on national archive holdings and archives), it was worded as follows: “1. Whoever exports archive materials abroad without permission or after their exportation does not return them to the country of origin by the date established in the permission shall be subject to the penalty of deprivation of liberty for up to 3 years. 2. If the perpetrator acts unintentionally, they shall be subject to the penalty of restriction of liberty or

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<sup>10</sup> W. Radecki [in:] M. Bojarski, W. Radecki, *Pozakodeksowe przepisy karne z komentarzem*, Warszawa 1992, p. 300; M. Bojarski, W. Radecki, *Pozakodeksowe prawo karne*, vol. 3, *Przestępstwa w dziedzinie porządku publicznego, wyborów, polityki i inicjatywy ustawodawczej, pracy i ubezpieczeń społecznych, kultury i własności intelektualnej. Komentarz*, Warszawa 2003, p. 362; W. Radecki [in:] *System Prawa Karnego*, vol. 11, p. 1030; W. Kotowski, B. Kurzępa, *Przestępstwa pozakodeksowe. Komentarz*, Warszawa 2007, p. 241.

a fine. 3. The court may order a confiscation of archive materials constituting the object of the offence”.

As regards the offence of illicit exportation of a monument (Article 74 of the Act on the protection of cultural property) was worded as follows: “1. Whoever exports a monument abroad without permission or after its exportation does not return it to the country of origin by the date established in the permission shall be subject to the penalty of imprisonment for up to 5 years and a fine. 2. If the perpetrator acts unintentionally, they shall be subject to the penalty of arrest for up to 6 months or a fine up to 20.000 PLN. 3. The court may order the confiscation of the monument, even if it was not the perpetrator’s property”.

Strikingly enough, the structure of Article 53 of the Act on national archive holdings and archives is identical with that of Article 74 of the Act on the protection of cultural property; para. 1 defines responsibility for an intentional offence, para. 2 – for unintentional offence, and para. 3 regulates the ability to order confiscation. Article 53 of the Act on national archive holdings and archives in paras. 1–2 reproduces the objective features of the offence from Article 74 paras. 1–2 of the Act on the protection of cultural property, the only difference being that it is archive material rather than a monument which is targeted by perpetrators. However, while comparing the sanctions (intentional illicit exportation of archive material was subject to the penalty of imprisonment for up to 3 years, and the unintentional illicit exportation of archive material – to the penalty of restriction of liberty or a fine, while intentional illicit exportation of a monument was subject to the penalty of imprisonment for up to 5 years and a fine, and the unintentional illicit exportation of a monument – to the penalty of arrest for up to 6 months or a fine up to 20.000 PLN), it is clear that the responsibility for illicit exportation of archive materials was considerably less severe than for the illicit exportation of monuments. The ability to order confiscation was regulated differently as well. For the offence of illicit exportation of an archive material the court was able to order confiscation of archive materials constituting the object of the offence. On the other hand, for the offence of illicit exportation of a monument the court was able to order confiscation of the monument “even if it was not the perpetrator’s property”.

At the same time, the sanction for intentional damage or destruction of archive material (Article 52 para. 1 of the Act on national archive holdings and archives) was the same as the sanction for the intentional illicit exportation of an archive material abroad (Article 53 para. 1 of the Act on national archive holdings and archives); both offences were subject to the penalty of imprisonment for up to 3 years. Similarly, the sanction for unintentional damage or destruction of archive material (Article 52 para. 2 of the Act on national archive holdings and archives) was the same as the sanction for the unintentional illicit exportation of an archive material abroad (Article 53 para. 2 of the Act

on national archive holdings and archives); both offences were subject to the penalty of restriction of liberty or a fine. Therefore, the loss of archive material as a result of its exportation abroad was treated the same as the loss of such an archive material because of damage or destruction. It was not a new solution, but merely one “borrowed” from the penal provisions protecting monuments, wherein the intentional damage or destruction of a monument (Article 73 para. 1 of the Act on the protection of cultural property) had the same sanction as the offence of intentional illicit exportation of a monument (Article 74 para. 1); both were subject to the penalty of imprisonment for up to 5 years and a fine. Additionally, the unintentional damage or destruction of a monument (Article 73 para. 2) had the same sanction as the offence of unintentional illicit exportation of a monument (Article 74 para. 2) as well – the penalty of arrest for up to 6 months or a fine up to 20.000 PLN.

The offence of facilitating exportation of archive material abroad contained in Article 54 of the Act on national archive holdings and archives was worded as follows: “1. Whoever disposes of, assists in disposing of or acquiring archive materials belonging to the national archive resource, and was aware that the acquirer wanted to export them abroad without permission, shall be subject to the penalty of imprisonment for up to 3 years. 2. If the perpetrator acted unintentionally, they shall be subject to the penalty of restriction of liberty for up to a year or a fine”.

On the other hand, the offence of facilitating exportation of a monument abroad (Article 76 of the Act on the protection of cultural property) was worded as follows: “1. Whoever disposes of or mediates in the disposal of a monument, and if on the basis of accompanying circumstances they should presume that the acquirer intends to export it abroad without permission, in the case when the exportation or an attempt at it actually happened, shall be subject to the penalty of detention for up to 2 years and a fine. 2. A person who notified the organs of conservation services about the transaction mentioned in par. 1 sufficiently early to prevent the exportation shall not be subject to the penalty”.

*Prima facie*, these two offences are similar. However, the offence covered by Article 54 of the Act on national archive holdings and archives can be perpetrated intentionally<sup>11</sup> (para. 1) as well as unintentionally (para. 2), whereas the offence covered by Article 76 of the Act on the protection of cultural property was unintentional.<sup>12</sup> The language of the law was different; in the case of the offence covered by Article 54 of

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<sup>11</sup> W. Radecki [in:] M. Bojarski, W. Radecki, *Pozakodeksowe przepisy...*, p. 303; M. Bojarski, W. Radecki, *Pozakodeksowe prawo karne...*, p. 369; W. Kotowski, B. Kurzępa, *Przestępstwa pozakodeksowe...*, p. 244.

<sup>12</sup> W. Radecki [in:] M. Bojarski, W. Radecki, *Pozakodeksowe przepisy...*, p. 294; M. Bojarski, W. Radecki, *Pozakodeksowe prawo karne...*, p. 355.

the Act on national archive holdings and archives it is “disposal, assistance in disposal or acquisition”, while in the case of the offence covered by Article 76 para. 1 of the Act on the protection of cultural property – “disposal or mediation in disposal”. The significant condition of responsibility for the offence covered by Article 76 para. 1 of the Act on the protection of cultural property was that “the exportation or the attempt at it actually took place”. Such a condition is not stipulated as regards the offence covered by Article 54 of the Act on national archive holdings and archives. The intentional perpetration of the offence covered by Article 54 of the Act on national archive holdings and archives was to be subjected to the penalty of imprisonment for up to 3 years (para. 1), while unintentional perpetration was to result in the penalty of restriction of liberty for up to a year or a fine (para. 2). The offence covered by Article 76 para. 1 of the Act on the protection of cultural property was subject to the penalty of arrest for up to 2 years and a fine. Article 76 para. 2 of the Act also stipulates the institution of voluntary disclosure. The perpetrator was to be immune from prosecution on the condition of notification to the conservation authorities early enough to prevent the exportation. However, the institution of voluntary disclosure was not stipulated in Article 54 of the Act on national archive holdings and archives. While analysing these two offences, it can be noted that the responsibility was more severe in the case of the offence of facilitating the exportation of an archive material abroad. The offence as specified in the Act on national archive holdings and archives had a more severe sanction and its perpetration was not influenced by whether the exportation of the object or an attempt at it actually took place. Therefore, the responsibility for the offence covered by Article 54 of the Act on national archive holdings and archives was not dependent on the actions of the acquirer of the object, and the condition of bearing the responsibility for the offence covered by Article 76 of the Act on the protection of cultural property by the perpetrator was that the exportation of the object or an attempt at it actually took place.

Article 55 of the Act on national archive holdings and archives was worded as follows:

“Whoever, being an owner or a holder of archive materials entered in a public register:

- 1) does not protect them against destruction or damage,
  - 2) fails to notify a relevant state archive:
    - a) about events which could have a negative impact on the state and preservation of archive materials,
    - b) about the transfer of ownership or holding of archive materials to another person,
    - c) about a change of place in which archive materials are held,
- shall be subject to the penalty of fine”.



On the other hand, Article 78 of the Act on the protection of cultural property was worded as follows:

“Whoever, being an owner or user of a monument:

- 1) does not protect the monument against destruction, vandalism or damage,
- 2) fails to notify the regional monument conservator:
  - a) about events which could have a negative impact on the state and preservation of the monument,
  - b) about the transfer of ownership or holding of the monument to another person,
  - c) about the acquisition of a registered monument through succession or legacy or
  - d) about the change of place in which the registered movable monument is located,

shall be subject to the penalty of detention for up to 3 months or a fine up to 4,500 PLN”.

It is clear that the responsibility for failing to protect archive materials and failing to notify about events is more severe than for the analogous behaviours towards historical monuments; the deed perpetrated by an owner or a holder of archive materials entered in a public register constituted an offence (Article 55 of the Act on national archive holdings and archives), while the deed perpetrated by an owner or user of a monument constituted a misdemeanour (see: Articles 78 and 80 of the Act on the protection of cultural property).

In conclusion, while laying down a less severe sanction for the individual offence of damaging and destroying an archive material than for the offence of damaging and destroying a monument (which is, additionally, a common offence), lawmakers weakened the penal and legal protection of archive materials against damage and destruction. The responsibility for illicit exportation of archive materials was also considerably less severe than for the illicit exportation of monuments. It could be argued that the introduction of penal provisions to the Act on national archive holdings and archives weakened protection of archive materials within criminal law, particularly when the regulation of responsibility for damaging or destroying archive material and exporting archive material abroad are taken into consideration.

Amendments in the offences contained in the Act on national archive holdings and archives took place on 1 September 1998, simultaneously with the entry into force of a new Penal Code, which was enabled under the Act of 6 June 1997 – Provisions introducing the Penal Code (*Journal of Laws* of 1997, no. 88, item 554). Under Article 5 para. 1 point 15 of the Provisions introducing the Penal Code, the regulations in Article 52 para. 1, Article 53 paras. 1 and 3, and Article 54 para. 1 of the Act on national archive holdings and archives were retained. The regulations in Article 52 para. 2, Article 53 para. 2, Article 54 para. 2, and Article 55 of the Act on national archive holdings and archives were retained as well, although their sanctions were modified; the sanction

of those regulations was worded as follows: “shall be subject to a fine or the penalty of restriction of liberty” (Article 5 para. 2 point 16 of the Provisions introducing the Penal Code). With the entry into force of the Penal Code, criminal responsibility regarding protection of monuments changed considerably because Article 73 of the Act on the protection of cultural property expired, which meant the protection effectively weakened, and this assessment is not changed by the inclusion of Article 294 para. 2 into the Penal Code itself, constituting the aggravated variant of, among others, the offence of destroying another person’s property if the object of the deed was “an asset of particular significance for culture”.<sup>13</sup>

### 3. Criminal law protection of archive materials in comparison with the protection of other elements of cultural heritage

Currently, chapter 5 of the Act on national archive holdings and archives, titled “Penal provisions”, contains 3 offences described in Articles 52, 53 and 54. It should be added that under Article 1 point 23 of the Act of 2 March 2007 on the amendment of the Act on national archive holdings and archives and of the Act – Labour Code,<sup>14</sup> which entered into force on 26 April 2007, Article 55 of the Act on national archive holdings and archives was repealed. In the explanatory memorandum to the government draft of the Act on the amendment of the Act on national archive holdings and archives it was indicated that the changes concerning Article 55 “are connected with the winding up of the non-state register of archive resource”.<sup>15</sup>

On the other hand, the Act of 23 July 2003 on the protection and preservation of monuments in chapter 11, titled “Penal provisions”, includes 5 offences:

- the offence of damaging or destroying a monument (Article 108);
- the offence of illicit exportation of a monument (Article 109);
- the offence of forging a monument (Article 109a);
- the offence of disposing of a forgery (Article 109b);
- the offence of illicit search for a monument (Article 109c).

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<sup>13</sup> See: W. Radecki, “Ochrona dóbr kultury w nowym kodeksie karnym”, *Prokuratura i Prawo* 1998, no. 2, pp. 10–11; M. Bojarski, W. Radecki, *Pozakodeksowe prawo karne...*, pp. 341–342; J. Pruszyński, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, vol. 2, Kraków 2001, pp. 601–602.

<sup>14</sup> The Act of 2 March 2007 on the change of the Act on national archive holdings and archives and the Labour Code Act (*Journal of Laws* of 2007, no. 64, item 426).

<sup>15</sup> The Government bill concerning the change of the Act on national archive holdings and archives and the Labour Code Act (paper no. 1242), <http://orka.sejm.gov.pl/Druki5ka.nsf/wg-druku/1242> (accessed: 9.09.2020).

The offence of intentionally damaging or destroying a monument (Article 108) is subject to the penalty of deprivation of liberty for a term of 6 months up to 8 years (para. 1), and if it is unintentional – to a fine, the penalty of restriction of liberty or of deprivation of liberty for up to 2 years (para. 2). It is also stipulated that in the case of sentencing for the offence specified in Article 108 para. 1 as destroying a monument the court orders, for the benefit of the National Fund for the Protection of Heritage Monuments, punitive damages proportional to the value of the destroyed monument (para. 3), while in the case of sentencing for the offence specified in Article 108 para. 1 as damaging a monument, the court orders the requirement to restore the previous state, and if such a requirement would be impossible to fulfil – punitive damages for the benefit of the National Fund for the Protection of Heritage Monuments proportional to the value of the damaged monument (para. 4). As regards the sentencing for the offence specified in Article 108 para. 2, the court can order punitive damages for the benefit of the National Fund for the Protection of Heritage Monuments in the amount from three to thirty times of the minimum wage (para. 5).

As regards the offence of illicit exportation of a monument (Article 109), if it is intentional, it is subject to the penalty of imprisonment for a term of 3 months up to 5 years, and if it is unintentional – to a fine, the penalty of restriction of liberty or imprisonment for up to 2 years (para. 2). The Act also stipulates that in the case of sentencing for the offence specified in Article 109 para. 1 the court must order, and in the case of sentencing for the offence specified in Article 109 para. 2 the court may order, punitive damages to be paid for a specified public goal connected with the guardianship of monuments in the amount from three to thirty times of the minimum wage (para. 3). The court can also order the confiscation of the given monument, even if it was not owned by the perpetrator (Article 109 para. 4).

In the Act on libraries in Article 29a the offence of illicit exportation of a library material was regulated, with its intentional action being subject to imprisonment for a term of 3 months up to 5 years (para. 1), and its unintentional action – to a fine, the penalty of restriction of liberty or imprisonment for up to 2 years (para. 2), while with cases of lesser importance – to a fine, the penalty of restriction of liberty or imprisonment for up to a year (para. 3). The Act also stipulates that in the case of sentencing for the offence specified in Article 29a para. 1 the court must order, and in the case of sentencing for the offence specified in Article 29a para. 2 the court may order, punitive damages to be paid for a specified public goal connected with the guardianship of monuments in the amount from three to thirty times of the minimum wage.

In the Act on museums in Article 34a the offence of illicit exportation of a *musealium* was regulated, with its intentional type subject to imprisonment for a term of 3 months up to 5 years (para. 1), and its unintentional type – to a fine, the penalty of restriction of liberty or imprisonment for up to 2 years (para. 2), while with cases of lesser importance –

to a fine, the penalty of restriction of liberty or imprisonment for up to a year (para. 3). The Act also stipulates that in the case of sentencing for the offence specified in Article 34a para. 1 the court must order, and, in the case of sentencing for the offence specified in Article 34a para. 2, the court may order punitive damages to be paid for a specified public goal connected with the guardianship of monuments in the amount from three to thirty times of the minimum wage.

It is clear that the penal provisions regulating the responsibility for illicit exportation of a library material and a *musealium* are almost identical.<sup>16</sup> This is probably due to the fact that they were introduced under a single piece of legislation – the Act of 25 May 2017 on restitution of national cultural property (consolidated text: *Journal of Laws of 2019*, item 1591).

While comparing the penal provisions contained in the four acts (the Act on national archive holdings and archives, the Act of 2003 on the protection and preservation of monuments, the Act on libraries, and the Act on museums) it can be observed that the criminal law protection of various elements of cultural heritage is not coherent. There are differences as regards the scope of this protection. Monuments enjoy the best level of protection against damage or destruction because the offence of damaging or destroying an archive material can be perpetrated solely by the person having a special responsibility to protect archive materials (individual offence) and if it is intentional it is subject only to the penalty of deprivation of liberty for up to 3 years. Similarly, the protection of archive materials against illicit exportation is weaker than the one granted to the remaining elements of cultural heritage (monuments of history, library materials, *musealia*). The offence of intentional illicit exportation of an archive material is subject to imprisonment for up to 3 years, and its unintentional type – to a fine or the penalty of restriction of liberty. This assessment is not changed by the presence of the offence under Article 54 of the Act on national archive holdings and archives, and which has no equivalent in the regulations concerning the protection of monuments of history, library materials and *musealia*.

#### 4. Conclusions

The existing legislation does not provide adequate protection to archive materials. The separation of criminal law protection of archive materials from the protection of historical monuments, which occurred as a result of the entry into force of the Act on

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<sup>16</sup> For a wider treatment, see: B. Gadecki, “Nowe przestępstwa w systemie karnoprawnej ochrony dziedzictwa kultury w związku z wejściem w życie ustawy z dnia 25 maja 2017 r. o restytucji narodowych dóbr kultury”, *Santander Art and Culture Law Review* 2017, no. 1, pp. 87–91.

national archive holdings and archives, led to a weakening of the criminal law protection of archive materials. Currently, in comparison with other elements of cultural heritage (monuments of history, library materials, *musealia*), criminal law protection of archive materials is weaker. Most likely, the main reason for this is the fact that lawmakers amended the respective statutes at different points of time and the particular changes of the relevant law were not coherent. The lack of textual coherence may have resulted from the fact that the penal provisions pertaining to the protection of cultural heritage are dispersed over a variety of acts. Undoubtedly, the creation of a single chapter in the Penal Code which would contain the penal provisions concerning the protection of cultural heritage would solve the problem. It should be underlined that debate concerning the usefulness of creating such a new Penal Code chapter and its content was vivid within the academia for many years.<sup>17</sup> Nevertheless, regardless of the problem of creating a dedicated Penal Code chapter, it is beyond doubt that a revision of the penal provisions contained in the Act on national archive holdings and archives is necessary in order to ensure that archive materials have adequate protection on par with other elements of cultural heritage.

## References

- Bojarski M. (ed.), *System Prawa Karnego*, vol. 11, *Szczególne dziedziny prawa karnego. Prawo karne wojskowe, skarbowe i pozakodeksowe*, Warszawa 2014.
- Bojarski M., Radecki W., "Ochrona zabytków w polskim prawie karnym. Stan aktualny i propozycje *de lege ferenda*" [in:] *Prawnokarna ochrona dziedzictwa kultury. Materiały z konferencji, Gdańsk, 30 maja – 1 czerwca 2005 r.*, ed. J. Kaczmarek, Kraków 2006.
- Bojarski M., Radecki W., *Pozakodeksowe prawo karne*, vol. 3, *Przestępstwa w dziedzinie porządku publicznego, wyborów, polityki i inicjatywy ustawodawczej, pracy i ubezpieczeń społecznych, kultury i własności intelektualnej. Komentarz*, Warszawa 2003.
- Bojarski M., Radecki W., *Pozakodeksowe przepisy karne z komentarzem*, Warszawa 1992.

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<sup>17</sup> See: W. Radecki, "Przestępstwa przeciwko dobrom kultury i innym dobrom intelektualnym", *Przegląd Prawa Karnego* 1993, no. 8–9, p. 36; M. Bojarski, W. Radecki, "Ochrona zabytków w polskim prawie karnym. Stan aktualny i propozycje *de lege ferenda*" [in:] *Prawnokarna ochrona dziedzictwa kultury. Materiały z konferencji, Gdańsk, 30 maja – 1 czerwca 2005 r.*, ed. J. Kaczmarek, Kraków 2006, p. 27; K. Zeidler, *Prawo ochrony dziedzictwa kultury*, Warszawa 2007, p. 216; M. Trzeciński, *Przestępczość przeciwko zabytkom archeologicznym. Problematyka prawno-kryminalistyczna*, Warszawa 2010, p. 73; M. Gołda-Sobczak, W. Sobczak, "Ochrona zabytków w polskim prawie karnym" [in:] *Prawna ochrona dóbr kultury*, eds. T. Gardocka, J. Sobczak, Toruń 2009, p. 193; O. Jakubowski, "Karnoprawna ochrona zabytków – rozważania nad kierunkami zmian prawnych" [in:] *Prawo ochrony zabytków*, ed. K. Zeidler, Warszawa – Gdańsk 2014, pp. 483–485.

- Gadecki B., “Nowe przestępstwa w systemie karnoprawnej ochrony dziedzictwa kultury w związku z wejściem w życie ustawy z dnia 25 maja 2017 r. o restytucji narodowych dóbr kultury”, *Santander Art and Culture Law Review* 2017, no. 1.
- Gołda-Sobczak M., Sobczak W., “Ochrona zabytków w polskim prawie karnym” [in:] *Prawna ochrona dóbr kultury*, eds. T. Gardocka, J. Sobczak, Toruń 2009.
- Jakubowski O., “Karnoprawna ochrona zabytków – rozważania nad kierunkami zmian prawnych” [in:] *Prawo ochrony zabytków*, ed. K. Zeidler, Warszawa – Gdańsk 2014.
- Kotowski W., Kurzępa B., *Przestępstwa pozakodeksowe. Komentarz*, Warszawa 2007.
- Pruszyński J., *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, vol. 2, Kraków 2001.
- Pruszyński J., “Dziedzictwo kultury w świetle Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 roku” [in:] *Konstytucja i władza we współczesnym świecie. Doktryna. Prawo. Praktyka*, eds. M. Kruk, J. Trzciniński, J. Wawrzyniak, Warszawa 2002.
- Radecki W., “Ochrona dóbr kultury w nowym kodeksie karnym”, *Prokuratura i Prawo* 1998, no. 2.
- Radecki W., “Przestępstwa przeciwko dobrom kultury i innym dobrom intelektualnym”, *Przegląd Prawa Karnego* 1993, no. 8–9.
- Trzciniński M., *Przestępczość przeciwko zabytkom archeologicznym. Problematyka prawno-kryminalistyczna*, Warszawa 2010.
- Zeidler K., *Restitution of Cultural Property: A Hard Case – Theory of Argumentation – Philosophy of Law*, Gdańsk – Warszawa 2016.
- Zeidler K., *Prawo ochrony dziedzictwa kultury*, Warszawa 2007.

### Sources of law

- Decree of 29 March 1951 on state archives (*Journal of Laws* of 1951, no. 19, item 149, as amended).
- Act of 15 February 1962 on the protection of cultural property and museums (*Journal of Laws* of 1962, no. 10, item 48, as amended).
- Act of 19 April 1969 – Penal Code (*Journal of Laws* of 1969, no. 13, item 94, as amended).
- The Act of 14 July 1983 on national archive holdings and archives (consolidated text: *Journal of Laws* of 2020, item 164, as amended).
- Act of 21 November 1996 on museums (consolidated text: *Journal of Laws* of 2020, item 902).
- The Act of 6 June 1997 – Penal Code (consolidated text: *Journal of Laws* of 2020, item 1444).
- Act of 6 June 1997 – Provisions introducing the Penal Code (*Journal of Laws* of 1997, no. 88, item 554).
- Act of 27 June 1997 on libraries (consolidated text: *Journal of Laws* of 2019, item 1479).
- Act of 23 July 2003 on the protection and preservation of monuments (consolidated text: *Journal of Laws* of 2020, item 282, as amended).
- Act of 25 May 2017 on restitution of national cultural property (consolidated text: *Journal of Laws* of 2019, item 1591).

## Summary

### **The over thirty-five-year duration period of the penal provisions contained in the Act on national archive holdings and archives: A commentary on the direction of legal amendments**

The author compares the penal and legal protection of archive materials to the one extended over other elements of cultural heritage (monuments of history, *musealia*, library materials). It is pointed out that the separation of penal and legal protection of archive materials from the protection of historical monuments – a process that followed the entry into force of the Act on national archive holdings and archives – resulted in the weakening of the penal and legal protection of archive materials. It is also argued that the legislator made amendments to acts concerning the penal and legal protection of various elements of cultural heritage in different time periods, and the individual amendments of the relevant law were not coherent. In addition, the author insists that the lack of coherence may have been a result of the fact that the penal provisions concerning cultural heritage protection are dispersed over a variety of acts, instead of being contained in a single chapter of the Penal Code.

**Keywords:** archive materials, library materials, *musealia*, penal provisions, monuments

## Streszczenie

### **Trzydzieści pięć lat przepisów karnych w ustawie o narodowym zasobie archiwalnym i archiwach: uwagi o kierunkach zmian prawa**

Autor porównuje karnoprawną ochronę materiałów archiwalnych do ochrony, jaką mają inne składniki dziedzictwa kultury (zabytki, muzealia, materiały biblioteczne). Wskazuje, że oddzielenie karnoprawnej ochrony materiałów archiwalnych od ochrony zabytków, które nastąpiło wskutek wejścia w życie ustawy o narodowym zasobie archiwalnym i archiwach, spowodowało osłabienie karnoprawnej ochrony materiałów archiwalnych. Ustawodawca dokonywał zmian ustaw w zakresie karnoprawnej ochrony poszczególnych składników dziedzictwa kultury w różnych okresach, a poszczególne zmiany prawa w tym zakresie nie były spójne. Brak spójności może wynikać z tego, że przepisy karne dotyczące ochrony dziedzictwa kultury są rozproszone po różnych ustawach, a nie zawarte w jednym rozdziale kodeksu karnego.

**Słowa kluczowe:** materiały archiwalne, materiały biblioteczne, muzealia, przepisy karne, zabytki