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Contents

Students' contribution

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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

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Legal perspectives of world heritage protection in the context of climate change

1. Introduction

To this date, connections between world heritage and climate change are not highly visible at the global scale. The earliest appearance of the issue was in 2005 at the 29th session of the World Heritage Committee. Several non-governmental organisations and individuals filed petitions to the World Heritage Committee demanding three World Heritage sites be added to the List of World Heritage in Danger because of the threat they were facing from climate change.[1] This was the beginning of world heritage finding its way to the discussions of the climate change crisis.

The number of alarming examples is increasing dramatically. From the sinking Venice into the lagoon to the mass bleaching of Australia's Great Barrier Reef, sea level is rising all around the world putting lives and cultural heritage objects at risk. One of the most vivid illustrations is Greenland's Ilulissat Icefjord, a world heritage site where the Sermeq Kujalleq glacier is melting due to increasing temperature. Another example is observed in Yemen, where the heavy flash floods of 2020 brutally affected world heritage sites of Zabid, Shibam, and Sana'a. Cultural landscapes such as Muskau Park, Garden Kingdom of Dessau-Wörlitz, Schlösser, Palaces and Parks of Potsdam and Berlin also monuments surrounded by cultural landscapes, for instance, Wartburg Castle are suffering from the dry periods which have a great impact on the flora of the parks and forests in the area.

[1] The petitions concerned the Belize Barrier Reef, Huascaran National Park and Sagarmatha National Park and were filed together with a report on Australia's Great Barrier Reef; see petitions and press release at http://www.climatelaw.org (accessed: 30.03.2020).

The recognition of the cultural dimension of climate change at the international level is even more complex. Up until today, the cultural sector is not treated as a priority. Of course, it does not mean that the international community has not made any progress in this area. In 2019, International Council on Monuments and Sites (ICOMOS) published the groundbreaking report "The Future of Ours Pasts: Engaging cultural heritage in climate action",[2] putting forward a multidisciplinary approach to cultural heritage protection from climate change threats. As evidence that loss and damage are happening, the report summarises key climate factors and mechanisms of impact on various cultural heritage properties.

From the legal perspective, the intersection between world heritage and climate change has not been thoroughly investigated. Many scholarly works are concentrated exclusively either on the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage (hereinafter: 1972 World Heritage Convention) or the United Nations Framework Convention on Climate Change (UNFCCC). A further branch of academic literature that is partly related to this paper reveals that climate change impacts a wide range of human rights, including these related to culture and heritage. For instance, Sabine von Schorlemer and Sylvia Maus in the volume "Climate Change as a Threat to Peace" analyse climate change as a threat to peace and its impacts on cultural heritage and cultural diversity. Besides, particularly relevant is the volume "International Cultural Heritage Law" by Janet Blake. It contains a comprehensive overview of the general concept and connection between cultural heritage and environmental law.

Based on the current state of scientific knowledge, the present paper attempts to fill in the knowledge gap by bringing the legal regulation of Paris Agreement Under the United Nations Framework Convention on Climate Change (the Paris Agreement) and 1972 World Heritage Convention as regards adaptation to and mitigation of climate change, on the one hand, and corresponding obligations related to world heritage protection, on the other. To reflect current tendencies of synergies between world heritage and climate change United Nations the 2030 Agenda for Sustainable Development (the 2030 Agenda for Sustainable Development) is discussed. Though it may seem that world heritage possesses a rather marginal role, the wide scope of existing legal instruments enables the link between world heritage protection and reduction of climate change harms.

[2] Climate Change and Cultural Heritage Working Group, *The Future of Our Pasts: Engaging cultural heritage in climate action,* International Council on Monuments and Sites – ICOMOS 2019, https://indd.adobe.com/view/a9a551e3-3b23-4127-99fd-a7a80d91a29e (accessed: 30.03.2020).

2. Legal regulation addressing climate change and its impact on world heritage

2.1. 1972 World Heritage Convention

While the model of the 1972 World Heritage Convention is considered to ensure a broad scope of cultural heritage protection, the recent concerns provoke debates whether adequate attention is devoted to the threats imposed by climate change. Before the further legal analysis, it should be acknowledged that cultural heritage protection from climate change is not explicitly stipulated in the provisions of the 1972 World Heritage Convention. Various interpretations are explaining the absence of climate change issues. From the historical perspective, for instance, the 1972 World Heritage Convention has been negotiated at a time when climate change was not yet identified as a matter distinct from and more unpredictable than ordinary annual weather change. These circumstances are relevant since the Conventions set out rules that address generally any country regardless of their location on the globe and its degree of exposure to ordinary annual weather change and climate change.[3] Nevertheless, it is remarkable that the 1972 World Heritage Convention adopted at a time when climate change was generally not considered *per se*, includes weather-related phenomena that could probably be associated with climate change. In particular, when describing the reasons for which a property already included in the World Heritage List may be inscribed on the List of World Heritage in Danger at Article 11(4), certain typical effects of climate change are mentioned, i.e. calamities and cataclysms, landslides, changes in water level, floods and tidal waves. When a world heritage property is threatened by one of these or other climate change-related phenomenon, it is possible to submit a request for international assistance to the World Heritage Committee.[4]

Furthermore, climate change is mentioned in the Operational Guidelines for the Implementation of the World Heritage Convention (WHC Operational Guidelines), in the context of the nomination of properties for inscription on the World Heritage List.[5] In

[3] G. Carducci, "What Consideration is Given to Climate and to Climate Change in the UNESCO Cultural Heritage and Property Conventions?" [in:] *Climate Change as a Threat to Peace: Impacts on Cultural Heritage and Cultural Diversity,* eds. S. Schorlemer, S. Maus, vol. 19, Peter Lang, Frankfurt am Main – Bern – Bruxelles 2014, p. 137.

[4] *The 1972 World Heritage Convention: A Commentary*, eds. F. Francioni, F. Lenzerini, Oxford University Press, Oxford – New York 2008, p. 305.

[5] World Heritage Centre, *Operational Guidelines for the Implementation of the World Heritage Convention* (43 COM 11A UNESCO 2019), Annex 5, p. 103, https://whc.unesco.org/en/guidelines/ (accessed: 29.03.2020).

the section "environmental pressures", where the major sources of environmental degradation affecting the property proposed for inscription are to be listed and summarised, climate change is identified as a possible example of such pressures. Although the WHC Operational Guidelines are not considered as hard law, its provisions may not be disregarded and a lot can be done by state parties by implementing the 1972 World Heritage Convention in order to protect cultural heritage from the effects of climate change.

When analysing the obligation to protect world heritage from the impacts of climate change Articles 4, 5 and 6 are of the utmost importance. Under Article 4 of the 1972 World Heritage Convention, state parties recognise the duty of ensuring the identification, protection, conservation, presentation, and transmission to future generations of the cultural and natural heritage situated on its territory. To this end, each of them will do all it can to the utmost of its resources and, where appropriate, with any international assistance and cooperation. Article 5 specifies that each state party shall endeavour, in so far as possible to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory. This article includes: a) measures such as adopting a general policy which aims to give cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes; b) setting up services for protection, conservation and presentation; c) developing scientific and technical studies and research and working out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage; d) taking appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and e) establishing centres for training. While Article 5 is an open-ended list,[6] other measures aiming to mitigate climate change in order to protect world heritage and going beyond those existing under the Paris Agreement, are possible. Energy efficiency, acceleration of decarbonisation by putting a price on CO_2 emissions, preservation of forests contributing to CO_2 removal from nature, private-public partnerships among various stakeholders done in an "open-source" way to speed up the development of the new technology that would safely remove CO_2 from the atmosphere and hopefully reuse it for economically beneficial purposes[7] – could be factors improving protection and conservation of world heritage.

In addition to Articles 4 and 5, Article 6 determines the protection of world heritage as a duty of the international community as a whole to cooperate. Under Article 6(3), states parties undertake not to take any deliberate measures which might damage directly

[6] G. Carducci, "Articles 4–7: National and International Protection of the Cultural and Natural Heritage" [in:] *The 1972 World Heritage Convention*…, p. 118.

[7] K. Kimmell, *Stemming the Tide: Global Strategies for Sustaining Cultural Heritage through Climate Change,* Conference Proceedings, Smithsonian American Art Museum, 2020.

or indirectly the cultural and natural heritage. In other words, state parties are under the obligation to forgo actions that might damage world heritage sites.[8] According to some experts, the emission of GHG or insufficient action to limit such emission can be considered falling under the measures listed in Article 6(3).[9] As a consequence, these provisions require that all state parties engage in an aggressive climate change mitigation strategy entailing sharp reductions in GHG emissions.[10] This is the only way to protect world heritage from further impacts of climate change and ensure that the 1972 World Heritage Convention is an effective tool for protecting and conserving sites of universal value for future generations.

The above-presented interpretation is facing criticism as it is considered too broad. Firstly, the wording of Article 6(3) requires some form of intention. One might argue that it is unlikely that state parties have the intent to damage world heritage sites by emitting GHG, that they deliberately harm world heritage in their territory or abroad.[11] Especially, considering that the maintenance and the protection of world heritage sites itself may contribute to GHG emissions. While mere adaptation and site-level mitigation are not always sufficient to save world heritage sites from threats of climate change, the call for global mitigation measures, namely, deep cuts in GHG emissions has been met with skepticism. State parties have expressed complaints that reductions in GHG emissions are the area of other international conventions, particularly the UNFCCC and not of the 1972 World Heritage Convention.[12]

The 1972 World Heritage Convention, potentially among the most powerful tools for world heritage protection, offers rather limited sources of obligation for climate action. A far-reaching interpretation of the obligations of the Convention committing state parties to an extensive mitigation strategy is not supported by state parties. Thus, to protect world heritage, it is necessary to find additional sources of obligation. This is where the focus of this paper turns to in the next chapters.

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[8] E.J. Thorson, "The World Heritage Convention & Climate Change: the case for climate-change mitigation strategy beyond the Kyoto Protocol" [in:] *Adjudicating climate change: state, national, and international approaches,* eds. W. Burns, H. Osofsky, Cambridge University Press, Cambridge, UK 2009, p. 263.

[9] See e.g., S. Maus, "Hand in Hand against Climate Change: Cultural Human Rights and the Protection of Cultural Heritage", *Cambridge Review of International Affairs* 2014, vol. 27, issue 4, pp. 699–716 (p. 704); E.J. Thorson, "The World Heritage Convention & Climate Change…", p. 264.

[10] E.J. Thorson, "The World Heritage Convention & Climate Change…", p. 264.

[11] F. Francioni, "Culture, Heritage, and Human Rights: An Introduction" [in:] *Cultural Human Rights*, eds. F. Francioni, M. Scheinin, Martinus Nijhoff Publishers, Leiden 2008, p. 11.

[12] UNESCO Headquarters, Paris, France, 2007, Contribution from Australia, p. 40, http://whc.unesco.org/uploads/activities/documents/activity-471-1.doc (accessed: 8.08.2020).

2.2. Paris Agreement under the United Nations Framework Convention on Climate Change[13]

The severity and urgency of climate change are underscored by the 2018 findings of the Intergovernmental Panel on Climate Change's (IPCC) Special Report on Global Warming of 1.5°C.[14] According to IPCC, humankind has already made the climate 1°C warmer since pre-industrial times. Warming is likely to reach 1.5°C around 2040 and 2°C by 2065 if emissions continue unchecked. The report highlights multiple climate change impacts that could be avoided or made significantly less severe by limiting Global warming to 1.5°C compared to 2°C, or more.

To fight dangerous climate change at the global scale, the Paris Agreement was adopted at the Paris Climate Conference (COP21) in December 2015. It is guided by three science-based goals, which are laid out in Article 2 of the Agreement. First of all, the mitigation goal aims to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit this increase to 1.5°C. Secondly, the adaptation goal aims to increase the ability to adapt to the adverse impacts of climate change and to foster climate resilience and low GHG emissions development. Finally, the finance flows goal aims to make finance flows consistent with a pathway towards low GHG emissions and climate-resilient development.

Since the planet is already experiencing a certain level of climate change, it is important to enforce adaptive measures addressing the negative consequences of climate change. Furthermore, mitigating GHG emissions has the potential to reduce the magnitude of future climate change. Consequently, greater attention shall be paid to the relation between the adaptation and mitigation actions based on the Paris Agreement and the obligation to protect world heritage sites. Section-by-section, when the Paris Agreement calls out the role of landscapes, ecosystems, and sustainable land use, it provides a handful of clues related to the cultural heritage dimension. Perhaps the most explicit attention to world heritage in the Paris Agreement comes in the section on adaptation which notes that adaptive action should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, to integrate adaptation into relevant socioeconomic and environmental policies and actions, where appropriate (Article 7(5)).

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[13] Paris Agreement under the United Nations Framework Convention on Climate Change, adopted in Paris on 12 December 2015, COP Report No. 21.

[14] Intergovernmental Panel on Climate Change, *Special Report on Global Warming of 1.5°C* (2018), https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf (accessed: 30.07.2020).

2.2.1. Mitigation goal and a link to world heritage

The mitigation goal is a cornerstone of the response to climate change and it cannot be achieved without understanding the relationship between emissions and temperature. The basic conclusion is that to have a 50% chance of meeting the goal of the Paris Agreement, it is needed to achieve net-zero CO_2 emissions worldwide by the middle of the century. Net-zero means a dramatic decrease in burning of fossil fuels for energy needs and increase in removing of CO_2 from the atmosphere. The Paris Agreement, in Article 4, sets out the emissions goal, according to which Parties aim to reach global peaking of GHG emissions as soon as possible and to undertake rapid reductions thereafter by best available science, to achieve a balance between anthropogenic emissions by sources and removals by sinks of GHG in the second half of this century. The main instrument for reaching the emissions goal is the nationally determined contributions (NDC), which each Party has to submit every five years.

Besides the reduction of emissions, the uptake of CO_2 from the atmosphere will have to play an important role in achieving the temperature goal of the Paris Agreement. Article 5 of the Paris Agreement states that Parties should take action to conserve and enhance sinks and reservoirs of GHG, including forests. As Parties may choose to cooperate in their mitigation actions, including through international carbon market mechanisms, the Paris Agreement addresses such voluntary cooperation. Article 6 provides a framework for using mitigation outcomes achieved in other countries to achieve a Party's NDC, establishes a new carbon crediting mechanism under international oversight and establishes a framework for countries to engage in non-market approaches.

Several mitigation actions can be undertaken concerning world heritage as its embedded values intersect both directly and indirectly with the Paris Agreement's decarbonisation imperative to mitigate GHG emissions. For example, incorporating climate action considerations into cultural heritage governance, and enhancing participation in climate change policy, legislation as well as planning processes. In some cases, world heritage sites' managers have recognised that cultural heritage sites can assist carbon mitigation efforts, given that historic houses and landscapes often have to incorporate passive environmental controls such as site location and orientation, airflow control and insulation,[15] which can reduce GHG emissions. In a view of the outstanding universal value, the world heritage sites can be used to demonstrate how cultural heritage can

[15] G. Hambrecht, M. Rockman, "International Approaches to Climate Change and Cultural Heritage", *American Antiquity* 2017, vol. 82, issue 4, p. 635, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0F0B8408889E4A12817FB922397C6ED8/S0002731617000300a.pdf/international_approaches_to_climate_change_and_cultural_heritage.pdf (accessed: 26.03.2020).

be an asset in climate action by establishing targeted programmes to raise awareness among tourists, guides, site managers and local communities about climate change, including the GHG implications of cultural tourism and the capacity of world heritage sites to contribute to CO_2 mitigation measures.

2.2.2. Adaptation goal and a link to world heritage

Adaptation is the process of identifying a range of options and testing them within a variety of hypothetical situations, from national policy to managerial on-site decision making. As climate change has a widespread impact on human and natural systems, adaptation to climate change is needed as a complementary approach to mitigation. It has become more relevant with the passing of time and failure of the international community to address the mitigation of GHG emissions adequately. The Paris Agreement establishes a goal on adaptation, its pillars are the enhancement of adaptive capacity, the strengthening of resilience and the reduction of vulnerability to climate change. The Agreement requires all Parties, as appropriate, to engage in adaptation planning and implementation through national adaptation plans, vulnerability assessments, monitoring and evaluation, and economic diversification (Article 7). All Parties should communicate their priorities, plans, actions, and support needs through adaptation communications, which shall be recorded in a public registry.

In the context of world heritage protection, the obligation to adapt to climate change involves the integration of risk and vulnerability assessments together with the coordination of cultural heritage protection implementation within different sectors and institutions. The impacts of climate change on cultural heritage are largely experienced through climate variability and extremes, with both linking climate change to disaster risk reduction. The effective adaptive measure against climate-induced threats for example is identifying existing critical disconnects between legal regulation for climate change adaptation and disaster risk reduction. Moreover, there are incompatibilities between the agendas of different agencies which create major difficulties in disaster risk management, for instance, restricted access to cultural heritage databases resulting in a delay in supplying information to those responding to disasters.[16] Therefore, to improve adaptation actions, the integration of cultural heritage in local and national plans for emergency management as well as inter-sectoral approach to reach a shared understanding among different authorities and experts such as planners, site managers and environmentalists by mapping and identifying relevant sectors and collaborating, are required.

[16] Climate Change and Cultural Heritage Working Group, *The Future of Our Pasts*…

3. Improving world heritage protection in the backdrop of climate change threats: The 2030 Agenda for Sustainable Development

An exemplary attempt to take transformational measures to shift the world towards a sustainable and resilient future is the 2030 Agenda for Sustainable Development.[17] Despite the lack of a legally binding character, since the document was adopted as a resolution, it constitutes soft law norms that often lay the groundwork for codification and contribute to constituting new customary law. Unfortunately, the 2030 Agenda for Sustainable Development has not succeeded in prioritising world heritage issues. At the core of this action plan "for people, planet and prosperity" there are 17 Sustainable Development Goals (SDGs) with a total of 169 targets. Although none of the 17 SDGs focuses exclusively on culture, a slight queue for the cultural aspects comes from Goal 11. It refers to the cities, in particular to the need for making cities and human settlements inclusive, safe, resilient and sustainable. World heritage is specifically mentioned in Target 11.4 which states the aim to strengthen efforts to protect and safeguard the world's cultural and natural heritage, one out of 169 targets. One might criticise that there is no clear rationale on why this Target was placed between Target 11.3, which is concerned with enhancing "inclusive and sustainable urbanisation and capacity for participatory, integrated and sustainable human settlement planning and management" and Target 11.5, which focuses on the reduction of the effects on people and economy of disasters. However, it could be justified that many relevant sites and elements of world heritage are found in cities and play a role in sustainable local development as well as green and public spaces can allow for the development of cultural activities and need to be accessible to everyone.[18] Commitment to the idea that world heritage is fundamental to foster local sustainable development, fills in the conceptual gap between world heritage and Goal 11.

As concluded so far, climate change has a widespread effect in every country, disrupting national economies and affecting lives. No surprise, that this global issue has a dedicated goal in the 2030 Agenda for Sustainable Development. Goal 13 calls to take urgent action to combat climate change and its impacts. In this regard, recently published Eurostat report "Sustainable development in the European Union – Monitoring report on

[17] United Nations, Transforming our World: The 2030 Agenda for Sustainable Development (United Nations A/RES/70/1 2015), https://sustainabledevelopment.un.org/post2015/transformingourworld (accessed: 11.04.2020).

[18] The UCLG Committee on Culture, *Culture in the Sustainable Development Goals: A Guide for Local Action,* United Cities and Local Governments, 2018, p. 22, https://www.uclg.org/sites/default/files/culture_in_the_sdgs.pdf (accessed: 20.09.2020).

progress towards the SDGs in an EU context"[19] offers attention-worthy conclusions. The paper contains a statistical overview of developments in the EU concerning sustainability goals. The analysis in this report focuses on aspects of the SDGs relevant for the EU and provides a statistical presentation of trends relating to the SDGs in the EU over the past five years "short-term" and the past 15 years "long-term". Overall, the EU has made progress in almost every indicator selected over the past five years. However, there has been no progress for SDG 13 "Climate Action". Aside from that trend, the report does not refer to world heritage and its importance to the SDGs both as a driver for achieving the SDGs as well as an enabler. A thorough analysis is important to get a snapshot of the overall sustainable development of the EU and to step up respective measures as highlighted as a commitment by the European Commission.

The 2030 Agenda for Sustainable Development suggests arguably the most ambitious and holistic development framework ever conceived, aspiring to recognise the link between culture, climate change and sustainable development. Even though world heritage plays a marginal role in it, the inclusion of a climate-culture-based approach has the potential to add a normative layer to the debate and thus increase the level of obligation to protect world heritage from climate change-induced threats.

4. Discussion

We are used to the permanence of world heritage; however, the process of changing climate proves us wrong. Changing patterns are rapidly causing damage and loss of world heritage. Climate crisis is a global phenomenon, which challenges us to think comprehensively about the shift and to provide interdisciplinary solutions. Examination of the 1972 World Heritage Convention and the Paris Agreement is a testament to the fact that the task is not to create new legislation but to allow the existing legal instruments to be effectively implemented and enforce the inclusion of world heritage concerns in climate change discussions.

To avoid worsening effects of climate change on world heritage, the ultimate solution is to reduce the emission of GHG worldwide by following the mitigation goal laid out in Article 2 and the adaptation goal laid out in Article 7 of the Paris Agreement as a complementary approach to mitigation. This will require actions at the international, national, local and community levels. The 1972 World Heritage Convention, as the most

[19] Eurostat, *Sustainable Development in the European Union – Monitoring report on Progress Towards the SDGs in an EU Context* (2020), https://ec.europa.eu/eurostat/documents/3217494/11011074/KS-02-20-202-EN-N.pdf/334a8cfe-636a-bb8a-294a-73a052882f7f (accessed: 8.08.2020).

prominent legal instrument of world heritage protection, has shown to offer rather limited sources of obligation for climate action. On the other hand, WHC Operational Guidelines being a soft law source could be amended to address the respective shortcomings of the Convention. Additionally, supplemented by the fresh perspective of the Agenda 2030 for Sustainable Development can offer a new driving force to the debate on the protection of world heritage in the face of climate change. Although the role of the world heritage may appear to be minor, the inclusion of a climate-culture-based approach could add a normative layer to the debate and thus increase the level of obligation.

5. Conclusions

Notwithstanding the undeniable consequences caused by floods, droughts, thunderstorms, increased temperature, heatwaves, and sea-level rise, in many cases, the focus on the protection of world heritage in the context of climate change is not sufficient. Despite varying place on the list of priorities of the international and regional regulation the obligations to protect world heritage and corresponding obligations to strengthen the global response to the threats of climate change have the potential to provide normative basis. While the Paris Agreement, and 1972 World Heritage Convention provide legal protection to world heritage in adaptation to climate change, mitigation measures, the interdisciplinary nature of the Agenda 2030 for Sustainable Development may act as a useful tool for blending world heritage in the climate action. However, if the link between climate change and world heritage protection is not adequately acknowledged at the national level of states, the dangers, threats to world heritage sites will surely increase. Thus, more research and innovation are needed regarding the fulfilment of adaptation and mitigation goals of the Paris Agreement at the national level of different states while still ensuring the protection of world heritage sites.

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Paris Agreement under the United Nations Framework Convention on Climate Change, adopted in Paris on 12 December 2015.

Summary

Legal perspectives of world heritage protection in the context of climate change

Climate change has now emerged as one of the most serious environmental and politico-economic challenges causing harm worldwide, and heritage sites are not an exception to it. As world heritage forms the identity of every community and may serve as a compass in deciding future societal orientation, preserving it from the adverse impacts of climate change is a key in maintaining social safety nets. Thus, this paper demonstrates that inclusion of world heritage into climate change debates is possible and could reinforce the international community's obligations to take necessary adaptation and mitigation activities. To achieve this goal, this paper extends the analysis of the obligations of world heritage protection stipulated in the 1972 World Heritage Convention by combining a thorough investigation of the Paris Agreement and newly introduced policy directions in the 2030 Agenda for Sustainable Development.

Keywords: climate change law, sustainable development goals, world heritage law

Streszczenie

Prawne perspektywy ochrony światowego dziedzictwa ludzkości w kontekście zmian klimatu

Zmiany klimatu należą do najpoważniejszych wyzwań ekologicznych i socjopolitycznych o zasięgu globalnym, a obiekty stanowiące dziedzictwo ludzkości nie są wolne od powstających zagrożeń. Ponieważ dziedzictwo kultury jest fundamentem tożsamości wszystkich społeczności i stanowi kompas dla ich rozwoju, ochrona tego dziedzictwa przed skutkami zmian klimatu jest nieodzowna dla utrzymania bezpieczeństwa społecznego. W artykule wskazano, że włączenie zagadnień światowego dziedzictwa do dyskusji o zmianach klimatu jest możliwe i mogłoby wzmocnić obowiązki społeczności międzynarodowej w kwestii podejmowania środków zaradczych. Przedstawiony wywód łączy więc zobowiązania wynikające z Konwencji w sprawie ochrony światowego dziedzictwa kulturowego i naturalnego, przyjętej w Paryżu dnia 16 listopada 1972 r., z analizą porozumienia paryskiego i niedawno przyjętą Agendą na rzecz zrównoważonego rozwoju 2030.

Słowa kluczowe: prawo zmian klimatu, cele zrównoważonego rozwoju, prawo światowego dziedzictwa

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UNESCO's World Heritage: To be or not to be

1. Introduction

Two world wars irreversibly changed all social landscapes: humanity had to come to terms not only with unprecedented loss of life, but also with massive and equally unprecedented destruction of assets considered material components of culture. The international community's recognition as to imports of the latter was changing. The adoption of the Convention Concerning the Protection of the World Cultural and Natural Heritage adopted by the General Conference at its seventeenth session in Paris on 16 November 1972 (hereinafter: UNESCO World Heritage Convention) was the turning point in this regard. In public perception, the Convention – together with its concept of a list of objects expressly placed under protection – played the role of catalyst for an international movement that understood the protection of cultural heritage as a key element for the strengthening and advancement of society as a whole. To date, of the 1,121 objects declared as world heritage, 869 are cultural, 213 are natural and 39 are mixed. In total, 53 are endangered.[1]

There is no doubt that inclusion of objects in the World Heritage List is itself an act of recognition at international level for the States in which they are located, but it also implies an enormous responsibility of the whole of society in its preservation so that they survive us and can be enjoyed by later generations. In this sense, it is necessary to draw attention to the fact that membership in this List confers a series of unavoidable responsibilities and commitments on part of the States, which are the guarantors of its conservation. Today, 48 years after the advent of the UNESCO World Heritage Convention, which has been signed by 194 countries to date, it is appropriate to discuss, through various examples, the current state of affairs with respect to international protection of items of exceptional universal value.

[1] UNESCO, World Heritage List, http://whc.unesco.org/en/list/ (accessed: 13.10.2020).

2. Background of the UNESCO World Heritage Convention

The first historical precedent that is known as the precursor to the UNESCO World Heritage Convention was the Athens Charter of 1933. The Charter sown the seeds of international cooperation in this field by shaping the first vision of historical heritage, even if in a rather anachronistic way. With the outbreak of the Second World War in 1939 however these attempts to stimulate international debate on the safeguarding and protection of heritage were halted, and it took the total destruction of certain areas of the world for the appreciation of the historical heritage to regain momentum. As Francesco Francioni commented, the Second World War heightened awareness of the need to take action against the drastic and in some cases historically unprecedented destruction suffered by heritage in such a short period of time.[2] Against this background, the Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter: The Hague Convention) was adopted in Hague on 14 May 1954, through which numerous actions were promoted in many parts of the world in order to reduce or to lessen the damage caused to the heritage during various armed conflicts.

In the 1960s, two international campaigns were launched all over the world to help protect and preserve certain pieces of the world heritage the loss of which would have been irreparable for all humanity. The first one concerned the actions taken by UNESCO in order to save the Nubian temples of Abu Simbel in Egypt from flooding as a consequence of the construction of the Aswan Dam; the other was about preservation of the city of Venice during the floods of 1966. These two major projects raised awareness of the need to enact a universal instrument to introduce the protection of heritage at a global level as it became clear the existing national protection mechanisms are insufficient. Thus, the development of a uniform international system of cooperation between States proved to be of importance for the safeguarding of heritage which, by its very nature, is universal.

The first step in the conservation of historical sites and sites of exceptional natural value was taken by the United States in 1965 when it convened a Conference on International Cooperation in Heritage Conservation, the most important outcome of which was to create a body responsible for stimulating international cooperation to identify, establish, develop and manage such sites. This paved the way for UNESCO's agreement in 1970, during the 16th General Conference,[3] to creation of a new Convention entitled

[2] F. Francioni, "Thirty years later: is the World Heritage Convention ready for the 21st century?", *Cultural Heritage and Law Review* 2003, no. 8, p. 12.

[3] UNESCO, *General Conference, 16th Session*, p. 57, https://unesdoc.unesco.org/ark:/48223/pf0000114046_spa?posInSet=5&queryId=dbfca55d-6e4c-4802-9c56-68abcfbb8ee7 (accessed: 10.11.2020).

International Protection of Monuments, Groups of Buildings and Sites of Universal Value, which would eventually also include natural sites, giving finally rise to the 1972 UNESCO World Heritage Convention. As Francisco Javier Melgosa Arcos observed, the World Heritage Convention was created because of the coincidence in time, and in the achievement of the same objectives, of the ecological movements and those responsible for culture in the world, giving rise to the concretion of a spirit, of some measures and the creation of a body that embodied the aforementioned Convention.[4]

As we have already mentioned, the Convention was created under the premise that there was a certain number of objects and places that, due to their exceptional value for all of humanity, should be protected under an international system,[5] because there were certain threats of destruction, disappearance or deterioration of the cultural and natural heritage that urgently required action not only by the national authorities but also by the peoples of the world.[6] In this sense, threats to the heritage were included in Article 11(4) of the Convention in an expanded form with respect to the previous texts: destruction caused by war was no longer the only named threat, and other factors were also taken into account such as natural disasters, dynamism of urban and tourist development or even neglect.

3. Protection of world heritage

In order to be declared a part of world heritage, an object must pass through filters established by the World Heritage Commission and managed by a competent body entrusted to implement the Convention. Thus, since 1978, a number of selection criteria have been established for the inclusion of properties on the World Heritage List. Let us analyse these now.

[4] F.J. Melgosa Arcos, "Cuarenta años de la Convención del Patrimonio Mundial" [in:] *Libro de Actas del XVII Congreso Internacional de la AECIT*, Orense 2012, p. 750, https://gredos.usal.es/bitstream/handle/10366/122141/DDAFP_MelgosaArcos_Cuarentaanosconvencionpatrimoniomundial.pdf?sequence=1 (accessed: 20.03.2020).

[5] Article 11(2) of the UNESCO World Heritage Convention which states that the Committee shall establish, keep up to date and publish, under the title "World Heritage List", a list of cultural and natural heritage properties, as defined in Articles 1 and 2 of this Convention, which it considers to be of outstanding universal value.

[6] The Noting of the World Heritage Convention which states that noting that the cultural and natural heritage is increasingly threatened with destruction and the First Recital which states that considering that the deterioration or disappearance of any item of the cultural and natural heritage constitutes a harmful impoverishment of the heritage of all the peoples of the world.

Whether natural or cultural, the candidate site must be exceptional in the sense that it should transcend the borders of its place o origin, it must be irreplaceable and it must be authentic – that is to say, it must remain unchanged over time, without having undergone far-reaching restoration or alteration. In other words, the Convention, in order to include a piece of property in the List, looks for outstanding universal value, authenticity and integrity of the site in question.

With regard to outstanding universal value, we have to take into account that this criterion is not defined in the 1972 UNESCO World Heritage Convention, so we have to refer to the Operational Guidelines for the implementation of the Convention (OG)[7] that have been published over the years. In the 2005 version of OG this value is defined as a cultural and/or natural significance that is so exceptional that it transcends national boundaries and is of common importance for present and future generations of humankind.

However, despite the attempts to define this outstanding universal value, we must conclude that there appears to be a flaw in this concept which results in lack of credibility in the system of representation of the World Heritage List. Many decisions taken by the Committee when it comes to inscribing certain sites have moved away from objective criteria, focusing instead on political, economic and cultural considerations, or even issues such as prestige or tourist attraction. To assess the authenticity of an object as part of heritage, its cultural value must be credibly expressed through various attributes such as form and design; materials and substance; use and function; traditions, techniques and management systems; the location and setting of the site; spirit and sensibility; and other internal and external factors. Thus, as Britta Rudolff explains, the conclusion is that each culture can objectify the authenticity of a given good, so that, following Jean Barthelemy's thesis, it is impossible to define authenticity univocally and objectively since there are as many ways in which an object might be described as authentic.[8]

On the other hand, considering the notion of integrity, we should note that it implies measuring the intact (untouched, unspoilt) character of the heritage and its attributes. Therefore, in order to examine the conditions of integrity one must assess the extent to which the site possesses all the elements necessary to express its outstanding universal value; whether it is of adequate size so as to allow full representation of the character-

[7] UNESCO, The Operational Guidelines for the Implementation of the World Heritage Convention, https://whc.unesco.org/en/guidelines/ (accessed: 13.07.2020).

[8] J. Barthelemy, "La notion d'authenticité dans son contexte et dans sa perspective", *Restauro International Journal of Historical Heritage* 1994, vol. 129, pp. 37–46; B. Rudolff, "Between 'Outstanding Universal Value' and 'cultural Diversity' – Heritage Values in Transition" [in:] *Constructing World Heritage*, eds. M.T. Albert, S. Gauer-Lietz, Frankfurt 2006, pp. 109–120.

istics and processes that convey the significance of the site; and whether it suffers from the adverse effects of development and/or neglect.

In addition, in relation to cultural goods, a series of additional criteria are also required for inclusion in the List. These are: 1) the object must be a masterpiece of human creation; 2) the object has to testify to an exchange of influences during a certain period or cultural area; 3) the object needs to offer a unique or exceptional testimony about a cultural tradition or a civilisation, whether it has disappeared or is still alive; 4) the object must represent a style of construction or landscape characteristic of a significant period of human history; 5) the object must be an example of a human establishment representative of a culture; 6) the object has to be related to events, living traditions, beliefs, exceptional works, etc.

Drawing up and monitoring the above-mentioned list is entrusted to the World Heritage Committee, an entity made up of representatives of several UNESCO member states and that is responsible for implementing the articles of the UNESCO World Heritage Convention. The Committee therefore requests each State Party to the Convention to submit to it a tentative list of sites it intends to nominate for the World Heritage List (Article 11 of the Convention).

The main purpose of these tentative lists is to allow the Committee to consider on case-by-case basis the outstanding universal value possessed by each site to be nominated to the World Heritage List. It should also be stressed that the Convention has set up this system of nominations to the List so that the States Parties themselves are responsible for nominations, i.e. the Committee cannot decide on its own whether to include into the List a site that has not been nominated by the respective countries. This system also helps to raise a sort of dual awareness – among States and their local populations – as to the actual universal value of the cultural treasures they possess. In the words of former ICCROM Director Stefano de Caro, "the prestige of World Heritage status can attract greater public interest in a heritage property and States Parties tend to use them as flagship sites to improve the management of cultural heritage in general".[9] However, as we will point out below, these good practices are not reality in all cases. This is because, although in principle it is necessary that States Parties provide protection and management mechanisms and legislation that unambiguously guarantee the long-term safeguarding of sites that eventually achieve World Heritage status, the actual implementation of these is not always carried out, and this is where failures occur. We must not forget on this point that Article 6.1 of the Convention enshrines the principle of respect for the national sovereignty of the States Parties, which means that the protection of a site must be the responsibility of the country in question, thus assuming the

[9] S. de Caro, "Managing Cultural World Heritage" [in:] *World Heritage Resource Manual* 2013, p. 4, https://whc.unesco.org/en/managing-cultural-world-heritage/ (accessed: 13.07.2020).

obligation to transmit the property to future generations in an optimum state of conservation by adopting protection, safeguard and conservation measures.[10]

Similarly to the mechanisms relating to inclusion of a site into the List, the World Heritage Committee is also equipped with the necessary powers to carry out a procedure of deletion of a site from the List that has either deteriorated to such an extent that it has lost its intrinsic characteristics or that after a period of time the State Party in possession of the site has failed to implement corrective measures for its safeguarding. In practice these exclusions may be detrimental since they may be used as a way for the States Parties to cease to protect certain sites despite prior commitment. This would undoubtedly be a setback to the very principles of the World Heritage Convention, the main objective of which is the conservation of such sites, and, in consequence, humanity might be at a loss. This was the case, for example, with the exclusion, at the request of the Sultanate of Oman, of the Arabian Oryx Sanctuary, where the said country decided to carry out oil prospecting in that territory.[11] Another instance of deletion concerned the cultural landscape of the Elbe Valley, where the city council of Dresden built a bridge that broke with the natural environment of the valley.[12] These examples underscore the need to raise awareness about world heritage, not only among the people, but also within the public authorities of the States, so that the importance of cultural goods is placed above any national plan of any kind.

As we have seen, the World Heritage Convention has conservation as its fundamental objective and this is precisely its greatest challenge. Achieving this goal requires wide collaboration, from site managers, public administrations of the States Parties, advisory bodies such as the International Council on Monuments and Sites (ICOMOS) or the International Union for Conservation of Nature (IUCN), the UNESCO World Heritage Centre, the international community, local actors and civil society. With regard to the conservation and management of cultural heritage, Gamini Wijesuriya points out the necessity of an integrated approach that facilitates communication and coordination between different groups within the community and local or state agencies as legislative bodies in order to address all the interests at stake.[13]

[10] Article 4 of the UNESCO World Heritage Convention states that each State Party to this Convention recognises that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory belongs primarily to that State.

[11] News extracted from the UNESCO Website, https://whc.unesco.org/en/news/362 (accessed: 13.10.2020).

[12] News extracted from the UNESCO Website, https://whc.unesco.org/en/news/522 (accessed: 13.10.2020).

[13] G. Wijesuriya, "An Integrated Approach to Conservation and Management of Heritage", *ICCROM Newsletter*, December 2008, vol. 34, p. 8, https://www.scribd.com/document/180538843/Newsletter-34-ICCROM-pdf (accessed: 10.06.2020).

As is well known, UNESCO – with the aim of guiding the activities of the Member States in protecting this cultural or natural heritage – has also been making various recommendations that intend to advise and persuade countries without imposing mandatory solutions. Thus, thanks to the efforts of many of the States Parties to the World Heritage Convention, as well as the effects of civil society, there was a number of successful actions undertaken to safeguard the heritage. However, on many occasions, all the efforts made have not been sufficient, and objects that were considered part of the world heritage have been lost, with detriment to the society as a whole. Therefore, for the sake of balance, it is appropriate to examine several cases that illustrate the lights and shadows of the UNESCO World Heritage Convention.

3.1. Success stories in the world heritage protection

1) Russia: Historic Centre of St. Petersburg and its surrounding monuments[14]
The Historic Centre of St. Petersburg was inscribed on the World Heritage List in 1990. In 2006 the World Heritage Centre learned of a construction project by Gazprom to build a new commercial centre that included a 300-metre high skyscraper in the middle of protected area. Russia was reminded of its obligations under the Operational Guidelines for the Implementation of the World Heritage Convention. In consequence, alternatives were considered for the design of the tower, respecting the spirit of the historical city of St. Petersburg. Eventually the Okhta Centre construction was halted in July 2010. In this way, the action of the Russian authorities was decisive in the preservation of the heritage value of that city as it made the company reconsider its position and decide to relocate the skyscraper outside the area qualified as historically and culturally relevant.

This case demonstrated the importance of dialogue between conservation of World Heritage and the interests of urban development, resulting in a solution that does not undermine the integrity of the protected area because it is considered exceptional for humanity.

2) Cambodia: Angkor[15]
Angkor is one of the most valuable archaeological sites in South-East Asia as it houses the remains of the capital of the Khmer Empire from the 9th to the 14th century. The site, which was declared a World Heritage Site in 1992, is vast in size as it occupies about 400 km^2, largely covered by forest. The site is visually spectacular and so the main

[14] For more information related: UNESCO Website, https://whc.unesco.org/en/list/540/ (accessed: 13.07.2020).

[15] M. Rössler, "World Heritage Success Stories", *World Heritage Review*, January 2019, no. 90, p. 20, http://whc.unesco.org/en/review/90/ (accessed: 13.07.2020).

concern for its preservation is mass tourism. However, cooperation in developing sustainable tourism on the part of the social partners involved and the government itself resulted in success in counteracting the pernicious effects of mass tourism. Among the measures implemented by the Cambodian authorities there were: the total restriction of more sensitive or vulnerable areas, the creation of a body of qualified guides and the increase in the price of tickets in order to raise funds for conservation of the site.

The case is a good example of a well-balanced approach between competing interests: today tourism in Angkor not only complies with respect for the world cultural and natural heritage, but also generates revenue that contributes to its preservation for future generations.

3) Mali: Timbuktu[16]

This city of Timbuktu is located at the gates of the Sahara desert and within the confines of the fertile area of Sudan. The city was founded in the 5th century, and its economic and cultural heyday was during the 15th and 16th centuries. Its privileged location was source of its prosperity as a hub of trade in salt, grain, gold and livestock. With this wealth the city became an important centre for the dissemination of Islamic culture with the creation of the Sankore University and 180 Koranic schools. The city of Timbuktu was put on the World Heritage List in 1988.

During the civil war in 2012 several extremist groups destroyed 14 monuments, including tombs and mausolea. A rapid international response involving the city's social fabric and both local and national authorities led to the mausolea being rebuilt in 2015. The reconstruction was carried out by local people who understood value of the ancestral knowledge transmitted from generation to generation and the role of monuments in keeping these traditions alive. In other words, this reconstruction was not only about material restoration of the protected sites but also about social recovery.

3.2. Failures in the world heritage protection

1) Syrian Arab Republic: cultural heritage

Syria is a cradle of the world's oldest civilisations. It is home to peoples from the East such as the Persians, Mongols, and Arabs, but also from the West with the Greeks, Romans, Byzantines, and finally the Crusader forces of the kings of Europe. Over time Syria became the place where nomadic tribes such as the Canaanites and the Arameans

[16] Th. Joffroy, B. Essayouti, "Lessons learnt from the reconstruction of the destroyed mausoleums of Timbuktu, Mali", *The International Archives of the Photogrammetry, Remote Sensing and Spatial Information Sciences* 2020, vol. XLIV-M-1, HERITAGE2020 (3DPast | RISK-Terra) International Conference, 9–12 September 2020, Valencia, Spain, pp. 913–920.

settled. In more recent centuries, the country was absorbed into the Ottoman Empire; with the outbreak of the First World War it became part of the territories under French rule and only after the Second World War it gained its independence. This complex history produced equally rich cultural legacy. Syria's cultural heritage consisted of thousands of archaeological sites and 7 world heritage sites.

However, since the Syrian civil war began in 2011, many archaeological sites, towns and castles have simply disappeared or are at risk of destruction. In addition, 5 of the 7 world heritage sites have been seriously damaged, including the Historic City of Aleppo, Crac des Chevaliers and the Cities of Palmyra, Bosra and Aapamea. As Isber Sabrine remarked, the action of terrorist groups during the years of the conflict has led to the destruction of incalculable property such as temples, mosques, churches, statues, reliefs and all kinds of heritage of incalculable historical value.[17] Archaeological sites have also been subject to clandestine excavations and the resulting illicit traffic in cultural property.

The scale of destruction of the Syrian heritage has led to the conclusion that it had been devised as yet another war aim. Destruction was deliberate, implemented to show superiority over the enemy or to achieve other war-related ends with propagandistic, ideological and economic intentions, including cultural cleansing. In this respect, it must be stressed that although states are sovereign in their territory and therefore also over the assets on it, sovereignty does not amount to a licence to damage or destroy the exceptionally important cultural heritage that exists on their borders, as these transcend the individuality of a society or a people and become exceptional assets for all mankind. An act of destruction can be a crime and may lead to prosecution.

Although the war in Syria is regarded a failure, there is still a lesson to be learned. The response by UNESCO as well as ICOMOS has been limited due to the nature of powers they possess. UNESCO may intervene only through international conventions, but the very nature of these instruments is that talks can only be made with legitimate governments. The context of a civil war makes it unclear which party is actually legitimate. All in all, the international response was scant and late; UNESCO got involved in 2014, three years after the beginning of the conflict.[18] Furthermore, the instability of the area meant that until very recently it was not possible to send experts to Syria regularly to make detailed assessments of the full extent of damage to the country's cultural heritage.

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[17] I. Sabrine, *The Protection of Cultural Heritage during the Syrian Conflict by Refugees in the Diaspora (The Case of Heritage For Peace)* [in:] *Migration and Asylum: New Challenges and Opportunities for Europe,* eds. B.B. Atienza, J.A. Parejo Gámir, B. Sánchez Alonso, Madrid 2016, p. 144.

[18] In this respect, one should mention the UNESCO-funded Emergency Safeguarding of Syrian Heritage Project, http://www.unesco.org/new/es/syria-crisis-response/regional-response/syria/projects/emergency-safeguarding-of-the-heritage/ (accessed: 10.11.2020).

The notorious rigidity of international texts encouraged non-profit organisations throughout the world to step in. Several non-governmental bodies such as Heritage for Peace, APSA or the Syrian Heritage Archive Project are working to fill the void in areas where, unfortunately, the Syrian Directorate General of Antiquities and Museums does not yet have access to. Their first task is to document the damage done to the Syrian cultural heritage.

The Syrian example demonstrates the need for cooperation between different actors in society as neither national nor international bodies are effective when they work in isolation. The consensus is that the catastrophic lessons of the destruction of cultural property in that territory requires new approaches and more effective systems capable of addressing the present challenges. Protection of world heritage demands a greater degree of responsibility and commitment from the States Parties to the UNESCO Convention. This commitment is linked to the principle of the common interest of mankind, which does not focus on the legal ownership of goods, but rather on the fact that these cultural riches belong to all humanity. Collective interest calls for collective action. The World Heritage Convention is, after all, enforceable against any State Party and its obligations are *erga omnes,* which means that as a signatory to the Convention a violation of the established obligations affects international community as a whole.

4. Conclusions

Cultural and natural heritage is a unique and irreplaceable asset that plays a fundamental role in fostering intercultural and intergovernmental dialogue and thereby promoting learning, education and social cohesion. For a long time we have believed that the World Heritage List was the culmination of the global efforts and that we could ingratiate ourselves with the assumption that the objectives of the UNESCO World Heritage Convention had been achieved. This assumption is premature, if not altogether wrong. The world is increasingly faced with pressing social, environmental and economic challenges and so our heritage is not immune to the turbulent scenarios in which we find ourselves.

Paradoxically, the spirit of the Convention has often been overshadowed and its precepts diluted by the World Heritage List itself, since on many occasions all the focus was on obtaining inscription and not on its corollary. Inscription is but a first step. Effective protection of a site requires a comprehensive follow-up so that situations such as those referred in this article, which have led to the total or partial loss or irreparable damage, are not repeated. The List itself is meaningless if there is no serious commitment on the part of all the agents involved in the maintenance of the site. As we have noted, the mere inclusion in the List does not always lead to better conservation. Truth

of the matter is that such inscription entails real obligations on the part of the States, not just theoretical ones.

It is therefore necessary to redouble our efforts so that communication and cooperation between different agents involved in the care of heritage – lawmakers, public authorities at all levels, local population and even business community – is effective. A change of perspective is needed here; the problems of heritage protection cannot be solved by experts acting alone, and it is essential to involve the entire society in the task of its safeguarding.

Consequently, there is urgent need for new directions and guidelines to help shape a new policy for the management of world heritage. It is important that the public authorities of the signatory states of the Convention once and for all give effect to the right of access and participation to the population in the governance of culturally significant properties, since the role of the community is key to any good management. The first step needed here is admission from the relevant bodies that our past heritage belongs to all of humanity and that it transcends physical borders or narrow cultural associations. This task may be achieved through synergy between education and awareness-raising measures. The second step is public participation: citizens must be involved in discourse about what they want to treat as world heritage, and furthermore, this discourse needs to function as a bridge between the public and all the other agents involved. Citizen participation must be encouraged at a local level, as they are the ones who have daily contact with the heritage located in their territories. It is therefore essential to draw up a collective-oriented, flexible and constantly revised strategic plans for the management of world heritage sites, with representatives from different areas in constant dialogue with one another and ready to make adjustments as needed. It seems nothing short of this would be enough to breathe life to the outstanding objective of the 1972 UNESCO World Heritage Convention: bequeathing our world heritage to the generations to come.

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Summary

UNESCO's World Heritage: To be or not to be

This paper examines the UNESCO World Heritage Convention throughout its 48-year history with the aim of presenting examples of its successes and its failures. Cultural heritage is in danger of destruction, disappearance or deterioration, and so the states have become aware of the uniqueness and intrinsic strength of cultural assets as means to strengthen societies. This awareness has led to intensified interest in cultural heritage protection.

The World Heritage List is an instrument of recognition of exceptional properties the loss of which would impoverish all present and future humanity. This halo of international recognition means that everyone has a responsibility to preserve this property for the future.

Keywords: conflicts, cultural heritage, protection, world heritage

Streszczenie

Światowe dziedzictwo UNESCO: być albo nie być

Niniejszy artykuł przybliża 48 lat funkcjonowania Konwencji w sprawie ochrony światowego dziedzictwa kulturalnego i naturalnego, przyjętej w Paryżu dnia 16 listopada 1972 r. Autorka podaje przykłady odniesionych przez ten czas sukcesów i niepowodzeń. Dziedzictwo nie jest niezniszczalne, dlatego też doświadczenia związane z destrukcją, odbieraniem ochrony czy stopniową degradacją uświadamiają państwom członkowskim, jak ważne jest dbanie o dziedzictwo.

Jednocześnie państwa mają świadomość, że unikalne właściwości dziedzictwa przekładają się na siłę społeczeństw. Z tego powodu rośnie zainteresowanie ochroną dziedzictwa.

Lista Światowego Dziedzictwa jest instrumentem rozpoznania przymiotów przesądzających o wyjątkowości obiektu, dzięki którym dziedzictwo jest źródłem duchowego bogactwa w wymiarze powszechnym. Wpis na Listę jest zatem źródłem zobowiązań nie tylko po stronie państw, ale także po stronie wszystkich ludzi.

Słowa kluczowe: konflikty, dziedzictwo kultury, ochrona, dziedzictwo światowe

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Cultural policy of the European Union

1. Introduction

There are few words that are as difficult to define as the word "culture". Probably the best definition possible – "culture" is about "everything humans do", as opposed to "nature" being "everything else" – delivers little in terms of explanation of complexity or content of the phenomenon. To make matters even more complicated, the ontological aspect of culture is entangled in axiology: humans have capacity to create meaning for the reality in which they are currently situated,[1] and through this ability people can give a dimension as well as meaning to their humanity. The term "culture" has no legal definition,[2] and while it was once used in the matter of cultivating plants and animals, over time "culture" has become a term entering the sphere of cultivating human minds.[3] The effect of culture goes far beyond the realms of use and at the same time gives value to business and politics.[4]

The European Economic Community was established more than half a century ago. At that time, it was assumed that the glory days of Europe were over because of post-war economic and political impoverishment. However, European integration turned out successful; old animosities were silenced and international tensions were effectively reduced. The European Community was an attractive model of integration to European

[1] K. Bielawski, *Przemoc w działaniach politycznych w Indonezji*, unpublished doctoral dissertation, Wydział Nauk Społecznych – Instytut Politologii, Uniwersytet Gdański 2020, pp. 38–39.

[2] A. Jagielska-Burduk, W. Szafrański, "Sektor kultury – działalność kulturalna. Wokół problematyki prawnej" [in:] *Kultura w praktyce. Zagadnienia prawne,* eds. A. Jagielska-Burduk, W. Szafrański, Poznań 2012, p. 14.

[3] E. Baldwin, B. Longhurst, S. McCracken, M. Ogborn, G. Smith, *Wstęp do kulturoznawstwa*, Poznań 2007, pp. 24–27.

[4] K. Bielawski, *Przemoc w działaniach politycznych*…, p. 38.

countries. It should be noted that all assimilation processes were related to the economy of the countries and cultural aspects were a side effect of the project. However, there is no Europe without Europeans, thus the countries attempted to continue further steps in the European integration project.[5]

Cultural policy, just like the concept of culture, does not have a legal definition, so attempts to formulate it have been made through discourse and approximation. Imprecision in the terminology used in this discourse is also evident in discourse on related notions, i.e. common cultural heritage, common cultural area or European cultural space. As cultural policy, a targeted and systematic integration in the cultural aspect has therefore been adopted.[6] According to this approach, cultural policy is about preservation of cultural identity for each Member State, about ensuring equal access to culture, about diversity of cultural offerings and promotion of cultural goods and services. The diversity of countries belonging to the European Union (formerly the Community) has caused, to say the least, difficulties in formulating a single cultural policy. Because of this diversity, the Union has developed a unique approach to the subject – one that is based on compromise and cooperation rather than law.

2. Historical background and legal framework

The official motto of the European Union is "united in diversity". This slogan points to the cultural paradigm "unity in multiplicity" which has an influence on diversity of cultures and cultural codes functioning throughout the European continent. The next stage of integration, mentioned above, has been associated with instilling a sense of European identity in society and since the 1970s numerous academic and political debates on the unification direction of the countries belonging to the Community have been held.[7]

It is important therefore to remember about different models of cultural policy that have worked in European countries. Member States were convinced that culture should remain as an exclusive national competence. This implied the need to conduct debates, as it was not obvious that culture belongs at the European level.[8] As far back as the 1980s,

[5] Z. Sokolewicz, "Kultura w procesie integracji europejskiej" [in:] *Europeistyka w zarysie*, eds. A.Z. Nowak, D. Milczarek, Warszawa 2006, pp. 318–334.

[6] D. Ilczuk, "Polityka kulturalna a społeczeństwo obywatelskie w świetle literatury, badań Rady Europy i Unii Europejskiej", *Kultura Współczesna* 1999, no. 1, pp. 65–66.

[7] M. Sassatelli, "Imagined Europe: The Shaping of a European Cultural Identity Through EU Cultural Policy", *European Journal of Social Theory* 2002, vol. 5, no. 4, pp. 435–451.

[8] A. Littoz-Monnet, *The European Union and Culture. Between economic regulation and European cultural policy,* Manchester 2007.

it was known that cultural integration activities required their own legislation, as a balance and compromise on the exclusive competence of the State in the field of culture, and Community involvement in the common policy in the area remained important.[9]

The legal basis for understanding the cultural policy came with the Treaty on European Union, signed in Maastricht on 7 February 1992 (OJ C 326, 26.10.2012, pp. 13–390; also known as the Treaty of Maastricht). In accordance with the provision contained in Article 128 of the Maastricht Treaty, the aim, competences and the scope of Community actions in terms of culture have been established. These were the foundations of the cultural policy, allowing the culture of individual Member States to develop while creating a common cultural heritage for Europeans. The Maastricht Treaty has sanctioned the role and the significance of cultural diversity while delegating part of the competence to the Community to create and emphasise the common heritage. That provision has defined EU responsibilities precisely and assigned them to the principles of complementarity and subsidiarity: the Community was supposed to encourage cooperation and, if necessary, to support or supplement the actions of a Member State. In line with these principles, Article 128(5) of the Maastricht Treaty excluded culture from any actions of harmonisation. Thus, the very idea of creating a common cultural policy within the European Union has been treated with great reserve. The Community was given competence to increase knowledge of the history of European peoples, to protect the European cultural heritage, to develop non-profit cultural exchange, and to promote broadly understood work and creativity. Due to this solution, the Community has been tasked with integrating cultural activities into other undertaken activities, such as cohesion policy, while protecting state autonomy in this area.

Another treaty regulating cultural policy was the Treaty of Amsterdam amending the Treaty on European Union, signed in Amsterdam on 2 October 1997 (OJ C 340, 10.11.1997, pp. 1–144; hereinafter: Treaty of Amsterdam of 1997), which justified the integration of cultural aspects into all activities and policies pursued by the Community.

The paradigm of cultural policy changed after 2000, as it was necessary to redefine the directions of engagement. There has been a proposed increase in interest in culture in the aspect of European society. However, legal considerations have specifically positioned the culture of community in the shadow of the identity of individual Member States. The fact that cultural policy was being obscured by the conservatism of the Member States for an extended period of time limited the effective use of Union funds in the modernisation of cultural infrastructure. Nevertheless, technological progress has had changes in the production, distribution, or consumption of cultural goods and services

[9] E. Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies*, Leiden – Boston 2008.

on the States as well as on the European Union. Yudhishthir Raj Isar has stressed that over time the range of goods and services has developed significantly, which undoubtedly affects every cultural process.[10] The Communication on the European Agenda for Culture in the age of globalisation of the world[11] – a document setting out new strategies and orientations for cultural policy, which was approved by the Council of the European Union on 16 November 2007 – has changed the understanding of the role of culture by underlining its important role in the process of European Integration and the significance of cultural policy for the idea of cooperation and integration.

The Agenda identified three thoughts that the European Union was to be guided by, namely: 1) promoting diversity while encouraging the dialogue, 2) culture as a catalyst for creativity, 3) culture as part of international relations.

The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007 (OJ C 306, 17.12.2007, pp. 1–27; hereinafter: the Treaty of Lisbon) which entered into force in 2009, established cultural heritage as a foundation and an inalienable human right. The culture of the Union has been expressed as a desire to deepen solidarity while respecting state cultures, traditions, and history. The Union, therefore, respects diversity, but also ensures the protection and development of the cultural heritage of Europeans.

The Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390; hereinafter: TFEU) regulates implementation of EU law into national laws, including rules related to cultural engagement. It is worth to note that the TFEU introduced the principle of majority voting, replacing the unanimity rule in force since 1992. Moreover, the responsibilities of the institutions of the European Union in promoting and implementing cultural policy actions have been established expressly. In particular, Article 167(2) of the TFEU mandates that the Union aims to deepen knowledge as well as to disseminate the culture and history of the Member States and European peoples; contributes to the flowering of the cultures of the Member States; protects cultural heritage of European importance; aims for non-commercial cultural exchanges; supports artistic, literary and audiovisual creation; and takes cultural aspects into account and respects and promotes the diversity of Member States' cultures. Of course, any EU action in that sphere must support and complement the actions of the Member States. The aim of the Member States was, therefore, to highlight and protect diversity in cultural systems.[12]

[10] Y. Raj Isar, "The cultural industries and the economy of culture", http://www.cutureac-tioneurope.org (accessed: 31.12.2020).

[11] The European Commission, *European agenda for culture in a globalising world,* Brussels, 10.05.2007, COM (2007) 242.

[12] E. Psychogiopoulou, *The Integration*…, p. 26.

Needless to say, any further agenda or action, is constrained by the scope and purpose of their respective legal bases in the field of cultural policy.[13] Accordingly, any direct action by the European Union in the field of culture is based on the Treaties, and the specificity of the instruments used by the European Union in the field of culture is subordinated to the principle of subsidiarity and complementarity. Culture, however, stands visibly apart from other areas of interest of the Union. There is actual reluctance to regulate these issues at the EU level, so much so it would appear as if the solutions to culture (and related policies) are supposed to work under different principles than, for example, trade, transport, or agriculture. The attitude of the Member States is conservative in this regard and the language of Article 167(1) and the rest of Title XIII of the TFEU does reflect this conservatism: instead of outright regulation or harmonisation of domestic laws, the EU "contributes" to the flowering of cultures (plural of the noun is no coincidence), and any action or initiative at the community level ("bringing common heritage to the fore") must "respect national and regional diversity". Nevertheless, the Union has developed mechanisms for the operation and financing of cultural activities,[14] which allowed creation of a legal framework, despite the lack of a legal definition.

The academia identifies three areas of cooperation within the European Union's cultural policy: 1) protection of European heritage, 2) projects developing European culture, 3) promoting European culture.[15] Despite the Member States' reluctance to allow regulation of cultural issues as a part of the continent's integration, it quickly became apparent that it was necessary to build a sense of community among Europeans. These theses underline that the European Union was aware of the difficult and serious challenge of multiculturalism within the Community.[16] Moreover, technological and economical progress has invited some international cooperation between the Member States. In this regard, it has been noted that culture is a resource of the European Union's "soft power", which has strengthened external relations and the competitiveness of the European cultural sector. Activities related to the Agenda have initiated a turnaround in the cultural policy. The aim was to include culture as an independent area within EU policies. But despite such postulations, culture has not become a strategic area of development, and this was confirmed in a 2010 manifesto entitled "Europe 2020 – a strategy for smart, sustainable and inclusive growth", where the area of culture was notably omitted in *exposé* of key

[13] J. Barcz, *Polityki Unii Europejskiej. Społeczne aspekty prawne,* Warszawa 2010.

[14] D. Jurkiewicz-Eckert, "Cultural Policy of the EU. How it works in practice" [in:] *Introduction to European Studies: A New Approach to Uniting Europe*, eds. D. Milczarek, A. Adamczyk, K. Zajączkowski, Warszawa 2013, pp. 729–762.

[15] K. Zeidler, "Zasada ochrony europejskiego dziedzictwa kultury" [in:] *Europa sędziów,* ed. Z. Brodecki, Warszawa 2007, pp. 292–293.

[16] H.E. Naess, *A New Agenda? The European Union and Cultural Policy*, London 2009.

solutions in terms of EU funds.[17] Moreover, in that document, the word "culture" was replaced by "creativity", which might cast doubts as to the role of culture as an independent priority of the European Union. The EU's engagement in culture is derived from the paradox of disproportionate discourse on the concept of "unity in multiplicity". Aside from axiological explanation, the "culture–creativity" word game had tangible consequences: on one hand, the number of cultural initiatives that receive funding has increased to the satisfaction of cultural audiences; on the other, there is a sense of frustration felt by some cultural institutions which complain about undue reliance on criterion of "creativity of the idea" in assessment of their applications for EU grants.[18]

3. Protection of cultural heritage within the framework of cultural policy

Given the Member States' autonomy in the area of cultural policy – the default position – defining what is actually common in the common policy might prove problematic. Europe has visible regional differences, and the concept of culture is not identical in all Member States. It is believed that culture is the source of the nation's identity, which is undoubtedly a component of cultural heritage, and aims to create a European society with the identity of society as Europeans. Thus, in order to create an awareness that allows the creation of a functioning culture (and cultural policy), it is necessary to find (or perhaps to create) some common ground. In the case of the Union, the common ground is the platform of dialogue.

The concept of "cultural heritage" mentioned in Article 167(1) of the TFEU is expanded in Decision No. 2228/97/EC of the European Parliament and of the Council of 13 October 1997 establishing a Community action programme in the field of cultural heritage (OJ L 305, 8.11.1997, p. 32). Article 2 of this Decision defines "cultural heritage" broadly and includes movable and immovable heritage (museums and collections, libraries and archives including photographic, cinematographic and sound archives), archaeological and underwater heritage, architectural heritage, assemblages and sites and cultural landscapes. Again, the cultural diversity of Europe – beginning with diversity in language[19] – affects not only the EU's policies, but also its secondary legislation. A notable example is

[17] D. Jurkiewicz-Eckert, "Cultural Policy of the EU…", pp. 753–761.

[18] Ch. Gordon, R. Fisher, D. Klaic, Analysis of the Commission Communication „A European Agenda for Culture in globalizing world", briefing paper for European Parliament, 2007, http://www.europarl.europa.eu/thinktank/en/document.html (accessed: 31.12.2020).

[19] A. Siwek, "Komentarz do art. 151 TWE" [in:] *Traktat ustanawiający Wspólnotę Europejską. Komentarz*, ed. A. Wróbel, vol. 2, *Art. 61–188,* eds. K. Kowalik-Bańczyk, M. Szwarc-Kuczer, Warszawa 2009, pp. 11–30.

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). This directive does not harmonise the principles of protection, but merely lays down a procedure for cooperation between states as the Treaties lack specific powers to enact any farther reaching measures. Despite the establishment of a common market, economic and monetary union, protection of heritage has been limited to "facilitating" and "refraining from measures threatening treaty objectives". In other words, the treaty provisions referred to above allow for little more than soft law. What is more, any actual Community legislation related to the cultural area would gain typical characteristics of EU law only if its subject intersected with other areas relevant to the Union. Consequently, the EU's cultural policy is connected to the notion of cultural heritage, and this connection works in two dimensions only – it is a cooperation mechanism and a source of funding for important activities. And while the third dimension – law, as a casual reader of the founding treaties might infer – is missing, this omission is not a flaw of the system; it is its feature.

The European approach to cultural heritage policy – dialogue instead of law – inspires actors in other normative frameworks worldwide, with a view to establish sustainable cultural exchanges, promote interculturalism, and, ultimately, add flavour to the relationships among peoples. No doubt, Europe should be able to fulfil itself in a common cultural space conducive to the development and progress of Europeans, both in an individual and collective sense, enhancing their feeling at the same time belonging to one community.[20]

4. Conclusions

The issue of the European Union's cultural policy remains sensitive. The EU has treated cultural policy as a sphere of national sovereignty and has refrained from introducing uniform regulations. The autonomy of the Member States in this field and the subsidiarity of the activities of the EU institutions allow the soft law system to keep its balance. The focus of cultural policy is on the economic importance of culture, which is not surprising since economy is both at the EU's origins and in its present core. Nevertheless, culture is acknowledged to have not only a financial dimension – the very reason why it was included int the Treaties is that it is a carrier of value.

Today, at the time of crisis caused by the COVID-19 pandemic, any reduction of national and EU funds – especially in the context of lockdown-related domestic policies

[20] L. Terezzini, lecture given on 21 May 2005 in Bologna during a session organised by ATER (Associazione Teatrale Emilia Romagna).

and regulations which have led to effective freezing of economic activity in the sphere of culture – can have far-reaching consequences. Not all cultural endeavours are economically self-sustainable; culture and heritage protection need the continuing support of the European Union.

Due to the differences between European regions and states, defining common cultural heritage is a difficult undertaking. The current legal framework does not allow typical legal measures aimed at direct regulation or harmonisation of domestic laws on this subject. Moreover, any EU initiative that might be perceived as an effort towards substantive or even procedural unification of law on culture is likely to face opposition from Member States. Nevertheless, the Union's objective remains to promote culture (understood as diversity of cultural expressions), to protect it and to help develop it. These objectives are realised through dialogue and soft-law measures. Preserving Member States' autonomy in this area, while at the same time supplementing national measures with dialogue and financing are key features of the system. The dialogue-oriented approach was purposefully chosen over typical legal measures adopted in other areas of interest to the EU, and this choice was meant to reflect the discursive nature of culture itself and to promote peace and mutual respect in Europe and around the world. In other words, establishing one standard policy in place of current approach would amount to an irreparable loss for the Member States and, ultimately, to the Union itself. Maintaining cultural diversity is a condition *sine qua non* for sustainable development in quality of life.

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Summary

Cultural policy of the European Union

The term "culture" is expansive and ambiguous. In legal discourse the usual difficulties as to the ever-changing meaning and undertones of this word are amplified by the lack of legal definition of the concept. In the broadest sense, culture can be understood as the entirety of spiritual and material legacy of mankind, and by adding an element of generational transformation we arrive

at the concept of cultural heritage. Cultural heritage has become one of the priorities of the modern world and has conditioned the emergence of a cultural policy appropriate for each country. The establishment of the European Community brought the citizens of the Member States closer together and influenced the formation of a common identity and the development of a common European heritage. The ensuing transformation of the Community into the European Union – an entity unique among international organisations – required the creation of equally non-standard solutions with regard to the integration and cooperation of the Member States in the field of the common cultural heritage. The EU motto "united in diversity" indicates the cultural paradigm of "unity in multiplicity", or, in other words, the principle of preservation of the cultural codes functioning throughout the European continent. The rising interest in the common policy in the field of culture is noticeable, and consequently, cultural policy has become one of the components of the EU's agenda. This article discusses evolution of the cultural policy of the European Union and its impact on the protection of cultural heritage.

Keywords: cultural policy, cultural heritage, European Union, integration, respect for heterogenity

Streszczenie

Polityka kulturalna Unii Europejskiej

Kultura jest pojęciem wieloznacznym i pojemnym. W dyskursie prawniczym na zwykłe trudności wywołane zmiennością treści i konotacji tego słowa nakłada się nadto brak definicji legalnej. Najczęściej za kulturę uważa się całokształt duchowego i materialnego dorobku ludzkości, przy czym, jeśli dodać do tego określenia element pokoleniowości, możemy mówić o dziedzictwie kultury. Ochrona tego dziedzictwa stała się jednym z priorytetów współczesnego świata i uwarunkowała powstanie polityki kulturalnej właściwej dla każdego z państw. Powstanie Wspólnoty Europejskiej zbliżyło do siebie obywateli państw członkowskich i wpłynęło na ukształtowanie się wspólnej ich tożsamości, co skutkowało rozwijaniem wspólnego europejskiego dziedzictwa. Przeobrażenie zaś Wspólnoty w Unię Europejską – podmiot różniący się od klasycznych organizacji międzynarodowych – skutkowało koniecznością opracowania równie niestandardowych rozwiązań w odniesieniu do integracji i współpracy państw członkowskich w zakresie wspólnego dziedzictwa kultury, a także usystematyzowania wspólnej polityki kulturalnej. Już samo motto Unii – „zjednoczona w różnorodności" – wskazuje na kulturowy paradygmat „jedność w wielości", a więc na zasadę zachowania niejednakowych kodów kulturowych funkcjonujących na kontynencie europejskim. Wzrost zainteresowania wspólną polityką w sprawach kultury jest zauważalny, a tym samym polityka kulturalna stała się jednym z komponentów działalności Unii Europejskiej. W artykule przybliżono ewolucję polityki kulturalnej Unii Europejskiej, jednocześnie wskazując na jej wpływ na ochronę dziedzictwa kultury.

Słowa kluczowe: polityka kulturalna, dziedzictwo kultury, Unia Europejska, integracja, poszanowanie różnorodności

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The Klimt row: Analysis of property restitution laws based on the Austrian Klimt Bloch-Bauer case

1. Introduction

Gustav Klimt's golden portraits have been admired by vast audiences around the globe for over a hundred years. The Austrian artist worked at the turn of the 19th and 20th centuries[1] and was the founder and main representative of the Vienna Secession. While his paintings and graphics displayed mastery in many forms and techniques, the style that brought him fame was the golden phase. His most recognisable piece is "The Kiss", created between 1907 and 1908.[2] Another painting, the "Portrait of Adele Bloch-Bauer I", also known as "The Lady in Gold" or "Austrian Mona Lisa", created at a similar time, today attracts attention of art enthusiasts and legal community alike: the topic of this article is an outline of the dispute between Republic of Austria and Maria Altmann *née* Bloch.

The painting, along with a large part of the Bloch-Bauer property, was stolen by the Nazis after the occupation of Austria in 1938.[3] Mrs. Bloch-Bauer did not live to see this event as she died in 1925, asking her husband in her will to donate Klimt's paintings to the Vienna Belvedere Museum, but only after his death. Ferdinand Bloch-Bauer, fleeing the Holocaust and persecution, settled in Switzerland, where he died in 1945.[4] These paintings by Klimt were hung in Belvedere during the war, and they remained there until Maria Altmann, Ferdinand Bloch-Bauer's heir, demanded their return.

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[1] N. Harris, *The life and works of Gustav Klimt*, Parragon Publishing, New York 1994, p. 12.

[2] "The Kiss by Gustav Klimt", 8 November 2007, https://www.belvedere.at/en/kiss-gustav-klimt (accessed: 17.10.2020).

[3] Bundesverfassungsgesetz über die Wiedervereinigung Österreichs mit dem Deutschen Reich, 1938, Vienna, http://alex.onb.ac.at/cgi-content/alex?apm=0&aid=bgl&datum=19380004&seite=00000259&size=45 (accessed: 20.11.2020).

[4] A.-M. O'Connor, *The Lady in Gold: The extraordinary Tale of Gustav Klimt's Masterpiece, Bloch-Bauer*, Bantam Books, New York 2012, p. 199.

The ensuing case is at the crossroads of two different branches of Austrian law, i.e. inheritance and restitution law. The issues at play included the validity of the will and, in consequence, determining to whom the portrait of Adele Bloch-Bauer should belong; on the other – the process of recovering works of art stolen by the Nazis. However, the context of national law is not the only important factor. The restitution case touches upon international and United States' law, which makes the matter so much more interesting. The aim of this article is to present this case and show how many branches of law can intertwine in the over one-hundred-year history of one painting. Furthermore, my work summaries the topic and adds the more recent development of the case, as many analyses written by other researchers were written before the year 2015.

2. Literature review

Due to the media coverage and international character of this case the Bloch-Bauer story has *de facto* become one of the best known and most frequently quoted cases of recovery of works of art stolen by the Nazis. The legal battle had lasted almost ten years, and most of the art law specialists were well aware of it, especially in Austria. The present outline shall recount this dispute from two perspectives – as a national issue and as an international issue. First of all, I will present the problem from the Austrian side, based on the judgments of the courts, the Austrian civil code, and the studies of prominent law professors, e.g., Rudolf Welser and Christian Rabl, who present the legal issues of Klimt's paintings at the Belvedere Museum in Vienna. I would like to focus on the controversial 1998 law on the return to the rightful owners of works of art from Austrian museums (Das Bundesgesetz über die Rückgabe von Kunstgegenständen aus Österreichischen Bundesmuseen und Sammlungen BGBl. I Nr. 181/1998; hereinafter: Austrian Restitution Act of 1998), on seven other acts of 1946–1949 – *Rückstellungsgesetze* (e.g. Bundesgesetz vom 26. Juli 1946 über die Rückstellung entzogener Vermögen, die sich in Verwaltung des Bundes oder der Bundesländer befinden – the 1st Rückstellungsgesetz, Bundesgesetz vom 6. Februar 1947 über die Nichtigkeit von Vermögensentziehungen – the 3rd Rückstellungsgesetz) and others, finally – articles by the investigative journalist Hubertus Czernin. Secondly, I will use American interpretations of the matter, because the final act of the legal drama took place in the United States. At the US stage the matter became international and even political, and it ceased to concern Austrian law only. An important source of information are the judgments of American courts, including the Supreme Court (*Republic of Austria v. Altmann*, 541 U.S. 677, 2004), which allowed Ms. Altmann to complete the restitution process of works of art belonging to her and her family.

The wide media coverage of the case was an inspiration for the books *The Lady in Gold: The Extraordinary Tale of Gustav Klimt's Masterpiece* by Anne-Marie O'Connor, documentary films such as "Art of the Heist: Lady in Gold" (2006) and even a Hollywood feature film – "Woman in Gold" (2015). References to the works of popular culture are useful: the issue has not only a legal but also historical, sociological and political aspects, including in the mainstream discourse.

3. Historical outline

In 1899 Adele Bauer married Ferdinand Bloch, an older Czech-Austrian sugar refiner, who took the shared surname Bloch-Bauer after their marriage.[5] Just like Adele's sister Therese and her husband Gustav (Ferdinand's brother), Adele and her husband were famous members of the Viennese *fin de siècle*, and the upper crust of the First Republic of Austria. Therese and Gustav were Maria Altmann's parents. Both, Ferdinand and his wife, were great connoisseurs of art and were friends with Gustav Klimt. In 1907 Klimt painted a portrait of Adele, the painting that almost a century later shook Austria and the whole legal world.

In 1925, Adele died of meningitis.[6] In her will, she asked her husband to donate Klimt's works to the National Belvedere Gallery in Vienna after his death. In 1936 Ferdinand donated Klimt's "Kammer Castle on the Attersee III" to the Belvedere.[7]

After the Nazis took control of the country, Ferdinand Bloch-Bauer was forced to flee Austria in 1938 and leave his property, which had been confiscated in a tax procedure in 1941.[8] The seized portrait of Mrs. Bloch-Bauer was sent to Belvedere at that time, and apparently, it was there that she received the nickname of the "The Lady in Gold", standing for the attempt to conceal the woman's Jewish descent.[9]

In November 1945, a few months after the end of World War II, Ferdinand Bloch-Bauer passed away in Zurich. As he did not have any descendants (his wife had two miscarriages[10]), he bequeathed all his property to his nephew and two nieces – one of them was Maria Altmann. His last will did not mention the paintings that Ferdinand consid-

[5] Ibid., p. 66.

[6] "Adele Und Ferdinand Bloch-Bauer", *Adele Und Ferdinand Bloch-Bauer – Wien Geschichte Wiki*, 2019, www.geschichtewiki.wien.gv.at/Adele_und_Ferdinand_Bloch-Bauer (accessed: 29.11.2020).

[7] Ch. Rabl, R. Welser, *Der Fall Klimt/Bloch-Bauer – Die rechtliche Problematik der Klimt-Bilder im Belvedere*, Manz Verlag, Wien 2005, p. 14.

[8] Supreme Court of the United States, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Opinion of the Court, p. 3.

[9] A.-M. O'Connor, *The Lady in Gold*…, p. 152.

[10] Ibid., p. 44.

ered to be lost forever, and it generally affirmed that all his belongings should be given to his brother's children. It is noteworthy that even before his death, Mr. Bloch-Bauer believed that Klimt's paintings – including "Portrait of Adele Bloch Bauer I" – belonged to him, as it was he who commissioned them and not his wife. Nevertheless, after the war, the Austrian government recognised the will of Adele Bloch-Bauer as binding and declared the painting to be property of the state.[11]

In 1946, a law was published which stated that all legal acts enacted between 1938 and 1945 were considered illegal and invalid.[12] This act gave the first hope and a chance to recover the stolen property. In the years 1948–1949 the Bloch-Bauer family tried, with the help of lawyer Dr. Rinesh, to move their goods to the United States. However, the Republic of Austria forced Dr. Rinesh to hand over paintings that were already in Austria's possession, including the portrait of Adele, in exchange for permission to export the rest of the family's belongings.[13]

This *status quo* lasted until 1998. It was then that allegations began to appear that the works in Austrian museums were held there illegally. In response, Austria opened the state archives and allowed research to be conducted on this matter.[14] This is how the Austrian investigative journalist Hubertus Czernin found documents proving that the property of Ferdinand Bloch-Bauer had not been donated to the museum by his will and that the museum authorities knew that some of their collections had not been legally obtained.[15] In the same year, Austria decided to allow the restitution of those goods, which, according to the 1946 law, had to be donated to the state in order to obtain permission to export others abroad. In addition, a "restitution commission" was established to assess the claims and their possible acceptance or refusal.[16]

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[11] Supreme Court of the United States, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Opinion of the Court, p. 4.

[12] Bundesgesetz vom 15. Mai 1946 über die Nichtigerklärung von Rechtsgeschäften und sonstigen Rechtshandlungen, die während der deutschen Besetzung Österreichs erfolgt sind (BGBl. Nr. 106/1946), https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001639 (accessed: 15.10.2020).

[13] Supreme Court of the United States, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Opinion of the Court, p. 4.

[14] Bundesgesetz über die Rückgabe von Kunstgegenständen und sonstigem beweglichem Kulturgut aus den österreichischen Bundesmuseen und Sammlungen und aus dem sonstigen Bundeseigentum (Kunstrückgabegesetz – KRG), (BGBl. I Nr. 117/2009), https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010094 (accessed: 20.10.2020).

[15] Supreme Court of the United States, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Opinion of the Court, p. 5.

[16] Ministry for Arts, Culture, Civil Service and Sport of Austria, "Restitution", *Bundesministerium Für Kunst, Kultur, Öffentlichen Dienst Und Sport – Startseite*, www.bmkoes.gv.at/Kunst-und-Kultur/restitution.html (accessed: 25.11.2020).

4. *Maria Altmann v. Austria*, 1998–2006

After the occupation of Austria in 1938 by Nazi Germany, Maria Altmann left Austria and settled in California. In 1945 she obtained American citizenship.[17] After the adoption of the Austrian Restitution Act in 1998, Maria Altmann, as one of the heirs of her uncle Ferdinand Bloch-Bauer, on the basis of the above-mentioned restitution act, sought to recover her family's works of art, i.e. "Adele Bloch-Bauer II", "Apfelbaum I", "Buchenwald", "Häuser in Unterach am Attersee", "Amalie Zuckerkandl", and, of course "Adele Bloch-Bauer I"[18] – the pearl in the crown of the collection. With the help of a lawyer and a friend of the family, Mr. E. Randol Schoenberg, Maria Altmann applied to the aforementioned restitution commission, which in 1999 rejected her application.[19] The reasons for the decision invoked the will of Adele Bloch-Bauer from 1923, in which she asked her husband to donate her paintings to the Belvedere National Gallery.[20] However, the commission has proposed to give back a dozen or so Klimt's drawings and other items that were stolen from the Altmann home during the war.[21]

Ms. Altmann did not agree with the Austrians' reasoning. She argued that uncle Ferdinand paid for the portrait of her aunt, which made him the owner of the painting, and in consequence Adele Bloch-Bauer did not have the right to dispose of her husband's property in her will.[22] Unfortunately, the legal status of the paintings was very difficult to establish, as it is not entirely clear to whom the portrait actually belonged. After the refusal, Maria Altmann decided to state her claim before the Austrian courts, but she had to withdraw the suit because the cost of initiating the proceedings was 1.2% of the assessed value of the items,[23] which would amount to a payment of over a million EUR. Mrs. Altmann, as the owner of a small boutique in California, did not have such resources. The plaintiff proposed to settle the matter out of court in arbitration, but the Republic of Austria did not consent to it.[24]

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[17] B. Hess, "Altmann v. Austria Ein transatlantischer Rechtsstreit um ein weltberühmtes Gemälde Gustav Klimts im Wiener Belvedere", *Kunstrechtsspiegel* 2007, vol. 2, p. 44.

[18] Ch. Rabl, R. Welser, *Der Fall Klimt/Bloch-Bauer*…, p. 21.

[19] G. Huber, "Die Goldene Adele Restitution von Kunstgegensänden in Österreich Adele, The Lady in Gold Austria: The Restitution of works of art", *Milionart Kaleidoscope* 2017, vol. 3, p. 34.

[20] "Bloch-Bauer's Testament", *Der Standard*, 31 March 2008, www.derstandard.at/story/2306397/bloch-bauers-testament (accessed: 29.11.2020).

[21] Supreme Court of the United States *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Opinion of the Court, p. 5.

[22] A.-M. O'Connor, *The Lady in Gold*…, p. 264.

[23] "Art of the Heist: Lady in Gold", dir. N. Janes (2006).

[24] Ibid.

Due to difficulties in financing court proceedings in Austria and the Austrian courts' unwillingness to cooperate, Maria Altmann and her lawyer E. Randol Schoenberg decided to seek justice in the United States. In 1999, a lawsuit against the Republic of Austria and the Belvedere Gallery was brought to a federal court in the central district of California (Los Angeles).[25] Suing a sovereign state – in this case, Austria – in the USA was possible for several reasons, as it violated: Austrian law, California state law and international law.

The first instance court, namely the Federal Central District Court in Los Angeles, granted the plaintiff's request under Section 2 of the Foreign Sovereign Immunities Act of 1976 (hereinafter: 1976 FSIA), which confers jurisdiction on federal district courts to hear civil lawsuits against foreign states.[26]

Ms. Altmann's main claims were as follows: under the Austrian Restitution Act of 1998 the portrait of Adele Bloch-Bauer and other works should be returned to their rightful owners, in this case to the heirs of Ferdinand Bloch-Bauer – including to Maria Altmann and her siblings. "The second claim is for replevin, possibly under California law. Other claims pertained, *inter alia*, 'seeking damages for expropriation and conversion' (fourth cause of action), and seeking damages for violation of international law, as the paintings were stolen during the Nazi occupation of Austria, and the compensation to the claimant for unlawfully benefitting from using her property (fifth course of action)".[27] This argument is important because it was one of the main grounds for initiating the case in the USA. The Republic of Austria and the Belvedere Gallery benefited from the commercial sale of images of Klimt's paintings (books, reproductions, gadgets), including the said portrait of Maria Altmann's Aunt in the United States.[28]

To counter the claimant's suit, Austria sought to dismiss the case on the basis of, *inter alia*, lack of jurisdiction, lack of a suitable place and the *forum non conveniens* doctrine. Their main goal was to prove that a case concerning a sovereign state should not be brought before the courts of another country.[29] On the basis of the principle of international law *acta iure imperii*, sovereign states enjoy immunity from foreign courts,

[25] United States District Court, C.D. California: *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (2001), 9 May 2001, *Maria V. Altmann, Plaintiff v. Republic of Austria, et al. Defendants*, https://law.justia.com/cases/federal/district-courts/FSupp2/142/1187/2346850/ (accessed: 20.11.2020).

[26] https://web.archive.org/web/20150627110441/http://usun.state.gov/documents/organization/218088.pdf (accessed: 20.11.2020).

[27] Supreme Court of the United States, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Opinion of the Court, p. 6.

[28] "Art of the Heist…"

[29] Supreme Court of the United States, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Syllabus, p. 1.

as sanctioned in Article 1(2) of the Charter of the United Nations, signed on 26 June 1945 in San Francisco.

In 2000, the Federal District Court rejected the defendants' claims.[30] The Court of Appeal upheld the judgment of the court of the first instance.[31] In 2004, the case was brought before the US Supreme Court.[32] The focus of the Supreme Court was to determine whether the 1976 FSIA could be applied to a case in which key facts occurred before the enactment of the law in question. The Republic of Austria was of the opinion that its immunity continued because, at the time of the initiation of the case and the first post-World War II restitution claims, Austria enjoyed complete immunity as a sovereign state and that the 1976 FSIA was not retroactive. The US Supreme Court ruled in the *Republic of Austria v. Altmann* case that the FSIA applies to facts prior to 1976, and exceptionally in the case of Mrs. Altmann, it may act retroactively.[33] In this way, the case could go back to the court in California, where it could be decided on the merits, with Austria's immunity overruled.

In fear of the costs, length of the proceedings and possible defeat in the courtroom, in 2005 the Republic of Austria agreed to arbitration.[34] The parties decided to appoint three Austrian arbitrators to assess who owned the paintings and whether the Austrian Restitution Act of 1998 was applicable in this case or not. Their decision was to be made on the basis of the evidence presented by the parties, be final and without the possibility of further appeal. The Republic of Austria was ordered to pay the entire costs of the proceedings.[35]

In 2006, the final decision was made, on the basis of which Austria was obliged to return to Mrs. Maria Altmann six paintings by Gustav Klimt, including the one most important for the claimant – the portrait of her aunt Adele Bloch-Bauer.[36]

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[30] US District Court for the Central District of California – 142 F. Supp. 2d 1187 (C.D. Cal. 2001), 9 May 2001, *Maria V. Altmann, Plaintiff v. Republic of Austria, et al. Defendants*.

[31] Supreme Court of the United States of America, (03-13) 541 U.S. 677 (2004) 327 F.3d 1246, *Republic of Austria v. Altmann*, https://www.law.cornell.edu/supct/html/03-13.ZO.html (accessed: 20.11.2020).

[32] United States Court of Appeals for the Ninth Circuit, Nos. 01-56003, 01-56398, *Maria V. Altmann, an individual, Plaintiff-Appellee, v. Republic of Austria, a foreign state; and the Austrian Gallery, an agency of the Republic of Austria*, *Defendants-Appellants*, 12 December 2002, https://caselaw.findlaw.com/us-9th-circuit/1464064.html (accessed: 20.11.2020).

[33] Supreme Court of the United States, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Syllabus, p. 1.

[34] A.-M. O'Connor, *The Lady in Gold*…, p. 250.

[35] Arbitral Award – *5 Klimt paintings Maria V. Altmann and others v. Republic of Austria*, 15 January 2004, https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria/arbitral-award-5-klimt-paintings-maria-v-altmann-and-others-v-republic-of-austria-15-january-2004/view (accessed: 29.11.2020)

[36] A.-M. O'Connor, *The Lady in Gold*…, p. 252.

After the paintings were moved to the United States, Maria Altmann decided to place them in the Los Angeles County Museum of Art. Then the paintings went to auctions, where they were sold for over 300 million EUR. The sum went to, among others, lawyer E. Ronald Schoenberg and the heirs of Ferdinand Bloch-Bauer – Maria Altmann and her family. The portrait of Adele Bloch-Bauer went to the Neue Gallerie in New York, its owner, Ronald Lauder, paid a record 120 million USD for the work of Klimt.[37]

5. Assessment

The portrait of Adele Bloch-Bauer left the Austrian soil almost fifteen years ago, but the loss of the "Lady in Gold" remains an open wound in the heart of the country to this day. However, it cannot be ignored that the Republic of Austria could have avoided an international scandal and a lengthy, costly trial. Maria Altmann wanted the painting to stay in her homeland from the very beginning, but the Austrians were not interested in settling the matter amicably.[38]

After the discovery in the 1990s of irregularities related to the legal status of some of the works in Vienna's Belvedere gallery that were acquired during the Nazi rule, Austria's offensive attitude began to arouse much controversy.[39] The years 1938–1945 remain a taboo subject to this day, yet most often we hear that the Austrians consider themselves the first victims of the Nazi regime. In March 1938 Austria became part of the Third Reich; the annexation (*Anschluss*)[40] was a violation of Article 80 of the Treaty of Versailles, signed in Paris on 28 June 1919, and one of its conditions was the prohibition of Germany and Austria from merging into one state.

It is worth noting, however, that after their defeat in the First World War, it was justified for the denizens of the former Austrian Empire to feel somewhat uneasy. By 1918, the area of Austro-Hungary was over 675,000 km^2,[41] whereas after the Treaty of Saint-Germain-en-Laye it had shrunk to about 80,000 km^2,[42] just 12 percent of the original size. The lands left to Austria were mainly mountainous, difficult to access, and economically

[37] C. Vogel, "Lauder Pays $135 Million, a Record, for a Klimt Portrait", *The New York Times*, 19 June 2006, www.nytimes.com/2006/06/19/arts/design/19klim.html (accessed: 29.11.2020).

[38] "Art of the Heist…"

[39] A.-M. O'Connor, *The Lady in Gold*…, p. 224.

[40] Bundesverfassungsgesetz über die Widervereinigung Österreichs mit dem Deutschen Reich, Wien, 13.03.1938, Wien 1938, http://alex.onb.ac.at/cgi-content/alex?aid=glo&datum=1938&size=45&page=74 (accessed: 20.11.2020).

[41] S.R. Williamson, *Austria-Hungary and the Origins of the First World War*, Macmillan Education, New York 1991, p. 4.

[42] Ibid.

unattractive. The country, created from the remnants of the former European power, plunged into poverty, and its inhabitants, frustrated, began to manifest their will to change. The charisma of Adolf Hitler, an Austrian by birth, his rhetoric about injustices of the First World War, and accusations against Jews for causing an economic collapse in both Germany and Austria began to appeal not only to Germans but also to many desperate Austrians. Hence the growing support of the NSDAP party in Austria and the enthusiasm to join the Third Reich. It is very difficult to judge whether the Austrians were the first victims of National Socialist ideology or whether they were complicit.

Before the Second World War, Austria was inhabited by about 210,000 Jews, 180,000 of whom living in Vienna,[43] including Maria Altmann and her family. Austria was inhabited by people of diverse nationalities, religions, and sexual preferences. Are they all guilty of the atrocities of those times? For years, the Altmann family has treated Vienna and Austria as their home. The state is not only a form of organisation of society but also people, non-homogenous in their nature. In all fairness, Austria, like almost everything in the world, is neither black nor white: it comes in shades of grey, it is both an executioner and a victim. After the end of the war in May 1945 and the creation of the independent Republic of Austria, the time has come to settle accounts with the past.

Anschluss was declared illegal on 8 May 1945, the NSDAP was outlawed[44] and its surviving members had to be officially registered. Special courts have been set up to prosecute National Socialists. Under the 1947 law, more than half a million party members were found directly or indirectly guilty of the crimes of the Second World War.[45] In over 13,000 court cases, only about 10% of the defendants were convicted and about 40 death sentences were handed down.[46] In the following years the death penalty was abolished (1950),[47] and so was the penalty of property forfeiture (1957);[48] many amnesties have been granted as well. The settlement for Nazi crimes was incomparably small given the number of the regime's victims.

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[43] Technische Universität Berlin. "Flucht Und Vertreibung Der Juden Aus Österreich", *Konferenz Von Évian – Online-Ausstellung*, 2018, https://evian1938.de/fluchtlingskrise-1938/flucht-und-vertreibung-der-juden-aus-oesterreich/ (accessed: 20.11.2020).

[44] Verbotsgesetz, Wien 1947, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000207 (accessed: 20.11.2020).

[45] Th. Olechowski, *Rechtsgeschichte Einführung in die historischen Grundlagen des Rechts*, Wien 2016, p. 120.

[46] Ibid.

[47] "Hintergrund: Die Todesstrafe in Österreich", *Die Presse*, 5 September 2013, https://www.diepresse.com/1449145/hintergrund-die-todesstrafe-in-osterreich (accessed: 11.10.2020).

[48] Bundesverfassungsgesetz vom 14. März 1957, womit Bestimmungen des Nationalsozialistengesetzes, BGBl. Nr. 25/1947, abgeändert oder aufgehoben werden (NSAmnestie Wien 1957), https://www.ris.bka.gv.at/Dokumente/BgblPdf/1957_82_0/1957_82_0.pdf (accessed: 20.11.2020).

It is not possible to quantify all property seized from Nazi victims in Austria and Europe. Unfortunately, the newly formed government of 1945 did not want to take responsibility for the prior Nazi persecution and did not feel obliged to pay compensation to the victims and their heirs, hiding behind the so-called *Opferthese*: according to this concept, Austria was not complicit, but herself became a victim of National Socialism.[49] It should be kept in mind, however, that the reluctance to restitution resulted mainly from the catastrophic state of the economy of a country ravaged by two world wars. It is believed that, unfortunately, the impoverishment was not the only cause; another crucial factor was anti-Semitism, rooted in history, and at that time extremely intense. It is worth to note that as early as in the Declaration on Austria signed during The Moscow Conference on 30 October 1943 in Moscow, the Allies had recognised the incorporation of Austria into the Third Reich as illegal.[50] *Anschluss* was forced by the Nazis using military power. Under international law, the Republic of Austria was indeed acknowledged as a victim of totalitarian Germany.

The return of the seized property was possible only *via* natural restitution and only if the property still existed. What is more, only the persecuted persons concerned and their heirs had the right to recover the property.[51] The mechanism was designed as a civil court case under the Restitution Acts (*Rückstellungsgesetze* – mentioned in the literature review). On a side note, the adoption of these laws was related to the pressure of the Allies occupying Austria.[52]

In just two days after the capitulation of the Third Reich, the law created by the provisional government obliged the owners of lost property to register it.[53] Each current possessor of the property was bound (on the basis of *ius ad rem*) to return it to the rightful owner, or, if it was sold, to pay damages amounting to the entire price of purchase. More than 60,000 proceedings were conducted under the post-war restitution laws,[54] but in many cases it was not possible to recover the property. The process itself was not easy, which was largely due to a large number of laws and their inconsistency. Many people, including Maria Altmann and her relatives, left Austria. Not only Austria did not allow an easy return to their homeland, but it also left them without any legal

[49] Th. Olechowski, *Rechtsgeschichte Einführung*…, p. 232.

[50] Moscow Declaration, 1943, https://avalon.law.yale.edu/wwii/moscow.asp (accessed: 20.11.2020).

[51] Th. Olechowski, *Rechtsgeschichte Einführung*…, p. 233.

[52] Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich, Wien 1955, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000265 (accessed: 20.11.2020).

[53] Gesetz über die Bestellung von öffentlichen Verwaltern und öffentlichen Aufsichtspersonen vom 10 Mai 1945. https://www.ris.bka.gv.at/Dokumente/BgblPdf/1945_10_0/1945_10_0.pdf (accessed: 20.11.2020).

[54] Th. Olechowski, *Rechtsgeschichte Einführung*…, p. 233.

assistance and they were forced to find their rights in complex trials on their own.[55] The Altmann family initiated similar legal proceedings through their lawyer Dr. Reinisch, but they did not get the "Lady in Gold" back.

The Austrian Belvedere Gallery was aware of the dubious provenance of the paintings mentioned by Dr. Erich Führer (Dr. Führer, after the property of Ferdinand Bloch-Bauer has been seized, became the temporary proprietor). He traded Bloch-Bauer's portraits for another painting by Gustav Klimt. Nevertheless, it was only the investigation and a series of articles by journalist Hubertus Czernin that revealed that the museum concealed how some of the works ended up in their collections. The actions of the Austrians in the first attempt to regain the family property by the Bloch-Bauers, right after the end of the Second World War in 1948, can be described as lacking good faith. The state seemed to pretend that it did not know how the said portrait got to the Viennese museum, explaining that the managers were simply following the will of Adele Bloch-Bauer, who died in the 1920s, and who bequeathed part of the property (including the portrait) to the Belvedere Gallery. However, neither Adele nor her husband willed the painting to the museum.[56] Another piece of evidence against the museum was the letter regarding the handing over of the works, signed by Dr. Führer with words "Heil Hitler".[57]

Austria's response to the actions of Mrs. Maria Altmann to regain her family's property was very firm. The return of the portrait of Adele Bloch-Bauer and other works turned out to be one of the biggest scandals of the time. This particular painting, next to "The Kiss", was one of the pearls in the collection of the Viennese gallery, and its loss would have been considered a direct hit on the country's pride and reputation. With a considerable financial background, Austria was therefore ready for a long and costly fight. Their primary strategy was simply to wait out the case: in 1998, when Maria Altmann was beginning her fight to get the paintings back, she was already eighty-two years old. It was therefore in the best interest of Austria to delay this case for as long as possible. Mrs. Altmann herself was to say that "her opponents were waiting for her imminent departure".[58] The picture of post-war Austria was that of a dependent, economically destabilised, and, above all, morally ambiguous country. We are taught that the world is often unfair, and I am convinced that the concealment of the origin of parts of the collection was due to the inconsistencies of the time. There is no direct proof about with whom exactly the Belvedere authorities sympathise and why this decision was made, but one thing is certain – Austria did not want to let the "The Lady in Gold" go.

[55] Ibid.

[56] Supreme Court of the United States, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Opinion of the Court, p. 5.

[57] Ibid.

[58] "Art of the Heist…"

One of the turning points in this case actually came from an unanticipated event. After one of Egon Schiele's paintings on loan from the Viennese Museum to New York turned out to be a cultural asset plundered by the Nazis,[59] Pandora's box has been opened. To clear their reputation, the Austrian state published an act that made it possible for the public to access the state archives.[60] At that moment, it was only a matter of time before someone dug into them to extract inconvenient facts. That person turned out to be Hubertus Czernin, whose research gave Maria Altmann the unexpected aid – the matter that I addressed in the previous chapter.

Almost seventy years after Ferdinand Bloch-Bauer escaped from Austria, the portrait of his wife returned to the family. However, it did not stay in its homeland. Vienna lost her "Mona Lisa", even though Mrs. Altmann wanted the painting to stay in Belvedere at first. It was the way she was treated by the country she and her family called home that forced her to take her aunt's portrait away. "The Lady in Gold" has become a recognisable item not only in the world of art, but it has also grown to be one of the symbols of the fight for justice and dignity with the Nazi regime.

This case showed the intricacies of art restitution cases all over the world – how interconnected they were and how seemingly insignificant events may turn the tide. In 1998, Austrians exposed their weaknesses to protect themselves from the Schiele scandal. It was thanks to this discovery that the spiral was triggered, which led to the fact that today in Austria, we see the likeness of Adele Bloch-Bauer on mugs and calendars in gift shops, but not in the Viennese art gallery.

6. Conclusions

The Bloch-Bauer family was part of the Viennese bourgeoisie in the late nineteenth and early twentieth centuries, and their lives seemed to resemble a fairy tale that millions could only dream of. They were affluent and fulfilled people, whose only fault was their ancestry and religion. The Bloch-Bauers were forced by the Nazi regime to flee, leaving their possessions behind. Ferdinand Bloch-Bauer left Austria never to return, and the portrait of his wife became the subject of one of the most important restitution cases in history.

This matter touched on so many branches of law that its interpretation still arouses great controversy. At the level of Austrian national law, it was affected firstly by inheritance law and secondly by post-war restitution edicts. The question of whom the portrait

[59] "Schieles Geliebte 'Wally'", 8 April 2018, https://oe1.orf.at/artikel/400869/Schieles-Geliebte-Wally (accessed: 20.10.2020).

[60] Kunstrückgabegesetz – KRG.

of a woman really belonged to cannot be answered with absolute certainty. I assume that Ferdinand Bloch-Bauer was the owner of the paintings, which proves the invalidity of his wife's will and undermines the main argument of the Republic of Austria, which stated that the works were donated to the museum in 1936.

After the dispute spilled over into the United States, the case became international. Austrian representatives did not want to resolve the case on American soil, but after the decision of the US Supreme Court, they had no choice but to recognise the superiority of Maria Altmann's arguments, and in 2006 they reached an out-of-court settlement.[61] The story of these two extraordinary women – Adele Bloch-Bauer and Maria Altmann – almost fifteen years after the end of this high-profile case, still holds many uncertainties. Whatever the truth might be, the case itself is a perfect illustration that it is worth to fight for one's rights in the courtroom and that a skilled lawyer will use all the tools at his disposal to fight for his client.

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[61] Arbitral Award – 5 *Klimt paintings Maria V. Altmann and others v. Republic of Austria*, 15 January 2004, https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria/arbitral-award-5-klimt-paintings-maria-v-altmann-and-others-v-republic-of-austria-15-january-2004/view (accessed: 29.11.2020)

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Summary

The Klimt row: Analysis of property restitution laws based on the Austrian Klimt Bloch-Bauer case

In this article I focus on the legal and moral complexity of Gustav Klimt's "Portrait of Adele Bloch-Bauer I" restitution case on an example of the case of *Maria Altmann v. The Republic of Austria*. The article illustrates the interconnectedness of various branches of law – inheritance law and restitution law at the national level, and at the international level – the jurisdiction of a state in a lawsuit against another sovereign entity. In this text, I utilise a number of sources, including Austrian legislation, judgments of American courts, legal acts of international law, scientific publications, a documentary, and a number of online resources consisting of mostly governmental or highly reputable newspapers. The painting's history shows how the turmoil of the Second World War influenced the lives of its owners, the attitudes of public authorities and a difficult moment in history of Austria.

Keywords: denazification, inheritance law, jurisdiction, Klimt, restitution

Streszczenie

Awantura o Klimta: analiza praw restytucyjnych na podstawie austriackiej sprawy Klimt Bloch-Bauer

Artykuł dotyczy prawnej i moralnej złożoności sprawy o restytucję portretów Adele Bloch-Bauer autorstwa Gustava Klimta. Wskazuje on na wzajemne powiązania różnych gałęzi prawa. Z jednej strony na poziomie narodowym – prawo spadkowe i prawo restytucyjne, a z drugiej strony – na poziomie międzynarodowym – jurysdykcja innego państwa w sprawie przeciwko innemu suwerennemu podmiotowi, na podstawie sprawy *Maria Altmann przeciwko Republice Austrii*. Autorka korzysta z wielu źródeł, w tym z ustawodawstwa austriackiego, wyroków sądów amerykańskich, aktów prawa międzynarodowego, publikacji naukowych, filmu dokumentalnego, a także stron internetowych, przede wszystkim stron rządowych i renomowanych tytułów prasowych. Losy obrazu doskonale pokazują, jak II wojna światowa wpłynęła na życie ich właścicieli, działania władz w Austrii w trudnym momencie jej dziejów.

Słowa kluczowe: denazyfikacja, jurysdykcja, Klimt, prawo spadkowe, restytucja

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Argumentative aspects of disputes over return of cultural objects lost to colonial powers

1. Introduction

In the great variety of discussions on the subject of cultural heritage one will find some that relate to art. This is hardly surprising: art law itself is a broad discipline, covering diverse issues such as the protection of cultural heritage, artists' rights, contracts, artistic authenticity, inheritance issues and restitution of cultural objects.[1] Nowadays, resolution of disputes happens in numerous ways – by judicial recourse, international judicial mechanisms, alternative dispute resolution or cultural diplomacy.[2] Despite the multiplicity of options, one can distinguish a common feature when it comes to art-related disputes – naturally, it is the specificity of the objects involved; to quote Quentin Bryne-Sutton, "works of art are distinguishable from everyday objects in that they not only have financial but also cultural and immaterial value".[3] In this article the analysis of art-related disputes will be narrowed down to the problems of restitution of cultural objects of special nature. Indeed, disputes on the return of cultural objects lost to colonial powers share not only similar stories of movement of the goods, but also perspectives on their potential return. As Jeanette Greenfield stated, "in Africa, South-East Asia and South Asia, the pattern of exploration, colonisation, tribute, and then the punitive removal of treasures was repeated, with the result that many African and Asian nations were deprived often of the central core of their own art, as in the case of Benin, or of

[1] Q. Bryne-Sutton, "Arbitration and mediation in art-related disputes", *Arbitration International* 1998, vol. 14, no. 4, p. 448.

[2] See: I. Stamatoudi, *Cultural property law and restitution. A commentary to international conventions and European Union law*, Cheltenham – Northampton 2011, pp. 189–209.

[3] Q. Bryne-Sutton, "Arbitration and mediation…", p. 448.

invaluable documentary records, as in the case of Sri Lanka".[4] A survey of the nature of arguments raised in cases regarding the return of these objects allows one to grasp a pattern of the exchanged statements.

2. Cultural objects lost to colonial powers

One of the ramifications of European colonialism is an unbalanced movement of antiquities all over the globe, while the countries of their origin remain poorly endowed.[5] In the second half of the 20th century attempts to amend historical injustices caused by the course of the Second World War set an example for a global movement of decolonisation.[6] The transfer of goods involving a colonial actor raises multiple questions regarding the degree of equality among the parties.[7] Indeed, in the colonial relationship the law affirms a model of subjugation of weaker population by stronger actors.[8] When it comes to the acquisition of cultural objects in that historical context, one may ask after Jos van Beurden: "did the acquirers consult its makers, original owners or their descendants? Was the transfer voluntary or was pressure exerted and was it and involuntary loss?".[9] The fact that the transfer was made to a colonially associated actor (e.g., colonial administrators) from a party under colonial power is fundamental to the discussion on cultural objects lost to colonial countries.

In this article cultural objects lost to colonial countries are understood as objects of cultural or historical importance that were acquired without just compensation or were voluntarily lost during the European colonial era.[10] Adding to that definition, J. van Beurden distinguishes three methods of transferring the goods: 1) acquisition by normal purchase or barter, at equal level; 2) acquisition in accordance with colonial legislation, but at unequal level; 3) acquisition in violation of this legislation and at unequal level.[11] Moreover, from the point of view of circumstances under which the objects were

[4] J. Greenfield, *Return of cultural treasures,* Cambridge 2009, p. 99.

[5] J. von Beurden, *Treasures in trusted hands. Negotiating the future of colonial cultural objects*, Leiden 2017, p. 118.

[6] E. Barkan, *The guilt of nations. Restitution and negotiating historical injustices*, Baltimore – London 2001, p. 159.

[7] See: J. von Beurden, *Treasures in trusted hands*…, p. 40.

[8] U. Mattei, L. Nader, *Plunder. When the rule of law is illegal*, Malden – Oxford – Carlton 2008, p. 26.

[9] Ibid., p. 40.

[10] See: J. von Beurden's definition of colonial cultural objects: *Treasures in trusted hands*…, p. 39; see further: U. Mattei, L. Nader, *Plunder*…, pp. 20–44.

[11] J. von Beurden, *Treasures in trusted hands*…, p. 41.

acquired one may enumerate following types: 1) gifts to colonial administrators and institutions; 2) objects acquired during private expeditions; 3) objects acquired during military expeditions; 4) missionary collecting; 5) archives.[12]

Among other causes for restitution of cultural objects, claims for return can be made regarding goods removed from former colonial States and indigenous peoples by specific States holding colonial power or other actors associated with that power at the time.[13] These cases remain profoundly connected with the process of settling accounts with the period of colonialism and acknowledging guilt for its consequences. Thus, states which achieved independence from colonial rule seek reinforcement of their original national identity, also by protecting their cultural heritage. In that sense, protection can mean not only preserving and retaining cultural objects within countries, but also recovering goods that were previously transferred or lost.[14] For that reason, countries of origin of antiquities lost during colonial era support initiatives of creating international instruments on the issue of return cultural objects, as well as raise direct requests regarding certain objects.

3. Return of cultural objects lost to colonial powers as a hard case

Legal definitions of cultural goods present in international law indicate that they may carry importance of a complex nature, including archaeological, prehistorical, historical, literary, artistic or scientific value.[15] This special character of cultural objects, manifested not only in their economic value, often inspires a debate, resulting in searching beyond the scope of legal regulations and scientific facts, but also raising moral, political and scientific issues.[16] Moreover, in the case of cultural goods lost during colonial period, direct application of rules of law is usually impossible as their removal occurred prior to establishing laws on the protection of cultural heritage.[17] Marie Cornu and Marc-André Renold address this subject stating that "where earlier dispossessions are concerned, the question arises in different terms. If the test used were whether the dispossession was unlawful, any principle of restitution could easily be defeated. In most situations,

[12] Ibid.

[13] K. Zeidler, *Restitution of cultural property. Hard case, theory of argumentation, philosophy of law*, Gdańsk – Warsaw 2016, p. 36.

[14] Ibid.

[15] See for example: Article 2 of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects signed in Rome on 24 June 1995.

[16] See: K. Zeidler, *Restitution of cultural property*…, pp. 105–130.

[17] See: Guidelines prepared by the UNESCO Intergovernmental Committee on the Return of Cultural Property to its Countries of Origin or Its Restitution in the Case of Illicit Appropriation, 1986.

either it was not unlawful under the law applicable at the time, or any wrongfulness has been purged by time. Besides the fact that it may not always be possible to ascertain and evaluate the circumstances in which a dispossession occurred, it sometimes took place with the consent of the states or communities concerned".[18]

Principles of international law applicable nowadays, as expressed in Article 11 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, signed in Paris on 14 November 1970 and other instruments, forbid the "export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power". Retroactive application of these rules of law, however, is usually not possible due to established principles on State responsibility as well as the rule of intertemporal law.[19] As stated in 1928 by Judge Max Huber of the Permanent Court of Arbitration in the case of Island of Palmas: "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled".[20] From this point of view, examining the chain of ownership solely from the legal perspective often results in effective defence by allowing to claim that the ownership has been acquired legally (argument from ownership).[21] It is also worth mentioning that the aspect of legality of the acquisition has shaped the vocabulary used to describe the nature of claims. As Janet Blake explains, "in a strict sense, 'restitution' is used where cultural property removed from a State's territory without its consent or in contravention of its export laws and to use 'return' where cultural property has been removed before such laws had been enacted".[22] With this in mind, throughout this work the term "restitution" is used in a broader sense, whereas "restitution" and "return" are used interchangeably.

Moreover, attempting to translate indigenous culture to the dominant legal structure of the debate may generate additional problems. Indigenous peoples, being neither

[18] 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, no. 1, p. 15.

[19] J. Shuart, "Is All 'Pharaoh' in Love and War: The British Museum's Title to the Rosetta Stone and the Sphinx's Beard", *Kansas Law Review* 2004, vol. 52, no. 667, pp. 689–690.

[20] Quoted fragment of the award published in: J. Crawford, *The International Law Commission's articles on state responsibility. Introduction, text and commentaries*, Cambridge – New York – Melbourne 2002, p. 131.

[21] See: K. Zeidler, *Restitution of cultural property*…, pp. 145–150.

[22] J. Blake, *International cultural heritage law*, Oxford 2015, p. 50; see further: L.V. Prott, P. O'Keefe, *Law and the cultural heritage*, vol. 3, *Movement*, London – Edinburgh 1989, pp. 834–836; see also: W. Kowalski, "Types of claims for recovery of lost cultural property", *Museum* 2005, vol. 57, no. 4, pp. 85–102.

individuals nor sovereign nations, often exceed the definition of actors in existing legal purview.[23] Specificity of indigenous traditions – largely oral and dynamic – clashes with the idea of culture as an established and definable heritage.[24] Elazar Barkan remarked that "traditional societies are based on the practice of maintaining and reproducing the past in ways that are believed by the practitioners to be traditional – namely, unaltered – over which they claim rights of proprietorship".[25]

Lack of direct legal regulations applicable to the transfer of cultural objects before a certain period and a diversity of values manifested in these treasures force one to evaluate the question of restitution as a hard case, possible to settle with more than one justified solution.[26] According to Kamil Zeidler, "we are dealing with a hard case when the case does not generate one standard solution, but, on the contrary, when there may be many correct findings. The solution of a hard case does not proceed clearly from the legal rules applied, and most frequently in such a situation it is necessary to appeal to norms other than legal ones and to assessments and evaluations".[27] Complex character of arguments raised in restitution debates proves that searching for a fair solution almost as a rule requires turning to reasons other than law. Thus, actors in a restitution debate concerning cultural objects lost to colonial countries need to acknowledge that in the course of exchanging arguments for and against return, it is possible to reach more than one solution justifiable by the criteria of equity and rationality.[28]

4. Argumentative aspects of restitution disputes

Perceiving restitution disputes as hard cases allows one to search for various frameworks for an exchange of arguments possibly leading to an achievement of proper assessment, evaluation or understanding. Current practice of resolving cultural heritage debates relies upon several means of dispute settlement, including adjudication by domestic courts, international judicial recourse, international judicial settlement mechanisms, alternative dispute resolution (notably Intergovernmental Committee for Promoting the

[23] E. Barkan, *The guilt of nations*…, p. 167.

[24] Ibid.

[25] Ibid.

[26] K. Zeidler, *Restitution of cultural property*…, p. 19; see further: R. Dworkin, *A matter of principle*, Oxford 2001.

[27] K. Zeidler, *Restitution of cultural property*…, p. 19.

[28] See: J. Stelmach, *Kodeks argumentacyjny dla prawników*, Kraków 2003, p. 21.

Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation) and cultural diplomacy.[29]

As it has been noted above, seeking judicial recourse in the cases regarding cultural objects lost during the colonial era can prove problematic. In fact, nonretroactivity of law is perceived as one of the deciding disadvantages of turning to traditional legal proceeding as it excludes certain types of cases.[30] Irini Stamatoudi is correct to say that "this, however, does not mean that the claim is not sound on ethical, scientific, historical, humanitarian or other grounds. These grounds, however, are not grounds that are judiciable by courts, which have to follow the rigid legal approach".[31] Therefore, it needs to be emphasised that regardless of the platform on which a given cultural heritage dispute is to be resolved, the special nature of the object in question introduces arguments other than derived from legal regulations. Because of that, dealing with claims for the return of cultural objects removed from their places of origin during the colonial era enables the use of a wide variety of arguments.

Analysing argumentative aspects of restitution cases or international legal instruments requires applying the theory of arguments relating to restitution. An argument is a statement aiming to ensure an acknowledgement of a thesis or to strengthen a meaning of the thesis itself; to put it differently, its purpose is to convince the addressee of the accuracy or inaccuracy of given statements.[32] The concept of restitution arguments – understood as arguments that are raised by parties in restitution dispute – constitutes one of the perspectives on cultural heritage case studies, explored by researchers of this field.[33]

To exemplify, Lyndel V. Prott and Patrick J. O'Keefe construct a typology of restitution arguments, dividing them into "the arguments for restitution or return" and "the arguments for retention", and organising them with more detail within these two

[29] See: A. Chechi, *The settlement of international cultural heritage disputes*, Oxford 2014, pp. 134–185; I. Stamatoudi, *Cultural property*…, pp. 189–209.

[30] I. Stamatoudi, *Cultural property*…, pp. 190–192.

[31] Ibid., p. 191.

[32] K. Zeidler, *Restitution of cultural property*…, p. 136.

[33] See e.g.: K. Zeidler, A. Plata, "The argumentative aspects of the Terezín Declaration and its place in public international law" [in:] *Terezin Declaration – Ten Years Later, 7th International Conference, The documentation, identification and restitution of the cultural assets of WWII victims. Proceedings of an international academic conference held in Prague on 18–19 June, 2019*, ed. V. Drbohlavova, Documentation Centre for Property Transfers of Cultural Assets of WWII Victims, p.b.o., Prague 2019, pp. 25–31; K. Zeidler, *Restitution of cultural property*…; L.V. Prott, P. O'Keefe, *Law and the cultural heritage*…, pp. 838–850; A.F. Vrdoljak, *International law, museums and the return of cultural objects*, Cambridge 2008, p. 2.

groups.[34] Arguments for restitution or return are as follows: wrongful taking of property, need for cultural identity, appreciation in its own environment, need for national identity, dangers to the cultural heritage from trafficking, dynamics of collecting; whereas in the category of arguments for retention the authors include: ownership, access, conservation, place in cultural history, the need to maintain Western collections.[35] Referring to the views of Ana F. Vrdoljak, one can delineate three rationales for restitution, emphasising such grounds as: sacred property (derived from the principle of territoriality and the connection between people, land and cultural goods), righting international wrongs (making an attempt to make amends for historical injustices), and self-determination and reconciliation.[36] Moreover, Kamil Zeidler offers a complex perspective by dividing restitution arguments into positive (supporting a restitution claim) and negative (supporting retention).[37] Determining whether a given argument is of positive or negative nature depends on the position it defends made by one of the parties of a restitution dispute.[38] The catalogue of restitution arguments assembled by K. Zeidler emphasises special nature of cultural objects as well as the complexity of possible bonds to cultural goods. To enumerate a few, K. Zeidler's proposition names arguments from justice, ownership, place of production, right of loot, national affiliation, cultural affiliation, social utility, most secure location, historical eventuation and the passage of time.[39] The theories of restitution arguments enable an in-depth assessment of statements expressed in documents regarding return of cultural objects or exchanged between the parties during a dispute.

5. Fundamental question of justice

The gravity of consequences of colonial relationships and gross historical crimes inspired a change in international perspective on morality. Modern approach motivates not only to accuse other States of human rights violation but also to self-examinate.[40] New sensitivity leads to exploring a broader meaning of restitution itself, understood not only as a legal category but also as a cultural concept combining return of the specific belongings (restitution *sensu stricto)*, forms of material redress for that which cannot be returned

[34] See: L.V. Prott, P. O'Keefe, *Law and the cultural heritage*…, pp. 838–850.
[35] Ibid.
[36] A.F. Vrdoljak, *International law*…, p. 2.
[37] K. Zeidler, *Restitution of cultural property*…, p. 138.
[38] Ibid.
[39] See: ibid., pp. 141–202.
[40] E. Barkan, *The guilt of nations*…, p. XVII.

such as human life, thriving culture and economy, cultural and national identity (reparations), and an expressed acknowledgment of wrongdoing or even an acceptance of responsibility (apology).[41]

Researchers remain sceptical whether emergence of the legal protection of human rights can further the discussion about the return of cultural objects lost during colonial era as the regulations themselves are often non-binding and rarely retroactive.[42] Thus, as a rule, it makes them irrelevant for settling these disputes in judicial proceedings.[43] However, UN's activity in early 1960s proved to be of great support in decolonisation.[44] Article 2 of the Declaration on the Granting of Independence of Colonial Countries and Peoples, General Assembly resolution 1514 (XV) adopted in New York on 14 December 1960, provides that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Further developments in international instruments confirmed that direction. Ultimately, Article 11 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the General Assembly on Thursday, 13 September 2007 directly included the option of restitution by expressing that "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs".

The idea of justice is fundamental to the exchange of arguments during a restitution dispute. Actually, the argument from justice may be raised equally efficiently by either side involved in a discourse.[45] According to Zygmunt Ziembiński the term itself carries an intense emotional context, and clearing up its meaning is immensely difficult as it undergoes a many-sided relativisation.[46] Thus, the argument from justice remains connected to moral norms. As K. Zeidler states, a restitution claim might be based on the argument from justice "as a certain state that was morally and legally justified previously, one that as a result of specific, usually illegal actions has been infringed".[47]

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[41] Ibid., p. XIX.

[42] See: J. von Beurden, *Treasures in trusted*…, p. 40.

[43] Ibid.

[44] See: S. Williams, *Who killed Hammarskjöld? The UN, the Cold War and white supremacy in Africa*, New York 2014, pp. 35–36.

[45] K. Zeidler, *Restitution of cultural property*…, p. 141.

[46] Z. Ziembiński, "Sprawiedliwość" [in:] *Zarys teorii prawa*, eds. S. Wronkowska, Z. Ziembiński, Poznań 2001, p. 95.

[47] K. Zeidler, *Restitution of cultural property*…, pp. 143–144.

A rhetoric example of an argument from justice applied in a restitution debate is present in a Memorandum submitted in 2000 to the House of Commons in London by Prince Edun Akenzua.[48] The member of the Benin Court expressed his claim for the return of Benin cultural objects "on behalf of the Oba and people of Benin who have been impoverished, materially and psychologically, by the wanton looting of their historical and cultural property".[49] Memorandum also emphasises that "Britain, being the principal looters of the Benin Palace, should take full responsibility for retrieving the cultural property or the monetary compensation from all those to whom the British sold them".[50]

Another illustration of the argument from justice in practice can be observed in a claim for the return of the Koh-i-noor diamond. In the specific words on behalf of the Sikh community, "if Koh-i-noor is to be returned to its last owner, then fairly and squarely the only legitimate claimant is the Sikh community from whose ruler, Maharaja Dalip Singh, it was forcibly taken by the East India Company (…). In all fairness to the Sikhs, Koh-i-noor should, therefore, be returned to the Government of India to be restored somewhere near Punjab as part of Sikh heritage. Undoubtedly, the Sikh claim is based on moral and historical grounds".[51]

With this in mind, it is vital to emphasise that although the history can be perceived as a continuum of facts immune from any amends or reinterpretation, the debate about fairness and sensitivity exposes that it is constantly shaped by differing perspectives.[52] The manifestation of fairness, as sought through the argument from justice, indeed can be different to the parties of the restitution debate, which is why it is usually supported by further ideas.

6. Complexity of cultural affiliation

In 1986 John H. Merryman identified two systems of thinking about cultural property, stating that theories of cultural nationalism and cultural internationalism are fundamental to cultural heritage debates.[53] This dualism of understanding cultural goods either as

[48] https://publications.parliament.uk/pa/cm199900/cmselect/cmcumeds/371/371ap27.htm (accessed: 29.11.2020).

[49] Ibid.

[50] Ibid.

[51] H. Singh, *Letter to editor*, "The Times", 11 September 1976: fragment reprinted in: J. Greenfield, *Return of cultural treasures*…, p. 130.

[52] E. Barkan, *The guilt of nations*…, p. X.

[53] See: J.H. Merryman, "Two ways of thinking about cultural property", *The American Journal of International Law* 1986, vol. 80, no. 4, pp. 831–853.

belonging to all humankind or as a part of a particular national patrimony establishes a new viewpoint on restitution arguments from cultural affiliation. This category of arguments draws from the concept of a nation or other social group as a community, which has formed and cultivates a separate and distinct culture of its own.[54] Undoubtedly, while discussing the future of cultural objects lost during the colonial era, the argument from cultural affiliation remains often linked to the argument from justice as they both emphasise moral sense of restitution. For instance, it is of great importance for the former colonial states to take pride in their indigenous heritage, which was denigrated or transferred from the place of its origin.[55] Thus, it is noticed that it is just to reconstruct artistic heritage of those states *in situ* both as their cultural patrimony and as an economic resource.[56] This method of argumentation, however, may prove problematic in the context of state borders, when it comes to clarifying the actual cultural affiliation of a given object.[57] Kamil Zeidler observed that often "two or more social groups see the same cultural property as their heritage, thereby negating other communities' ties to it".[58]

To illustrate, arguments from cultural affiliation are present throughout the text of "A Plea for the Return of an Irreplaceable Cultural Heritage to those who Created It", an appeal made by the former UNESCO Director-General Amadou-Mahtar M'Bow on 7 June 1978.[59] The significance of the transcendent bond between a culture or a nation and the object is described as follows: "architectural features, statues and friezes, monoliths, mosaics, pottery, enamels, masks and objects of jade, ivory and chased gold – in fact everything which has been taken away, from monuments to handicrafts – were more than decorations or ornamentation. They bore witness to a history, the history of a culture and of a nation whose spirit they perpetuated and renewed".[60] Moreover, the Plea emphasises an educational value of cultural objects and their role in self-exploration of each culture or nation: "the peoples who were victims of this plunder, sometimes for hundreds of years, have not only been despoiled of irreplaceable masterpieces but also robbed of a memory which would doubtless have helped them to greater self-knowledge and would certainly have enabled others to understand them better".[61] Nevertheless, the text of the Plea introduces the ideas behind cultural internationalism by acknowledging

[54] K. Zeidler, *Restitution of cultural property*…, p. 167.

[55] L.V. Prott, P. O'Keefe, *Law and the cultural heritage*…, p. 840.

[56] Ibid.

[57] K. Zeidler, *Restitution of cultural property*…, p. 167.

[58] Ibid., p. 169.

[59] A Plea for the Return of an Irreplaceable Cultural Heritage to those who Created It. An appeal by Amadou-Mahtar M'Bow, Director-General of UNESCO, https://unesdoc.unesco.org/ark:/48223/pf0000034683_eng (accessed: 29.11.2020).

[60] Ibid.

[61] Ibid.

that through the passage of time and undertaken care for the objects in their place of transfer it is possible to establish a new cultural bond. To illustrate: "(…) certain works of art have for too long played too intimate a part in the history of the country to which they were taken for the symbols linking them with that country to be denied, and for the roots they have put down to be severed".[62]

As a matter of fact, the concept of cultural heritage of all humankind often supports the position of institutions that are reluctant about returning the objects in their collections. This reasoning was vividly expressed in the text of Declaration on the Importance and Value of Universal Museums signed in December 2002.[63] There, the accentuated concept of universalism suggests that no specific culture is solely entitled to the objects of cultural value but also that the cultural affiliation can actually change overtime. As follows: "Over time, objects so acquired – whether by purchase, gift, or partage – have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them".

Even though cultural internationalism and the argument from cultural affiliation often contradict each other in the course of restitution disputes, their nature, in fact, is similar. In a way, the argument from the cultural affiliation to all humankind draws from the same reasoning as the arguments describing that special bond reserved to certain groups and objects. Analysing the texts of mentioned instruments exposes that these concepts can become so intertwined that they happen to be used simultaneously to support one statement.

7. Restitution claims and passage of time

Restitution disputes concerning cultural objects lost during the colonial era demonstrate that the passage of time influences legitimacy of the case, legal framework of the discourse, as well as its dynamic contextual aspects. Developing the last part, one may refer to the views of Gary Edson: "social change has had an impact on moral attitudes and caused a change in ethical behavior. Multi-cultural acceptance has manifested itself as a part of the new ethical orientation of museums. Concern for right action, right representation, and equal and fair treatment for all has altered the thinking, planning, programming, and orientation of many museums".[64] This change of perspective surely

[62] Ibid.

[63] Full text of Declaration was reprinted in: *Witnesses to history*, ed. L.V. Prott, Paris 2009, pp. 116 ff.

[64] G. Edson, *Museum Ethics*, London 1997, p. 44.

becomes visible in the sensitivity of cultural events and debates on diversity, but also in engagements possibly leading to change in dealing with restitution claims.

However, arguments from passage of time usually hold their place as negative restitution arguments in statements opposing to the return of cultural treasures. In case of goods lost during the colonial era, the passage of time is often claimed in relation to factual circumstances causing the change of perspective on acquiring cultural objects, namely from the moment of the event which caused their loss, up to the situation where a restitution claim is raised. Arguments of similar nature are present in the aforementioned Declaration on the Importance and Value of Universal Museums: "The objects and monumental works that were installed decades and even centuries ago in museums throughout Europe and America were acquired under conditions that are not comparable with current ones. (…) Objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era".[65] Nevertheless, modern statements of museums holding objects of colonial provenance often acknowledge colonial or military collection history which led to the acquisition of the objects in question.[66]

During a restitution dispute, arguments from passage of time, highlighting the difference in circumstances under which the objects were acquired, often clash with the arguments from justice, calling for compensation for historical atrocities, regardless of the time that has passed. Cultural diplomacy and alternative means of dispute resolution grant a platform for confronting these ideas on case-by-case basis. Developing discipline of museum ethics also provides reflections on the test of time and change in sensitivity due to ongoing social change and the evolving role of museums.[67]

Despite fundamental differences, disputants appear to agree on at least one point: certain Western museums (appointing themselves as universal) are a historical phenomenon, which is nowadays impossible to recreate.[68] Regardless of the colonial circumstances under which the objects in their collections were acquired, their removal, acquisition and display became facts of cultural history.[69] The restitution argument from historical eventuation accentuates that historic processes are usually accompanied by transformations of property, including the movement of cultural objects.[70] In that

[65] As reprinted in: *Witnesses to history*…, p. 116.

[66] See for example: https://www.britishmuseum.org/about-us/british-museum-story/objects-news/maqdala-collection (accessed: 29.11.2020).

[67] T. Besterman, "Museum Ethics" [in:] *A companion to museum studies*, ed. S. Macdonald, Malden (MA) – Oxford 2006, p. 431.

[68] K. Singh, "Universal museums: The view from below" [in:] *Witnesses to history*…, p. 126.

[69] L.V. Prott, P. O'Keefe, *Law and the cultural heritage*…, pp. 848–849.

[70] K. Zeidler, *Restitution of cultural property*…, p. 176.

sense it does not suggest the fairness of the *status quo*. Instead, it seems to invite a discussion about possible future actions, including improvements in sensitive narrative about the past and other forms of cooperation.

8. Perspectives on social utility and safety

The argument from social utility draws from the assertion that the right of an owner might be limited, when cultural property represents a significant value not only for them, but for a broader recipient, for whom the access to that property must be guaranteed.[71] The great museums often argue that their universalism and educational value are maintained in the name of international scholarship, human curiosity and global culture.[72] Furthermore, the argument from social utility tends to emphasise museums' mission which is, *inter alia*, to educate and influence aesthetic sensitivity. Museums considering themselves as universal claim to exhibit objects displaced from their place of origin in a valuable and informative context of the objects collected worldwide.

Opponents to that rhetoric observe that this practice provides the visitors only with an aesthetic experience, separated from all the background factors enriching the perception of the objects.[73] In almost poetic words addressed in 1973 to the President of the United Nations General Assembly, the Permanent Representative of Zaire to the United Nations remarked "there is a deep-rooted and indissoluble bond between nature, man and his artistic creations. The cultural riches of the poor countries are at their best in their natural setting, because there they glow in an almost sensual aura. An authentic work of art burns with an inner flame, vibrates with the ardent faith which has led a people to believe in immortality, in supreme values, and to embody those values in deathless form with chisel and brush, in bamboo and rare woods".[74]

Nevertheless, the question of objects' safety poses another complex issue in discussions about the future of the goods lost by the former colonial States. Museums and other owners of cultural objects are expected to safeguard these treasures so that it remains possible to leave for future generations the richest possible collections of their heritage in the best possible condition.[75] Argument from the most secure location is

[71] Ibid.

[72] L.V. Prott, P. O'Keefe, *Law and the cultural heritage*…, p. 845.

[73] I. Stamatoudi, *Cultural property*…, pp. 189–209.

[74] Letter dated 2 November 1973 from the Permanent Representative of Zaire to the United Nations addressed to the President of the General Assembly: https://digitallibrary.un.org/record/852847 (accessed: 30.11.2020).

[75] K. Zeidler, *Restitution of cultural property*…, p. 179.

often used as a negative restitution argument suggesting that the requesting party is not capable of securing the objects.

These rationales are expressed in Restitution and Repatriation: Guidelines for Good Practice issued by British Museums and Galleries Commission.[76] According to section 3.1.10 titled "Refer to Current Museum Policies", British museums facing restitution request should "consider whether the museum is able to store and care for the material adequately and appropriately, including providing religious and cultural care requested by the traditional owners; provide adequate and safe public access to this material and its associated research information";[77] and, according to section 3.1.11 titled "Consider Ethical Concerns", should consider "ability of those requesting return to safeguard material in the long term".[78]

On the other hand, in the New Zealand case of the carved meeting house (*whare whakairo*) named Te Hau ki Tūranga indigenous peoples' claims supported by the arguments of moral nature were judged sceptically by another tribal member Karl Johnstone who claimed: "to request it back is an interesting proposition because we actually don't have the resources to care for it nor the expertise, so what do you do with it when you get it back?".[79] However, it needs to be emphasised that, in a dynamically changing reality, wider acceptance that former colonial States are unable to take proper care of their heritage would definitely be simplistic and often inaccurate. That is why examining each request on case-by-case basis remains vital.

9. Conclusions

The issue of restitution of cultural objects remains a topical one. It evokes strong emotions and induces disputes exceeding legal argumentation. Cultural objects carry unique values, appreciated from various perspectives, ranging from purely aesthetic to patriotic and even existential. This is why return of cultural objects lost in colonial context provokes thoughts on justice and the possibility of amending historical atrocities. The variety of restitution arguments illustrates the diversity of interests present in the context of the future of cultural goods.

[76] Excerpts published in: *Witnesses to history*…, pp. 130–149.

[77] Ibid., p. 139.

[78] Ibid., p. 140.

[79] C. McCarthy, "Practice of Repatriation: A Case Study from New Zealand" [in:] *Museums and restitution. New practices, new approaches*, eds. L. Tythacott, K. Arvanitis, Farnham – Burlington 2014, p. 77.

Modern developments in the dispute resolution prove that restitution of cultural objects, with all probability, will be conducted on case-by-case basis; including, where possible, by way of creating specific solutions and making exceptions to existing legal regulations. It is also vital to acknowledge that although universalism of the great museums stands for genuine humanistic approach to cultural heritage and broad public enjoyment of exhibitions, it can be also rightfully scrutinised by introducing narratives of the peoples affected by injustices that have led to the acquisition of the objects in admired collections. Perceiving the issue of return of cultural treasures as a hard case invites a possibility that there is often more than one right solution. It makes room for the parties to evaluate each story and to take into account the meaning of every object. Thus, it makes it possible to pay respect to all witnesses to human history.

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UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects signed in Rome on 24 June 1995.
Declaration on the Importance and Value of Universal Museums signed in December 2002.
United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the General Assembly on Thursday, 13 September 2007.

Summary

Argumentative aspects of disputes over return of cultural objects lost to colonial powers

The aim of the paper is to analyse elements of argumentative discourse on return of cultural objects lost to colonial powers during the colonial era. Loss of these objects took place prior to establishing legal norms on protection of cultural heritage, therefore nations and peoples raising the requests for their return often rely on others means of dispute resolution than judicial recourse. Arguments from justice and cultural affiliation form a core of argumentation supporting the requests for return of the objects in question, whereas arguments from the ownership, passage of time, social

utility and the most secure place are often used to argue for the retention. Variety of arguments shows a diversity of interests present in the context of the future of cultural goods. The author offers examples of the usage of arguments in legal instruments and within restitution dispute.

Keywords: argumentation, colonialism, cultural heritage, hard case, restitution

Streszczenie

Argumentacyjny aspekt dyskursu nad zwrotem dóbr kultury utraconych na rzecz imperiów kolonialnych

Celem artykułu jest analiza dyskursu dotyczącego zwrotu dóbr kultury utraconych na rzecz byłych imperiów kolonialnych z terytoriów znajdujących się pod ich wpływem. Utrata omawianych obiektów nastąpiła przed ustanowieniem norm prawnych dotyczących ochrony dziedzictwa kultury. Z tego względu państwa zgłaszające żądania ich zwrotu korzystają z alternatywnych metod rozstrzygania sporów. Argumenty ze sprawiedliwości i przynależności kulturowej stanowią kluczowe koncepcje popierające żądania zwrotu omawianych dóbr kultury, podczas gdy argumenty dotyczące własności, upływu czasu, użyteczności społecznej i najbezpieczniejszego miejsca są często wykorzystywane jako przemawiające za zatrzymaniem dóbr w aktualnym miejscu ich przechowywania. Różnorodność argumentów podnoszonych w toku sporu restytucyjnego eksponuje wielość interesów stron dotyczących przyszłości dóbr kultury. Autorka wskazuje przykłady użycia opisywanej argumentacji w źródłach prawa i w dialogu dotyczącym zwrotu dóbr kultury utraconych przez byłe kolonie.

Słowa kluczowe: argumentacja, kolonializm, dziedzictwo kultury, trudny przypadek w prawie, restytucja

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Native American repatriation in the auction industry: A transparent approach

1. Introduction

In January of 2019, early in its second year of business, Minnesota art auction house Revere Auctions received a large consignment of Native American art and antiquities. Due to the sacred nature of many of the items, it became clear that making consignment decisions based on marketability alone would not be enough. The Association on American Indian Affairs (AAIA), an organization focused on protecting and repatriating Native American cultural heritage, reached out to Revere with concerns about several objects in the sale. Through insights gained during discussions with the AAIA and consultation with Tribal officials, Revere drafted a policy dedicated to the ethical handling of Native American objects. As employees of Revere Auctions, we, the authors of this article, have been closely involved with this policy from its inception to its current stage. During that time, we have been party to the many complexities and unique challenges of forging a new path of ethics in the auction industry. In the early phases of the policy's development, it became clear that accessible policies of this nature are close to nonexistent in the private sector. Revere's policy is an attempt to make steps to resolve the widespread damage the auction industry and art market have inflicted on Native American cultural heritage by creating a clear framework for how to deal with complex situations involving Native American objects.

Native American artifacts and cultural heritage have been subject to widespread theft and displacement dating back to the early days of colonization. Similar to art with ownership ties to Nazi Germany, Native American objects on the market have significant risk of having an unsound provenance. Many Native American objects on the market would have never been sold by Native American peoples due to sacredness, spiritual identity, or communal ownership, and were therefore illegally obtained.[1] However, the issue with many Native American objects on the market goes farther than just the manner of acquisition, and lies in the very ideas of property and ownership. What many collectors view as art or interesting historical objects are seen by Native American peoples as sacred living beings that are neither objects nor ownable.[2] At the least, buying, selling, handling, and displaying sacred cultural heritage such as funerary objects, ceremonial objects, and objects of cultural patrimony is misappropriation; at most it is cultural genocide. Not only is it a great disrespect to Native American peoples, it is a threat to the culture itself, as many objects of cultural heritage "are essential to the continuation of diverse American Indian cultures, traditions and religious practices today".[3]

2. Repatriation in the private sector

While some progress has been made in recent decades to deter the unethical treatment of Native American cultural heritage in museums, universities, and many public institutions, auction houses have been slow to make similar changes in both policy and practice. The Native American Graves Protection and Repatriation Act (NAGPRA) has served as the primary legislation regarding the protection of Native American cultural heritage since its introduction in 1990. However, unlike many museums and universities with Native American cultural heritage in their collections, auction houses are not federally funded and therefore are not required to adhere to the Act.[4] This gives auction houses a wide breadth of flexibility when establishing policies that deal with the handling of Native American objects, with the source of pressure to act being a result

[1] CCP Stuff, "AAIA Challenges Private Ownership of Native American Art", *Cultural Property News*, 29 November 2018, https://culturalpropertynews.org/aaia-challenges-private-ownership-of-native-american-art/ (accessed: 10.11.2020).

[2] E.A. Sackler, "Calling for a Code of Ethics in the Indian Art Market" [in:] *Ethics and the Visual Arts*, eds. E.A. King, G. Levin, Simon and Schuster, New York 2006, pp. 92–93.

[3] Association on American Indian Affairs, "Buyers Should Invest in Contemporary American Indian Art Instead of American Indian Antiquities", *News Release*, 6 December 2018, https://www.scribd.com/document/395017777/2018-12-05-final-draft-statement-buyers-hould-invest-in-contemporary-art?secret_password=bxITfvaTI80gAJnGhvGl (accessed: 15.11.2020).

[4] Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3003(a), 1990.

of public criticism rather than legal obligations. Successful stories of auction house repatriation are typically the result of outside demands to action from organizations such as the AAIA, rather than individual Tribal Nations, who would need to file civil suits in order to make legal claims. Auction houses and art institutions often rely on legal loopholes that tribal governments are unable to dedicate the resources to challenge.[5] If an ethical market is to exist, the attitude of auction houses and stakeholders must change from one of discretion to accountability.

While public criticism has made it increasingly difficult for auction houses to deal in culturally sensitive objects, the industry is far from where it needs to be. Private institutions or people dealing with the sale of Native American art commonly vow to conduct "due diligence" in vague policy statements that do little to clarify the actual actions being taken to prevent the misuse and appropriation of Native American cultural heritage. The lack of details surrounding these policies and procedures, as well as the continued practice of putting sensitive cultural items on the market, points to the lack of effectiveness of this approach.[6] One of the central problems in the "due diligence" approach is that academic or industry "experts" cannot conduct sufficient provenance research alone without consulting Tribal representatives. For example, a New Jersey auction house withdrew several culturally sensitive Native American lots from a 2018 auction in response to demands from the AAIA. Rather than consulting Tribes about the objects' provenance, research was conducted by an in-house "specialist in Tribal art".[7] According to the AAIA, Native American peoples must be the primary authority in this research, as oftentimes "information about the origination of an item has been manipulated and the affiliated Tribe is the only appropriate expert to confirm whether an item is saleable or has been misappropriated".[8] The deceptive idea of "good faith" acquisitions, which are the foundation of many collections, must be rejected entirely.[9]

Ideally, all pieces of Native American cultural patrimony would be with their ancestral Tribes. The AAIA stresses that collectors should seek out art by contemporary Native American artists rather than antiquities or other historical objects. However, with millions of Native American objects spread throughout the world, the most effective

[5] CCP Stuff, "AAIA Challenges Private Ownership…"

[6] ATADA, Voluntary Returns Program, https://atada.org/voluntary-returns (accessed: 20.11.2020).

[7] Association on American Indian Affairs, "Rago Auction Withdraws Native American Cultural Heritage Scheduled for Sale", *News Release*, 17 October 2018, https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-10-17_rago_pr.pdf (accessed: 15.11.2020).

[8] Association on American Indian Affairs, "Auction Alerts", 2020, https://www.indian-affairs.org/auction-alerts.html (accessed: 15.11.2020).

[9] M. Masurovsky, "A Comparative Look at Nazi Plundered Art, Looted Antiquities, and Stolen Indigenous Objects", *North Carolina Journal of International Law* 2020, vol. 45, no. 2, p. 523.

role auction houses can take is to produce business models that minimize future unethical sales and prioritize facilitating the return of sensitive cultural objects.[10] In order for this to work, the model must be centered around transparency and consultation with Native American peoples. While auction houses do not have the power to determine the buyer, they do have the ability to influence the narrative of objects brought to market. Even if they can only control what they themselves make available on the market, refusing to recognize Native American cultural heritage as art objects and making a point to condemn any unethical treatment can help redefine market norms.[11]

Rather than being a central participant in the misuse and appropriation of Native American cultural heritage as auction houses have historically been, policies can be structured to use auction houses' unique position as intermediaries in the art market to aid in the return of cultural heritage. Sales at auction are a matter of public record, and provide a great deal of visibility to the objects being sold. A public venue of sale allows Tribal Nations, as well as other stakeholders, to see what is being sold. This allows them to coordinate repatriation efforts, as well as allowing them to track a piece of cultural heritage via a public record of its sale. This is a clear advantage over a private sale, in which the buyer and seller are often the only parties aware of the sale. Auction houses can also play the role of a neutral intermediary in transactions of Native American cultural heritage. The anonymous nature of many sales at auction houses can allow a buyer or seller to communicate with a Tribal Nation about the return of an object without having their identity revealed. Auction houses also have significant power when it comes to establishing future practices in the market for Native American art or objects. By finding ways to stop prices from rising on pieces of cultural heritage and building the market for art created by contemporary Native artists, auction houses can help create a market for Native American art that respects and benefits Native American people.

3. The policy

The primary goal in drafting the policy was to create a process for dealing with Native American cultural heritage that was ethical yet realistic, approaching the industry where it currently stands. It is an unfortunate fact that often people liquidating collections of Native American art and cultural heritage are not interested in donating their collections to Tribal Nations and simply want to sell. In many cases, consignors have invested

[10] National Congress of American Indians, Resolution SAC-12-008: Support for International Repatriation, https://www.ncai.org/attachments/Resolution_DuwbLqpfrhQZrLoqKUXshHYKXcvQNfLTUBIPSJWHSmpYZnFkOQL_SAC-12-008.pdf (accessed: 10.11.2020).

[11] Association on American Indian Affairs, "Buyers Should Invest…".

a great deal of money into their collection and cannot afford to forgo profits and donate; in other cases, overwhelmed heirs inheriting collections want the whole collection liquidated without having to sort out sensitive objects. Our fear in drafting this policy was that if we were to outright refuse to sell any object that might be culturally sensitive, the consignors might turn to any available seller, regardless of ethics. We hope that by providing a framework for ethical handling that works within the current limitations of the market, we can slowly change the culture within the industry to a more ethical one. The policy consists of the following four steps:[12]

1) We make information about objects of Native American origin available to appropriate authorities, such as Tribal Historic Preservation Officers, so they can review the items and flag any that are extremely culturally significant, and therefore require dialogue and communication that other objects do not.
2) Items that are flagged will be subject to a seven business day waiting period before the auction winner can pay and pick up the item. This time allows the Tribal Nation to appeal to donors and/or the consignor. For these appeals, we solicit written explanations of the significance of the objects, which are then used to provide the information necessary for consignors, buyers, and outside donors to consider donating the objects.
3) Should the Tribal Nation wish, they can buy the object for the hammer price without participating in the auction. This ensures that repatriation efforts do not inflate the market on items that tribal authorities feel are inappropriate for sale. If a donor is found, they can buy the object for the hammer price and donate it to the appropriate Tribal Nation at this time.
4) After a Tribal Nation has worked with us for an auction, if they ask us not to sell objects from their nation, we will honor that wish to the best of our ability.[13]

In drafting this policy, we drew on multiple existing legal policies. Several pieces of our methodology were influenced by the methodology laid out in NAGPRA. While auction houses do not have to comply with NAGPRA, as discussed above, NAGPRA is the standard when it comes to repatriation in the United States. Its methodology is widely accepted and has been used for many years with success. The first action NAGPRA requires museums and Federal Agencies to take is to create an inventory of potentially qualifying objects, which are then shared with appropriate Tribal authorities.[14] We de-

[12] Revere Auctions' full statement and policy can be found at https://www.revereauctions.com/native-american-objects-ethics-statement/ (accessed: 25.11.2020).

[13] We intend to honor this under all circumstances; however, we recognize that there may be times in which an object is misidentified or its origin is otherwise unclear, which could lead to its being offered for sale.

[14] 25 U.S.C. § 3005(a), 1990.

cided to start with this as our first step: there is a clear, well-established precedent, and it is a straightforward way to start the consultation process. The next step in NAGPRA is the "expeditious" repatriation of any objects requested by "a known lineal descendant of the Native American or of the tribe or organization".[15] This, of course, is not possible for an auction house. Since any object in question belongs to a consignor, it remains at their discretion whether or not to return an item before it has been sold. Therefore, we needed a policy with clear steps for how to proceed if an object flagged as cultural heritage is actually sold.

The United Kingdom's policy on the Export of Works of Art and Objects of Cultural Interest provides a useful set of steps for the sale and subsequent return of an object. The purpose of this policy is to prevent "national treasures" from being removed from the country. Items are assessed by a committee using the Waverley Criteria, a set of three questions used to determine "if a cultural object is a national treasure and if its departure from the UK would be a misfortune".[16] If the committee decides that the item fits the criteria, the Secretary of State can place it under temporary export deferral, and then public institutions are given the chance to raise funds and match the sale price, to keep the item in the UK for the benefit of the public.[17] By using a similar framework, Revere Auctions has been able to create a process that allows objects to pass through the auction house without requiring Tribal Nations to bid, driving up the price on and therefore strengthening the market for their cultural patrimony. Bringing in outside donors allows consignors with a monetary need to sell to be paid without having the object pass into a private collection.

4. The policy in action

Revere has been able to use this policy to successfully repatriate several objects. Each time an auction includes Native American objects, we send a list to the AAIA, which helps us get in touch with the appropriate Tribal Historic Preservation Officers (THPOs) or other officials. So far, we have helped facilitate the return of objects to the White Earth Nation (Ojibwe/Anishinaabe), the Oglala Lakota Nation, and the Navajo Nation. In some cases, this has required extensive and detailed consultation. In one instance, a consignor

[15] Ibid.

[16] Reviewing Committee, Arts Council, https://www.artscouncil.org.uk/supporting-collections-and-cultural-property/reviewing-committee#section-1 (accessed: 28.11.2020).

[17] Department for Digital, Culture, Media & Sport, *Export of Objects of Cultural Interest, 1 May 2016 to 30 April 2017,* p. 71, https://www.artscouncil.org.uk/sites/default/files/download-file/Export%20Objects%20Cultural%20Interest1617_web.pdf (accessed: 20.11.2020).

brought in a ceremonial bundle of objects, which included a diverse group of sacred pieces. The provenance information was vague, and upon initial research, it was not clear to which Tribal Nation they should be returned. After many emails, photos, and details sent to different THPOs, the groups we were consulting with determined that several of the objects contained in the bundle were Navajo and several were Oglala Lakota. Following further discussions with the consignor and the THPOs from the aforementioned nations, the consignor donated these objects to their respective peoples.

The donor process outlined in step three of our policy has been particularly successful on multiple occasions. In these cases, the consignor declined to donate the object, so it was sold at auction. During the seven day holding period, a donor was found, so the consignor was paid, and then the object was returned to the Tribal Nation. This process has largely been met with positive responses from buyers. Younger buyers in particular have been receptive to participating in sales conducted in this way. One buyer who won a lot for which a donor was found reached out to Revere to express their relief at avoiding involvement in an unethical situation. The receptiveness of donors and young buyers suggests that the goal of an overall shift in the market toward a more ethical approach is not only possible, but close at hand. Furthermore, it suggests that the enactment of a transparent public policy such as Revere's can actively help to move the market in that direction.

Unfortunately, due to the nature of the policy and the industry, not every object of cultural importance is able to be repatriated. There have been situations in which the consignor was not interested in donating objects, and we were unable to find donors. In those situations, the sale proceeds as usual after the holding period. It is unfortunate that these pieces end up in private collections instead of with the Tribal Nation who created them; as we work to improve this policy, finding ways to avoid this outcome is a high priority. However, in these cases, it is important to remember that the piece of cultural heritage would have been sold regardless. In this case, we hope our policy helps to mitigate some of the damage of these transactions by providing Tribal Nations with information and a way to pinpoint a place in the object's history. In some cases, we have also provided the buyer with the contact information for the Tribal Historic Preservation Officer for the Tribal Nation from which the object originated, to facilitate future consultation or donation.

The reception to the policy has been mixed. We have had several people, like the buyer discussed above, who were very pleased with our policy. There have been irate telephone calls from others who felt our policy vastly oversteps its boundaries, and we should only do what is required of us by law – which is to say, nothing. Conversely, we have had some people tell us that we are not doing nearly enough to protect culturally sensitive objects. In November of 2019, Revere sent two representatives to the

AAIA's Annual Repatriation Conference to present on a panel with two members of the Hopi Nation about ways to bring the auction industry up to speed on ethical treatment of Native American cultural patrimony. Many productive discussions with fellow panelists and attendees ensued, and although individual reactions varied, the general consensus seemed to be that a comprehensive, consultation-centered public policy was a step in the right direction. It is abundantly clear that transparent public policies about this issue are something that the auction industry needs and, by and large, does not yet have. This policy is a first attempt at creating something that will fill that void, helping to move the overall cultural trend of sensitive and ethical handling of Native American cultural heritage into the auction industry.

5. Conclusions

The strong reactions to Revere Auctions has received in response to this policy point to the sensitive nature of this topic – and to the importance of continued work being done to address it. Revere's policy is a first attempt at creating a transparent public policy regarding handling of Native American cultural patrimony by auction houses. Repatriation within private institutions will require extensive work to build a process that works as well as possible for all stakeholders. Revere's approach is designed to be flexible, and to evolve as we continue to learn and have conversations. Moving forward, we plan to continue enacting the policy at all relevant occasions, and to continue consulting with Tribal authorities and other stakeholders about ways to clarify and improve our methodology.

Creating public policies is only a first step in ethical practices relating to Native American cultural heritage in the auction industry. Reconciling the extremely disparate views of the stakeholders in this issue will require a shift in the broader cultural discourse about Native American cultural patrimony, allowing for the creation of an environment that acknowledges clashing cultural understandings of ownership, takes into account historical trauma, and truly listens to everyone involved. In the words of Marc Masurovsky of the Holocaust Art Restitution Project, creating a world where institutions can ethically handle material culture and share knowledge about oppressed peoples "requires a de-centering of a discourse whereby the host institution is no longer the purveyor of a system of ideas and values that has enabled and justified cultural crimes. For that to happen, new forms of dialogue must be conceptualized, practiced, and implemented between the hosts of the displaced objects, the aggrieved parties, and the mediating institutions – a new social contract of cultural rights".[18]

[18] M. Masurovsky, "A Comparative Look at Nazi Plundered Art…", pp. 524–525.

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Summary

Native American repatriation in the auction industry: A transparent approach

United States legislation protecting Native American cultural heritage fails to extend to the private sector, allowing auction houses to continue contributing to the misappropriation and displacement of Native American cultural heritage. In response to this problem, Revere Auctions developed a Native American Objects Ethics Policy that lays out a transparent methodology for handling Native American cultural patrimony, with a focus on consultation with the Association of American Indian Affairs and Tribal government officials. By enacting this policy, we hope to

help facilitate the repatriation of Native American cultural heritage and create new trends in the way the auction houses approach culturally sensitive materials.

Keywords: Native American cultural heritage, restitution, transparency, auction industry, culturally sensitive materials

Streszczenie

Repatriacja dóbr kultury Indian północnoamerykańskich w sektorze aukcyjnym: imperatyw transparentności

Prawo amerykańskie chroniące dziedzictwo kultury Indian północnoamerykańskich nie obejmuje sektora prywatnego, przez co domy aukcyjne nadal przyczyniają się do sprzeniewierzeń i trwonienia tego dziedzictwa. W odpowiedzi na ów stan dom aukcyjny Revere Auctions przyjął „Politykę etyczną obiektów indiańskich", w której ustalono przejrzysty sposób obchodzenia się z przedmiotami stanowiącymi indiańskie dziedzictwo, z uwzględnieniem konsultacji ze Stowarzyszeniem Spraw Indian Północnoamerykańskich (Association of American Indian Affairs) i z władzami plemiennymi. Wypada wyrazić nadzieję, że wdrożenie tej polityki przyczyni się do ułatwienia repatriacji dziedzictwa kultury Indian Północnoamerykańskich i zapoczątkuje nowe sposoby postępowania z przedmiotami, których natura ze względów kulturowych jest delikatna.

Słowa kluczowe: dziedzictwo Indian północnoamerykańskich, restytucja, transparentność, sektor aukcyjny, przedmioty o kulturowo delikatnej naturze

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Cultural heritage and cultural access rights: Leonardo da Vinci and trials concerning authenticity, prizing, international loan and export of his works after 2010[1]

1. Introduction

2019 was a jubilee year in which the entire art world celebrated the 500th death anniversary of Leonardo da Vinci – master of the Italian Renaissance, who, according to many rankings, has no competitor as a pretender to the title of "the most famous artist of all time". Regardless of whether someone belongs to the group of admirers of his work or not, one cannot but admit that the master's work electrifies the world public opinion, simultaneously in at least 3 aspects – scientific (the artist's biographies are rewritten over and over again), financial (so far an auction record of all times belongs to the work attributed to Leonardo – "Salvator Mundi" sold in 2017) and popular (spectacular success of Dan Brown's "The Da Vinci Code" thanks to the title's reference to the artist). Therefore, it is hard to deny that the contemporary Renaissance artist and inventor has become a "brand" in itself, and everything that "wears this brand" arouses wide public interest.

The unwavering interest in the master, despite passing time, manifests itself also in the number of court cases involving artworks created by Leonardo da Vinci or attributed to him. Some of those – such as the famous case of Hahn's against Joseph Duveen, a prominent art dealer on the authenticity of a painting being a copy of Leonardo da Vinci's "La Belle Ferroniere", which took place in the United States in 1920–1929 –

[1] The preparation of this article was financed with the resources of 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.

became legal landmarks where history, law and art meet, significantly contributing to changes in the field of art market expertise. Others, although they turned out to be less spectacular, also influenced the history of the reception of the master's works. Trials related to Leonardo da Vinci's works are not only the domain of the past, however. They are also limited not only to the question of authenticity. Due to the fact that they differ significantly in subject matter, they can together serve as an exemplification of contemporary problems related to the ownership of works of old master's art, both in the public and private dimension, as well as at the interface between these two spheres.

This article outlines lawsuits related to works attributed to Leonardo da Vinci. The review covers matters relating the ownership of valuable objects – mainly works of art – but also issues related to access to cultural goods. The selection of the presented proceedings was made on the basis of the aforementioned subject criterion (attributive relationship with the master) and covers the last 10 years (2010–2020). The purpose of this report is to supplement the analyses carried out in relation to the works of Leonardo da Vinci in connection with the 500th anniversary of his death. These cases show, as in the lens, the problems related to the evaluation of works of art classified as cultural heritage. Many of the questions posed in them can be described as the most vital dilemmas of the law of cultural heritage.

2. "Salvator Mundi"

On 12 January 2015 a Russian oligarch, Dmitri Ryborovlev, filed a criminal complaint in Monaco against a dealer and an owner of the so-called free ports,[2] Yves Bouvier, in which he alleged fraud and money laundering.[3] The case was the result of the complainant's discovery that his Swiss business partner, hired as an intermediary in the purchase of the old masters' artworks, significantly inflated their price by breaking the terms of the signed contract – the agent was buying them on his behalf cheaper than he resold them later.[4] One of the "overpaid" works of art was Leonardo da Vinci's "Saviour of the

[2] On free ports see: N.M. Neuhaus, "Customs Warehouses in Switzerland: An Introduction", Institute of Art & Law, 4 May 2015, https://ial.uk.com/customs-warehouses-in-switzerland-an-introduction/ (accessed: 20.04.2019).

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[4] A. Fontevecchia, "Steve Cohen's Modigliani In The Middle Of An Art Market War: *Billionaire Rybolovlev vs Yves Bouvier*", https://www.forbes.com/sites/afontevecchia/2015/03/12/steve-cohens-modigliani-in-the-middle-of-an-art-market-war-billionaire-rybolovlev-vs-yves-bouvier/#18cef6115bd2 (accessed: 20.04.2019).

World". Bouvier purchased the painting from an American art dealer Robert Simon and his associates for a sum of 80 million USD. Ryborovlev paid Bouvier for the same painting 47.5 million USD more (selling price was 127.5 million USD). The accusation of fraud alleged combined losses estimated at over 1 trillion USD in overpayment for the purchase of 38 works over a 10-year period.[5] The court battle was not limited to Monaco; the oligarch sued the merchant in other countries where his company was based – in Switzerland, Singapore,[6] Hong Kong and New York.[7] Ryborovlev sought to ban Bouvier from pursuing his economic activity and to broadly secure his claim against the entire property of the former contractor, although unsuccessfully.[8] The described matter was called in the media as the "Bouvier Affair".[9] In October 2017, Yves Bouvier – probably in response to his legal troubles – decided to sell his company *Natural Le Coultre*, which included free ports.[10]

Meanwhile, the Russian oligarch also sued the auction house Sotheby's, accusing them of colluding with Bouvier. The auction house consistently denied its involvement. Image losses were also suffered by a company named Simon Group, from which the Swiss agent purchased a painting attributed to Leonardo da Vinci.[11] Bouvier and Sotheby's jointly countersued the Russian in Geneva to prevent him from filing another lawsuit against them in Britain. Pursuant to the provisions of the Geneva Convention, it is not possible to conduct several separate proceedings simultaneously in more than one state that is signatory to this international agreement.[12]

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[5] A. Shaw, "Swiss freeport king Yves Bouvier sells art storage company Natural Le Coultre", *The Art Newspaper*, 26 October 2016, https://www.theartnewspaper.com/news/swiss-freeport-king-yves-bouvier-sells-art-storage-company-natural-le-coultre (accessed: 22.04.2019).

[6] New York Court of Appeal judgment of 18 April 2017 in the case of *Estate of Lorette Jolles Shefner v. Galerie Jacques de la Beraudiere,* 2017 NY Slip Op 02949, Appellate Division, First Department Published by New York State Law Reporting Bureau.

[7] M. Carrigan, "Russian billionaire Rybolovlev sues Sotheby's for $380m in fraud damages", *The Art Newspaper*, 3 October 2018, https://www.theartnewspaper.com/news/russian-billionaire-rybolovlev-sues-sotheby-s-for-usd380m-in-fraud-damages (accessed: 22.04.2019).

[8] V. Noce, "Yves Bouvier clears legal hurdle in Singapore", *The Art Newspaper*, 19 April 2017, https://www.theartnewspaper.com/news/yves-bouvier-clears-legal-hurdle-in-singapore (accessed: 22.04.2019).

[9] T. Baumgartner, "The Bouvier affair and the problem of secret commissions", Institute of Art & Law, 6 April 2016, https://ial.uk.com/the-bouvier-affair-and-the-problem-of-secret-commissions/ (accessed: 22.04.2019).

[10] A. Shaw, "Swiss Freeport…"

[11] K. Geiger, "Sotheby's, a Prized Art Client and His $47.5 Million da Vinci Markup", *Bloomberg*, 30 November 2016, https://www.bloomberg.com/news/articles/2016-11-30/sotheby-s-a-prized-client-and-his-47-5-million-leonardo-markup (accessed: 22.04.2019).

[12] E. Kinsella, "Sotheby's and Yves Bouvier Hit Back Against 'Salvator Mundi' Seller Rybolovlev in Ongoing International Feud", *Artnet News*, 21 November 2017, https://news.artnet.com/

In 2016, Ryborovlev filed a complaint to the US prosecutor's office about the possible fraud by Bouvier in the sale of works of art.[13] The Swiss agent stated in New York that he had never acted for or on behalf of Rybolevlov, but had always remained a private entrepreneur specialising in art trade. As a consequence – as he tried to convince the prosecutor's office – he was free to sell the works of art he bought to whomever he wanted and for as much as he wanted.[14] It turned out, however, that the agent, according to the contract signed with the oligarch, was to officially collect only 2% of the price paid for the works delivered to his Russian client, and he first resold them to offshore companies controlled by him in order to hide the inconsistent profit.[15] In June 2018, however, an investigation by the U.S. prosecutor's office was discontinued after a Russian profitably sold Leonardo da Vinci's painting at an auction in Christie's in 2017.[16] At the same time, also in June 2018, the Russian billionaire was accused of corruption in Monaco and arrested for questioning.[17]

On 2 October 2018, Ryborovlev filed a lawsuit in federal court in New York against Sotheby's, demanding a total of 380 million USD in damages for complicity in "the greatest fraud in history", as the Russian called Bouvier's "swindle".[18] According to the statement of facts presented in the documents submitted to the court, the fault of specific persons representing Sotheby's was in deliberate participation in the price increase procedure through the intermediation of fictitious sales.[19]

art-world/sothebys-and-yves-bouvier-sue-rybolovlev-in-ongoing-international-feud-1156712 (accessed: 22.04.2019).

[13] K. Geiger, H. Miller, "The Da Vinci Markup? Europe's Art Scandal Comes to America", *Bloomberg*, 9 March 2016, https://www.bloomberg.com/news/articles/2016-03-09/the-da-vinci-markup-europe-s-art-scandal-comes-to-america (accessed: 22.04.2019).

[14] A. Au-Yeung, "The Legal Fight Surrounding. The Most Expensive Painting In The World", *Forbes*, https://www.forbes.com/sites/angelauyeung/2017/12/05/the-legal-fight-surrounding-the-most-expensive-painting-in-the-world-salvator-mundi-dmitry-rybolovlev-yves-bouvier-affair/#4a9949b27fc6 (accessed: 22.04.2019).

[15] C. Miliard, "€10 Million Bail for Yves Bouvier, Indicted for Defrauding Dmitry Rybolovlev", *Artnet News*, 2 March 2015, https://news.artnet.com/art-world/yves-bouvier-indicted-for-defrauding-dmitry-rybolovlev-held-on-eur10-million-bail-272265 (accessed: 22.04.2019).

[16] V. Noce, "Russian tycoon accuses Yves Bouvier of 'campaign of disinformation' as US calls off investigation into Swiss entrepreneur", *The Art Newspaper*, 1 June 2018, https://www.theartnewspaper.com/news/russian-tycoon-accuses-yves-bouvier-of-conducting-a-campaign-of-disinformation-as-us-fraud-investigation-called-off (accessed: 22.04.2019).

[17] M. Duron, "Collector Dmitry Rybolovlev, Seller of $450.3 M. Leonardo, Questioned in Monaco on Corruption Allegations", *Art News,* 6 November 2018, http://www.artnews.com/2018/11/06/collector-dmitry-rybolovlev-seller-450-3-m-leonardo-questioned-monaco-corruption-allegations/ (accessed: 22.04.2019).

[18] M. Carrigan, "Russian billionaire…"

[19] E. Kinsella, "Russian Billionaire Dmitry Rybolovlev Accuses Sotheby's of Price Inflation in a $380 Million Suit", *Artnet News,* 3 October 2018, https://news.artnet.com/art-world/dmitry-rybolovlev-sothebys-suit-1362958 (accessed: 20.04.2019).

Unfortunately, the content of the court proceedings has not been disclosed. However, the Ryborovlev cases against Bouvier revealed many shortcomings of the international art market, primarily in the field of testing the authenticity of works of art, ethical standards of auction houses and museum institutions taking liberties with interpretation of the ICOM Code of Ethics for Museum Professionals (in particular, with the Code's prohibition of opining about works in the market circulation) and lack of transparency in transactions in the private trade of works of art.

3. "La Bella Principessa"

Another dispute over Leonardo's authorship is the case of a female profile portrait entitled "La Bella Principessa". It is a portrait of a young Italian woman in Renaissance clothes, made with a coloured pencil on vellum.[20] In 1998, the artwork was put up for sale at Christie's in New York. Initially, neither the author of the work nor the identity of the person depicted in it was given; it was described as "the work of an anonymous 19th-century artist from Germany, imitating the style of Italian Renaissance artists".[21] The owner of the drawing, Jeanne Marchig – the widow of a Florentine artist and art conservator, Gianno Marchig – was convinced it was from the Renaissance, but Christie's expert on drawing, Francois Borne, was of a different opinion. His views became the reason for a later trial. At this stage, the collector did not protest, because – as she claimed in a later interview – she succumbed to the authority of the expert, and she herself needed money.[22]

A Canadian art collector based in Paris, Peter Silverman, attempted to buy the work. In one of the interviews, he strongly advocated changing the dating of the drawing at the moment of his first contact with it.[23] During the 1998 auction of Old Masters' Drawings, Silverman offered 19,000 USD but the work was sold for 21,850 USD. It was purchased by Kate Ganz, a New York art dealer and drawing expert, daughter of famous contemporary art collectors of the same name. She was convinced that the work was a pastiche of several different works by Leonardo.[24]

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[20] W. Isaacson, *Leonardo da Vinci*, Kraków 2019, p. 360.

[21] Christie's, Auction 8812, Item 402, January 30, 1998; cf. ibid., p. 358.

[22] M. Kemp, *Mój Leonardo. Pięćdziesiąt lat rozsądku i szaleństwa w świecie sztuki i poza jego granicami*, Warszawa 2020, p. 160.

[23] *Mystery of a Masterpiece. An Interview with Peter Silverman,* NOVA/National Geographic/PBS, 25 January 2012.

[24] K. Krzyżagórska-Pisarek, "'La Bella Principessa' – Arguments against the Attribution to Leonardo", *Atribus et Historiae* 2015, vol. 36, no. 71, p. 62.

The Canadian collector stumbled upon drawing again in 2007, when he visited a gallery run by Ganz in New York. He then became convinced that it must be the work of a Renaissance master. The art dealer accepted his offer to sell the work at the same price for which she had purchased it.[25] Silverman's purchase of the work initiated a re-launch of the debate over its possible authorship.[26] The collector was the first to publicly argue that it could be a work created by Leonardo da Vinci. In order to prove his thesis, the collector enlisted the help of art experts. Initially, he approached Mina Gregori, a French art historian who concluded that the portrait shows two influences – Florentine and Milanese – what could be an argument for Leonardo.[27]

This was just a prelude. Nicholas Turner, former curator of the British Museum in London, who looked at the picture of the drawing and said that Leonardo's authorship was indeed possible. It was mainly indicated by left-handed hatching. However, other experts whom Silverman asked for their opinion stated that it doesn't look like Leonardo's work.[28] Also Kate Ganz, the art dealer who sold the drawing to Silverman, was sceptical.[29] That did not deter Silverman: using the method of radiocarbon dating, he managed to determine the time frame of vellum formation: 1440–1650. This meant that Leonardo could possibly – although still not necessarily – be the author of the drawing in question. Then the Canadian collector turned to the Paris-based company Lumiere Technology, founded by Pascal Cotte, which produces ultra high resolution images of works of art. Thanks to the Several-hundred-times magnification enabled detailed comparative analysis of the drawing and other works by Leonardo and it revealed many similarities between the drawing and other works of the master.[30]

The results of these analyses were presented to Cristina Geddo from the University of Ghent. The researcher drew attention to the fact that the author used pastel crayons in three colours: black, white and red. This corresponded to the well-known practice of Leonardo.[31]

Silverman has gained an ally in Cotte in the fight for Leonard's authorship. Together, they turned to the Oxford professor Martin Kemp, who is considered one of the highest

[25] M. Kemp, *Mój Leonardo*…, p. 141.

[26] S. Hewitt, "Life with Leonardo" – buyer Peter Silverman talks to ATG, *Antiques Trade Gazette* 2009, no. 1913, p. 4, on-line interview: http://content.yudu.com/Library/A1hrhz/AntiquesTradeGazette/resources/4.html (accessed: 20.04.2019).

[27] P. Silverman, *Leonardo's Lost Princess: One Man's Quest to Authenticate an Unknown Portrait by Leonardo da Vinci*, New Jersey 2012, p. 16.

[28] W. Isaacson, *Leonardo da Vinci*…, pp. 362–363.

[29] E. Povoledo, "Dealer Who Sold Portrait Joins Leonardo Debate", *New York Times*, 29 August 2008.

[30] W. Isaacson, *Leonardo da Vinci*…, p. 364.

[31] C. Geddo, "The Pastel Found: A New Portrait by Leonardo da Vinci?", *Artes* 2009, no. 14, p. 63.

authorities in the field of Leonardo da Vinci's work.[32] Kemp responded with interest to the material sent to him in 2008.[33] The Oxford professor agreed to see the drawing in person and delivered his affirmative opinion about the Leonardo's authorship. Information about this discovery was disseminated by Martin Kemp in a book co-written with Pascal Cotte and published for the first time in 2010.[34] Two years later, Silverman himself published a book on the long process of examining the authenticity of a work.[35]

A publication by Kemp and Cotte provided Jeanne Marchig, the former owner of a drawing of "good ammunition", to bring legal action against the auction house: "on 3 May 2010 attorney for Jeanne Marchig filed a lawsuit against Christie's, citing as grounds 'a deliberate refusal and failure to investigate the claimant's fiduciary duty, negligence, breach of guarantee of correct drawing attribution, and false statements during the auction and sale'".[36]

The auction house raised a defence arguing that the claim was time-barred. The plaintiff, however, indicated that it was only in 2009 that experts were ready to confirm Leonard's authorship. In the first instance, the trial was discontinued for procedural reasons.[37] However, the appeal was upheld and the case was returned to the court of first instance. Eventually, the parties settled out-of-court and the auction house donated an undisclosed amount to a charity organisation controlled by Marchig. One of the reasons for agreeing to such an arrangement was the fact that the auction house lost the original frame in which the drawing was delivered to them by the claimant. However, this point is highlighted by Christie's line of defence, according to which "most advocates of new attribution derive significant financial benefits from this and not another resolution".[38]

Although Kemp and Cotte's thesis about the work's authenticity has been supported by many reputable experts,[39] other equally respected experts on the subject raised their doubts.[40] The difference of opinion corresponds to geographical divisions: while most

[32] M. Kemp, *Mój Leonardo*…, p. 136.

[33] D. Grann, "The Mark of the Masterpiece", *The New Yorker,* 5 July 2010, https://www.newyorker.com/magazine/2010/07/12/the-mark-of-a-masterpiece (accessed: 18.07.2019).

[34] Zob. M. Kemp, P. Cotte, *The Story of the New Masterpiece by Leonardo da Vinci: La Bella Principessa,* London 2010.

[35] Zob. P. Silverman, *Leonardo's Lost Princess*…

[36] M. Kemp, *Mój Leonardo*…, p. 161.

[37] Por. *Marchig v. Christie's Inc.*, 762 F. Supp. 2d 667 (S.D.N.Y. 2011).

[38] M. Kemp, *Mój Leonardo*…, p. 161.

[39] Kemp's opinion was shared by Dr. Nicholas Turner, prof. Alessandro Vezzosi, Mina Gregori, Professor Emeritus of the University of Florence, Dr. Cristina Geddo, prof. Claudio Strinati, prof. Carlo Pederetti.

[40] Objections to Leonardo's authorship were raised by: Pietro C. Marani, Everett Fahy, Carmen C. Bambach, Martin Clayton, Klaus Schroeder, Nicholas Penny, David Ekserdjian.

of Leonardo's supporters come from continental Europe, most opponents come from Britain and the United States.[41] There were even voices that Giannino Marchig, Jeanne's husband, who died some time earlier, had faked the drawing – this hypothesis was put forward on the ArtWatch portal.[42]

Perhaps the greatest controversy arose around a fingerprint discovered at the edge of the drawing; this issue cast a shadow on credibility of the expertise presented by Kemp and Cotte. Initially, Christophe Champond from the Institute of Criminology and Criminal Law in Lausanne was examining this trace, however, he found that its condition is insufficient to make a positive identification.[43] A different opinion was expressed by Peter Paul Biro, a Montreal court expert who responded to Silverman's announcement: he presented his discovery to *The New Yorker* journalist David Grann,[44] then described in an author's chapter published in the first edition of Kemp and Cotte's book.

The revelation hit the headlines around the world; "the new Sherlock-Holmes", "the discovery of the real Da Vinci Code" euphoria was extinguished only by David Grann's article in *The New Yorker*. The article undermined the expert's credibility and cast a shadow on the evidence presented by him.[45] Biro brought a lawsuit against Grann accusing him of defamation, but courts of first and second instance ruled in favour of the journalist. This further undermined the credibility of the self-proclaimed expert. Consequently, Kemp and Cotte removed the chapter Biro wrote from the Italian edition of their book. This put a big question mark on other experts' findings as well.[46] Soon the two authors went on the counteroffensive and announced new revelations. Cotte noticed that the vellum on which the drawing was made had cut marks on the left edge, suggesting that it might have been originally made as an illustration for a book.[47]

The search for a matching volume led researchers to David Wright, retired professor of art history at the University of South Florida. He pointed to a tome of the history of the Sforza family in the collection of the National Library of Warsaw, published on the occasion of the wedding of Blanka Sforza. It was made in 1496 and initially belonged to the king of France, and then in 1518 it was given as a gift to the king of Poland on the occasion of his wedding with Bona Sforza.[48] Both researchers, accompanied by cameras

[41] M. Kemp, *Mój Leonardo*…, p. 176.
[42] Ibid., p. 162.
[43] W. Isaacson, *Leonardo da Vinci*…, p. 367.
[44] D. Grann, "The Mark of a Masterpiece…"
[45] M. Kemp, *Mój Leonardo*…, p. 154.
[46] W. Isaacson, *Leonardo da Vinci*…, p. 371.
[47] Ibid., p. 371.
[48] P. Cotte, M. Kemp, *La Bella Principessa and the Warsaw Sforziad*, https://www.bbk.ac.uk/hosted/leonardo/KempCotteLBP.pdf (accessed: 30.06.2019).

from two TV stations – PBS and the National Geographic channel – went to Warsaw to examine the book. They presented many arguments for their conception.[49]

Only apologetic voices appeared in scientific studies, while criticism was initially revealed very "timidly" in press statements. However, Jonathan Jones tried to challenge Kemp's claims in *The Guardian* in 2015. He could not understand how Martin Kemp – an Oxford professor and art lover who knew quite a lot about Leonardo – could have made such a mistake. Soon, Katarzyna Krzyżagórska-Pisarek, a specialist in the attribution of works of early Renaissance art, followed in the footsteps of the journalist. In a published scientific article the author systematically compiled the arguments "for" and "against" Leonardo's authorship.[50] First, attention should be given – after Maroni[51] – to the fact that the drawing shows many corrections, which is unusual for Leonardo. In addition, these changes were made using several techniques simultaneously. Secondly, one cannot overlook the fact that Kemp and Cotte indicated Leonardo's authorship so unequivocally, hardly considering arguments against such a thesis.[52] Moreover, the lack of comparable drawings made by the artist from Vinci also appears to repudiate his authorship. Leonardo just did not draw that way.

The most important objection however is the drawing's unclear provenance. There is no information about the work before the beginning of the 20th century, when it was included in the collection of Giannino Marchig. The collector never revealed how he came into possession of it.[53] According to Kemap and Cotte, this is due to the fact that it is not a stand-alone work, but a page cut with a knife from a codex prepared for Bianca Giovanna Sforza on the occasion of her wedding to Galeazzo Sanseverino (1458–1525). Their hypothesis was repeated by David Wright.[54] Krzyżagórska-Pisarek, however strongly disputed the arguments of Kemp and Cotte. First of all, she emphasised that the first known owner of the described drawing, Giannino Marchig (1897–1983), was an expert copyist and imitator of Leonardo, and a skilled restorer of works of art.[55] In the 1920s he exhibited in Warsaw, where he may have approached the "Warsaw Sforziad".[56] In the 1930s, Marchig found himself in the circle of Bernard Berenson, who at that time was considered an outstanding expert in Italian Renaissance art. Krzyżagórska-Pisarek

[49] W. Isaacson, *Leonardo da Vinci*…, p. 372.

[50] K. Krzyżagórska-Pisarek, "'La Bella Principessa'…", p. 64.

[51] P.C. Marani, "Deux nouveaux Leonardo?", *Dossier de l'art* 2012, no. 195, pp. 58–63.

[52] D. Ekserdjian, "Leonardo da Vinci. 'La Bella Principessa' – The Profile Portrait of a Milanese Woman", *Burlington Magazine* 2010, vol. 152, no. 1287, pp. 420–421.

[53] P. Cotte, M. Kemp, *La Bella Principessa*…

[54] D.R.E. Wright, *Ludovico il Moro, Duke of Milan, and the Sforziada by Giovanni Simonetta in Warsaw*, http://www.bbk.ac.uk/hosted/leonardo/Wright_Sforziad.pdf (accessed: 30.04.2019).

[55] See: *Giannino Marchig, 1897–1983: paintings and drawings,* exhibition catalog, London 1988.

[56] K. Krzyżagórska-Pisarek, "'La Bella Principessa'…", p. 65.

rightly noticed that if he would have had in his possession the work of Leonardo, Berenson and other experts would have certainly talked about it, and he would have asked them for their opinion. The fact that he himself considered the drawing to be the work of one of the master's students seems to be extremely important to the matter.[57]

In the discussed article, which opposes the attribution of the drawing work "La Bella Principessa" to Leonardo da Vinci, attention was also drawn to the weak foundations of the thesis about the origin of the vellum card from the Warsaw Codex. Although Polish art historian Bogdan Horodyński, who was the first researcher to compare all 3 codes known as the "Sforziad", gave the number of 208 folios that make up the Warsaw version, while it in fact consists of 202, a detailed comparison of the description of the content of today's code with the description of this author from 1954 indicates that it has been kept unchanged.[58] Kemp and Cotte's conclusion, which is based solely on a numerical comparison, is therefore incorrect. Horodyński, stating the total number of pages, must have made a mistake in his calculations, and the experts, encouraged by this fact, were deceived by appearances, without making their own findings in this regard.

The situation was complicated by one more alleged author of the drawing – this time self-proclaimed. It was a famous forger, Shaun Greenhalgh: in his book published in 2015 called "The Forger's Tale" he admitted to drawing "La Bella Principessa". He claimed to have done it as part of his arm training in 1978. He was only 17 at the time. According to Kemp, the author of the "autobiographical" story, however, only intended to increase the sales figures by adding this colourful episode to the end of his book in the form of an incompatible supplement. Kemp continued: "In an extremely witty way, the Greenhalgh-forger falsified his story about the forgery".[59]

It seems, however, that the fundamental problem is not whether Greenhalgh is telling the truth or not, but rather that Kemp's version is also not entirely credible. As the prominent art critic and journalist Jonathan Jones vividly put it in the pages of *The Guardian*: "I have no idea if Greenhalgh – in prison since 2007 for counterfeiting other works of art – really created this ugly pastiche. However, I am absolutely sure that it has nothing to do with Leonardo da Vinci".[60] Also, Alessandro Vezzosi – another renowned Leonardo specialist – who initially, relying solely on photographic reproduction, reacted enthusiastically to the appearance of a "new Leonardo",[61] cooled his enthusiasm

[57] Ibid., p. 65.

[58] Cf. B. Horodyński, "Miniaturzysta Sforzów", *Biuletyn Historii Sztuki* 1954, no. 16, pp. 195–213.

[59] M. Kemp, *Mój Leonardo*…, p. 180.

[60] J. Jones, "This is a Leonardo da Vinci? The gullible experts have been duped again", *The Gourdian*, 30 November 2015, https://www.theguardian.com/commentisfree/2015/nov/30/leonardo-da-vinci-experts-painting-la-bella-principessa (accessed: 2.03.2020).

[61] A. Vezzosi, *Leonardo infinito*, Reggio Emilia 2008, pp. 138–142.

after coming into direct contact with the work.[62] The mere existence of different opinions based on factual arguments does not allow any position to be considered final and indisputable.[63]

4. Portrait of Isabella d'Este

In 2013 a story appeared in the media about a long-sought painting portrait of Princess Isabella d'Este, which Leonardo da Vinci was said to have done during his stay in Mantua in 1499. If this image turned out to be authentic, it would be a real breakthrough in the study of the master's work. Carlo Pedretti was said to have opted for the authorship of the artist from Vinci in *Corriere della Serra*.[64] However, it seems that the Italian scientist was not serious. According to Carmen Bambach, Pedretti was ironic because it is obvious that this painting did not come from the master's hand.[65] Martin Kemp also raised many objections, provoked by a press article, which stated that since he did not explicitly reject Leonardo's authorship, he did not exclude it or even support it. The scientist also drew attention to many circumstances of the work's creation, unusual for the artist from Vinci, including the fact that the picture in question was painted on canvas, while all the other paintings of the master were made on a wooden board.[66]

The history of this work is not entirely clear. According to specialised tests, it comes from the time of Leonardo. It was supposed to disappear in Italy in the 16th century. Its fate was not known until 2013; the painting surfaced when a lawyer from the Italian town of Pesaro, acting on behalf of his anonymous clients, tried to sell them in Switzerland, claiming that the author was Leonardo da Vinci. The expected price for the work was 93 million pounds sterling. The Italian prosecutor's office called on the Swiss police to block the transaction. Prosecutor Manfredi Palumbo in a comment sent to the press confirmed that the painting was under investigation in a tax fraud case.[67] The work was secured in a bank deposit in one of the banks in Lugano,[68] in connection with court

[62] A. Vezzosi, *Leonardo da Vinci. Malarstwo: nowe spojrzenie,* Kielce 2019, p. 50.

[63] W. Isaacson, *Leonardo da Vinci*…, p. 373.

[64] H.M. Sheets, "The Latest Leonardo Debate", *Art News*, 5 December 2013, https://www.artnews.com/art-news/news/the-latest-leonardo-debate-2339/ (accessed: 18.03.2020).

[65] Ibid.

[66] Ibid.

[67] S. Garcia, "Lost Leonardo da Vinci masterpiece worth £90 million recovered from Swiss vault", *Independent*, 11 February 2015, https://www.independent.co.uk/arts-entertainment/art/news/lost-leonardo-da-vinci-masterpiece-worth-90-million-recovered-from-swiss-vault-10039155.html (accessed: 23.03.2020).

[68] Ibid.

proceedings against Edmidia Cecchini, an Italian citizen from Pesaro, on the charge of participating in the illegal trade in works of art.[69] In 2015, everything indicated that the painting would return to its homeland. The verdict was issued against her. The defendant appealed. She disputed the allegation of illegal export of the work by claiming that it had been in the family deposit in Switzerland for centuries. The judgment of the Italian Supreme Court became the basis for the official application for the return of the work.[70] In March 2018, the Federal Criminal Court in Ticino, Switzerland, ordered the return of the painting.[71] Ms. Cecchini appealed again. In September 2018, the Swiss Federal Administrative Court granted the request of its Italian counterpart, but on 13 May 2019, the Swiss Supreme Court dismissed this restitution request stating that the work had not been illegally removed from Italy. The latter decision contains a great deal of information on the circumstances in which the mutual legal assistance principle will apply, points to discrepancies between national legal frameworks regulating the export of cultural goods, and may also be seen as a warning to collectors when who are about to move their own collections abroad.

5. The "Vitruvian Man"

In 2019, the Louvre Museum in Paris organised a monographic exhibition dedicated to Leonardo da Vinci to celebrate the 500th anniversary of his death. Preparations for this exhibition had started much earlier and involved difficult negotiations with many prominent museum institutions in order to bring as many of the master's works as possible to this exhibition.

Much effort has been made to bring the famous drawing known as the "Vitruvian Man" to Paris. This work is a part of the collection of the Venetian Academy and is presented only once every 6 years due to its poor condition.[72] An Italian museum has expressed initial readiness to borrow a drawing for the Paris exhibition. When the information about a possible loan reached the media, a group of activists from an association

[69] C. del Frate, "Italy asks Switzerland to return work allegedly by Leonardo", https://www.corriere.it/english/18_aprile_20/italy-asks-switzerland-to-return-work-allegedly-by-leonardo-073767a2-44a7-11e8-af14-a4fb6fce65d2.shtml?refresh_ce-cp (accessed: 23.03.2020).

[70] La Corte Suprema di Cassazione, Sent. 314, UP 30/1/2018, R.G.N. 54833/17.

[71] See: Tribunale Penale Federale, Sentenza del 4 settembre 2018, Corte dei reclaim penali, case number RR.2018.182.

[72] A. Christafis, "Biggest ever Leonardo da Vinci exhibition to open in Paris", *The Guardian*, 19 October 2019, https://www.theguardian.com/artanddesign/2019/oct/19/biggest-ever-leonardo-da-vinci-exhibition-to-open-in-paris-louvre (accessed: 17.03.2020).

called "Italia Nostra" protested, pointing to the fact that the work was already presented in 2019 during the Venice Biennale.[73] The group successfully blocked the loan in domestic courts: the Regional Administrative Court in Venice (Tribunale Amministrativo Regionale di Venezia) prohibited the export of the work by its decision of 9 October 2019. The decision found the "Virtuvian Man" too fragile despite the positive opinion of the director of Gallerie dell'Accademia and the consent of the Italian Minister of Culture, Dario Franceschini.[74] However, the appellate court changed this decision and agreed to the export by a decision of 20 October 2019. According to the reasons, the exceptional importance of the Paris exhibition on a global scale justifies the loan.[75] The loan was therefore secured 4 days before the opening of the Paris exhibition.

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[73] A. Greenberger, "A Guide to the Louvre's Gargantuan Leonardo da Vinci Retrospective", *Art News*, 23 October 2019, https://www.artnews.com/art-news/news/leonardo-da-vinci-louvre-guide-13452/ (accessed: 17.03.2020).

[74] A. Greenberger, "Leonardo da Vinci's Prized 'Vitruvian Man' May Not Travel to Paris for Louvre Retrospective After All", *Art News*, 9 October 2019, https://www.artnews.com/art-news/news/vitruvia77n-man-leonardo-louvre-loan-blocked-13354/ (accessed: 17.03.2020).

[75] C. Ruiz, "Green light for Leonardo's Vitruvian Man to go to Louvre", *The Art Newspaper*, 17 October 2019, https://www.theartnewspaper.com/news/green-light-for-leonardo-s-vitruvian-man-to-go-to-louvre (accessed: 18.03.2020).

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Summary

Cultural heritage and cultural access rights:
Leonardo da Vinci and trials concerning authenticity, prizing,
international loan and export of his works after 2010

The legal battle between a Russian oligarch Dymirty Ryborovlev and a Swiss free port owner Yves Bouvier turned public attention to the practices of art market and the scope of its transparency. The case of Jeanne Marchig v. Christie's showed how fragile is the process of professional art authentication. Example of alleged and unexpected finding of a portrait of Isabella d'Este pointed to the existence of shady areas of trade in works of art in private circulation, which makes the whole art market even less transparent. Finally, the "Vitruvian Man" case was raising the question of accessibility of old art belonging to the public collections.

These four court cases presented in this article – all involving artworks created by Leonardo da Vinci or attributed to him – show the entire spectrum of legal problems related to works of art made by old masters, which are of particular importance to private owners, states, regions and the cultural heritage of mankind. The outlined examples illustrate the extent to which the artworks can be objects of market speculation when they turn into the target of human's desire being perceived as an ordinary commodity – a thing one "must have" or "must see".

The first two cases exemplify problems of private possession of works of art which are possibly of greater cultural value. The works' circulation outside any public scrutiny makes the final

verification of their authenticity impossible. Unequivocal decisions in this regard may be contrary to the interests of investors managing finances entrusted to them. As a consequence, there are no effective tools to protect the interests of collectors who have lost money as a result of market speculation. Dymitry Ryborovlev, who did not receive legal icompensation for the suffered losses, learned it the hard way; the role of Jeanne Marchig in the history of Leonardo's alleged drawing remains ambiguous to this day.

Two last cases focused on the relations between the state and the individual with respect to cultural property. The cases illustrate whether or not cultural property should be excluded from the market as *res extra commecium,* and whether their private possession can be compatible with public interest, especially with collective rights of access. On the other hand, as the example of "Vitruvian Man" shows, public ownership is not a universal solution to all questions relating to the preservation of exceptional artworks.

All of mentioned cases seem to confirm the lack of transparency of the contemporary art market and the insufficient coverage of works of art of particular historical and artistic value by legal regulations.

Keywords: cultural heritage, access to culture, authenticity of works of art, valuation of works of art, international loan of works of art

Streszczenie

Dziedzictwo kultury i prawo dostępu do kultury: Leonardo da Vinci i procesy sądowe dotyczące autentyczności, wyceny, międzynarodowych wypożyczeń oraz eksportu jego prac po roku 2010

Sądowa batalia między rosyjskim oligarchą Dmitrijem Rybołowlewem a szwajcarskim właścicielem „wolnych portów" Yvesem Bouvierem zwróciła uwagę opinii publicznej na praktyki na rynku sztuki i na ich przejrzystość. Sprawa *Jeanne Marchig przeciwko Christie's* pokazała, jak kruchy jest proces profesjonalnego uwierzytelniania dzieł sztuki. Przykład rzekomego i nieoczekiwanego odnalezienia portretu Isabelli d'Este wskazywał na istnienie szarej strefy handlu dziełami sztuki w prywatnym obiegu, co czyni cały rynek sztuki jeszcze mniej przejrzystym. Wreszcie sprawa „Człowieka witruwiańskiego" dotyczyła kwestii dostępności sztuki dawnej znajdującej się w zbiorach publicznych.

Cztery sprawy sądowe przedstawione w niniejszym artykule – wszystkie dotyczące dzieł stworzonych przez Leonarda da Vinci lub jemu przypisywanych – ukazują całe spektrum problemów prawnych związanych z dziełami sztuki wykonanymi przez dawnych mistrzów, które mają szczególne znaczenie dla prywatnych właścicieli, państw, regionów i dziedzictwa kultury ludzkości. Przedstawione przykłady ilustrują, w jakim stopniu dzieła sztuki mogą być przedmiotem spekulacji rynkowych, gdy stają się obiektem zaspokajania ludzkich pragnień jako zwykły towar – rzecz, którą „trzeba mieć" lub „trzeba zobaczyć".

Pierwsze dwa przypadki są przykładem problemów związanych z prywatną własnością dzieł sztuki o znacznej wartości historycznej i kulturowej. Uzmysławiają, że obieg dzieł poza wszelką kontrolą publiczną uniemożliwia ostateczną weryfikację ich autentyczności. Jednoznaczne ustalenia co do ich prawdziwości często są sprzeczne z interesami inwestorów zarządzających powierzonymi im finansami. W konsekwencji brak jest skutecznych narzędzi ochrony interesów kolekcjonerów,

którzy stracili pieniądze w wyniku spekulacji rynkowych. Przekonał się o tym na własnej skórze Dmitrij Rybołowlew, który nie otrzymał odszkodowania za poniesione straty, a rola Jeanne Marchig w historii rzekomego rysunku Leonarda do dziś pozostaje niejednoznaczna.

Dwie ostatnie sprawy dotyczyły relacji między państwem a jednostką w odniesieniu do dóbr kultury. Przypadki te wiążą się z pytaniem o to, czy dobra kultury powinny być wykluczone z rynku jako *res extra commercium* oraz czy ich prywatne posiadanie jest zgodne z interesem publicznym, zwłaszcza czy jest do pogodzenia ze zbiorowym prawem dostępu do dóbr kultury. Jak pokazuje jednak przykład „Człowieka witruwiańskiego", własność publiczna nie jest uniwersalnym rozwiązaniem wszystkich kwestii związanych z zachowaniem wyjątkowych dzieł sztuki.

Wszystkie wymienione przypadki zdają się potwierdzać brak przejrzystości rynku sztuki współczesnej oraz niedostateczne objęcie przepisami prawa dzieł sztuki o szczególnej wartości historycznej i artystycznej.

Słowa kluczowe: dziedzictwo kultury, dostęp do dóbr kultury, autentyczność dzieł sztuki, wycena dzieł sztuki, międzynarodowe wypożyczenia dzieł sztuki

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Collecting works of art: Are they taxable? An Italian perspective

1. Introduction

The art market has undergone a tremendous increase in recent years. In fact, nowadays, owning work of arts is not only possible by the so called "luxury market" aimed at the purchase of works of the highest artistic and monetary value, but, even the small collectors have expanded their audience due to the popularity of flea markets and of websites on which it is possible to purchase goods no longer in use. At the same time, commerce has also developed and many individuals, starting a collection, often not only can be qualified in the eyes of the market as buyers but also as sellers by placing themselves in that *limen* that divides collecting from speculation. In addition, art represents an asset that is becoming increasingly part of a family's identity, as well as an investment opportunity that offers returns and diversification. Recent developments have shown that there is a significant opportunity to integrate art into wealth management as a way of preserving and growing a family's wealth.[1]

However, investing in art has tax implications one should be aware of. As it often happens, the law does not stand on the same track as economic evolution and if the last one is innovated and varied, the chameleon-adaptive capacity of the rules is very precarious and inadequate. Thus, problems arise where, on the one hand, there is an outdated rule that does not provide for current phenomena and, on the other, a Financial Authority that interprets it in the most restrictive way. Even jurisprudence, which generally helps professionals by imprinting a general interpretative line – despite the civil law system does not assign a strong value to it – in the case in question, has only

[1] KPMG *Guide on Taxation of art*, https://assets.kpmg/content/dam/kpmg/ro/pdf/part-1-web.pdf (accessed: 2.03.2020).

analysed the distinction between the collector and the art dealer leaving out the figure of the speculative investor.

Lack of attention by institutions to the dynamics and interests of the art market and the difficulties generated by unclear legislation that causes uncertainty among operators, where the tax treatment of the circulation of works of art is characterised by application uncertainty, do not favour economic activity. Fair and timely taxation, on the other hand, can represent an effective tool for developing the sector. There are several aspects of tax legislation that have an impact on the market for works of art and may be strategic in the context of a policy that aims to promote the growth of the entire cultural sector. The latter is the purpose of this work: to outline the existing tax aspects inherent to the art sector and to give voice to a sector which, although often placed in the background, could always have significant developments since investing in artistic works, usually, results in low-risk investments designed to increase their value over time.[2]

2. European perspective on the tax regime of art

A question arises: are the proceeds from the sale of works of art subject to taxation? As often happens in the tax field, the answer to this type of question is neither simple nor univocal for all possible cases.

At the outset of any further consideration, the various "categories" of collectors must be distinguished. It is believed that it is possible to identify three different types of collectors. First, a so-called "amateur" or collector *sensu stricto* can be identified, to be classified as a mere enthusiast, a person who collects exclusively for passion and love for art in general or for a specific artistic period or for a particular author and who – starting from the moment of purchase – does not harbour any speculative intention of resale. Then, there is the category of the so-called "collectors merchants" who collect, buy and resell works on an occasional basis, aiming, however, from the moment of purchase of the work (understood as a mere speculative investment) to resale it to make a profit. Finally, the category of "professional" collectors – those who, with habit and professionalism, buys and sells works in order to make a profit, generating a real business income deriving from the conduct of a commercial activity.

The sale of artistic goods, as producers of wealth, can lead to tax implications depending on the way in which the subject carries out his conduct. The collector can purchase works of art in the gallery, at auction, directly from the artist, from a private

[2] F. Solfaroli Camillocci, "Taxation, a driver for the Art Market", *Tafter Journal*, February 2018.

person who by habitual profession does not trade in works of art. Depending on the purchase method, the VAT treatment varies, and, even within the same method, the VAT treatment may vary. The application of VAT varies according to the country in which the purchase takes place.

The European Directive 94/5/EC provides that, since 1 January 1995, "the harmonized VAT arrangements adopted by the ECOFIN Council in February 1994 (Seventh VAT Directive) have applied to all transactions in the European Union involving works of art and antiques".[3] This Directive, firstly, eliminates all forms of double taxation which previously stemmed from the application of two different systems by Member States to sales of works of art and antiques and the introduction of the "margin system" as the general rule. According to this system, tax is paid on the vendor's profit margin with no deduction of VAT. Secondly, the Directive applies the country-of-origin principle to all those dealing professionally in works of art and antiques, thereby enabling them to enjoy the same ease and simplicity of operation as private individuals: purchase of goods without tax formalities anywhere in the European Community, followed by a total freedom of movement. In addition, in order to help the art and antiques market to develop, the Directive contemplates the extension – from six month to two years – for the temporary admission of works of art intended for re-export to circulate throughout Europe without payment of customs duty or charges.

3. VAT regime in Italy

As far as Italy is concerned, the purchase and sale in the art gallery can take place with either the application of the "ordinary VAT regime" or the special regime, the so-called "margin system".[4] The ordinary VAT regime, regulated by the Decree of the President of the Republic (hereinafter: D.P.R.) no. 633/1972,[5] provides for the application of VAT at the ordinary rate, currently 22% on the sale price. The margin regime, governed by

[3] Council Directive 94/5/EC of 14 February 1994 supplementing the common system of value added tax and amending Directive 77/388/EEC – Special arrangements applicable to second-hand goods, works of art, collectors' item and antiques.

[4] P. Farina, "La fiscalità nella compravendita di opere d'arte", *Parte prima: le imposte nell'acquisto*, 3 January 2019, https://farinastudiolegale.com/2019/01/03/la-fiscalita-nella-compravendita-di-pere-darte-parte-prima-le-imposte-nellacquisto-di-pierluigi-farina-avvocato-farina-studio-legale/ (accessed: 2.03.201).

[5] Decree of the President of the Republic, 26 October 1972, no. 633, Establishment and regulation of value added tax, *Official Italian Gazette*, General Series of 11 November 1972 – Ordinary Supplement no. 1.

the Law Decree (hereinafter: D.L.) no. 41/1995[6] (which transposed the European Directive 94/5/EC) provides, as mentioned above, the application of VAT on the difference between the sale price and the purchase cost plus repair and accessory costs. It follows that the tax base on which VAT is applied is not constituted, as for the sales under the ordinary regime, by the sale price, but by the margin realised by the retailer.

The conditions required for the application of the margin regime, pursuant to Article 36 of the D.L. no. 41/1995 are the following:

a) the transfer must relate to the art objects indicated in the Table attached to the D.L. no. 41/1995 (paintings, prints, engravings, sculptures, tapestries, enamels, artistic photographs, postage stamps);
b) the above mentioned items must have been purchased from:
   i) private collectors residing in Italy or in another EU state;
   ii) companies or professionals who have not been able to deduct the VAT relating to the purchase or import;
   iii) operators resident in another European country who benefit in their country from the exemption granted to small businesses;
   iv) VAT subjects who operate under the margin regime and have subjected the transfer to the margin regime.

Even the sales of art objects made through auction sales agencies are subject to the margin regime, pursuant to Article 40-*bis* of the D.L. no. 41/1995, when the agencies act in their own name and on behalf of private individuals, on the basis of a commission contract. In this case, VAT is due on the difference between the consideration paid by the successful bidder, equal to the hammer price of the work plus the buyer's premium and the amount that the organiser of the auction corresponds to the client, equal to the hammer price net of the commission due to the auction organiser (the so called seller's commission).

Finally, the collector can also purchase the works from private individuals, who do not carry out the business of buying and selling works of art in a professional manner. In this case, as the requirements for the application of VAT are not met, the purchase is not subject to tax.

It should be noted that if the artist himself – or his heirs – makes the sale to a third party, the VAT rate is reduced to 10%. However, this method of purchase is scarcely practiced, since most of the sales take place through galleries, without establishing a direct relationship between artist and collector.

[6] Law Decree, 23 February 1995, Urgent measures for the reorganization of public finances and for employment in depressed areas, *Official Italian Gazette*, General Series of 23 February 1995, no. 45.

A very recent clarification from the Italian Revenue Agency specified that if the works are not made in the entirety of the artist-taxable person, they cannot benefit from the reduced rate of 10%. The specific case concerns the response to question n. 303 of 2 September 2020 which had to clarify whether an artist who designs, with the use of the computer and using three-dimensional software, original figurative sculptures that subsequently prints with special 3D printers, fell within the field of application of the reduction. According to the Revenue Agency, the operation cannot be facilitated as the Table attached to the D.L. no. 41/1995, as far as sculptures are concerned, refers to "original works of statutory art or sculptural art, of any material, as long as they are entirely made by the artist". Furthermore, it should be noted that for each project up to 200 per colour were printed, which contrasts with the "limited edition" envisaged by the D.L. no. 41/1995, which admits a number of sculptures limited to a maximum of eight copies.

Today 22% is the maximum rate set in Europe for the taxation of works of art sold by galleries, while the minimum is set in Switzerland (8%).

4. Capital gains regime in Italy

The sale of works of art by private individuals in Italy, in addition to not being a transaction subject to VAT, does not generate any taxation by way of tax on the capital gain generated by the sale itself.[7] The reference legislative text is the Consolidated Law on Income Taxes (hereinafter: TUIR),[8] as there is no specific legislation regarding the taxation of purchases and sales made by individuals. First, it is necessary to take into account Article 6 TUIR and assess whether the revenues generated from the sale of a work of art can fall into one of the expected income categories. The question is answered – in part – by Article 55 of the TUIR by examining the concept of business income, that is the income deriving from an "exercise as a habitual professional, even if not exclusive to the activities indicated in Article 2195, of the Italian Civil Code (…) even if not organized in the form of an enterprise".

The Court of Cassation believes that the requirement of habituality must be assessed on a case-by-case basis in relation to the economic significance of the economic transactions carried out and their complexity. If it is true that one who carries out isolated transactions cannot be defined as an entrepreneur, one cannot agree with an approach desired by the Supreme Court according to which even the completion of a single transaction

[7] M. Bodo, "Arte & Fisco: il collezionismo e la tassazione dei proventi derivanti dalla vendita di opere d'arte", *Collezione da Tiffany*, 10 January 2019.

[8] Decree of the President of the Republic, 22 December 1986 no. 917, Consolidated Law on Income Taxes (TUIR), *Official Italian Gazette*, no. 302 of 31 December 1986.

could constitute entrepreneurial activity in the event that it has a substantial economic significance and is accomplished through the existing position of a series of complex transactions. However, jurisprudence has identified a number of circumstances in the presence of which it can be considered that the purchase and sale of works of art carries out a commercial activity: continuous nature of the activity; relevance of the business; lack of other income; short period of time between the acquisition and sale of the asset; carrying out activities aimed at increasing the value of the asset.

Moreover, the taxpayer may submit a request for a ruling to the Financial Administration to be sure about the taxability of the transaction if there is objective uncertainty about the tax qualification of the case.[9]

As for the determination of taxable income, based on Article 71 of TUIR, the income deriving from occasional commercial activities consists of the difference between the amount received during the year and the expenses related to the production of income, with the clarification that the amount of expenses cannot exceed amount of income received.

According to the prevailing orientation, the indeterminacy of the discipline and the interpretative uncertainties could be overcome with the introduction of a regime similar to that envisaged for capital gains deriving from securities transactions or for real estate capital gains, providing for, for example, the taxation of the capital gain from the sale of works of art if the sale takes place within a certain period of time of the purchase and taking into account the expenses incurred. Alternatively, a flat-rate taxation of the sale price could be applied, with a progressive reduction of the tax base in relation to the years that have passed.

In the event that there is no business income, it will be necessary to check whether the proceeds from the sale are not subject to other regulations. On this point it should be remembered that prior to the issuance of TUIR, Article 73 of the D.P.R. 597/1973[10] of 29 September 1973, precisely in relation to the activity of buying and selling works of art placed outside the business activity, taxed any capital gains achieved by reason of transactions conducted with a speculative spirit even when they were not part of business income. The same Article then identified an objective criterion without the possibility of contrary proof aimed at defining the speculative intent: the case in which the sale followed the purchase of the work less than two years later.

The same case has not, however, been transposed within the TUIR and the only reference is made by Article 67(1)(i), according to which income deriving from non-habitual

[9] E.M. Bargarotto, "Regime tributario della cessione di opere d'arte", *Rassegna Tributaria* 2019, n. 2.

[10] Decree of the President of the Republic, 29 September 1973, no. 597, Establishment and regulation of personal income tax, *Official Italian Gazette*, General Series of 16 October 1973, no. 268, Ordinary Supplement no. 1.

commercial activities constitutes different income. The reason for this legislative choice has been identified by some in the *noluntas taxandi* towards tax regimes that could lead to tangible discrimination between the sale of any precious object and the alienation of one of these qualifying "work of art".

From this it follows that the legal structure of the TUIR imposes a general criterion capable of being applied to any different income and therefore to impose itself on the income generated by any commercial activity not exercised in a habitual way.

Ultimately, with regard to the different types of "collectors" exhibited in the first paragraph, the following can be summarised. As far as the merchant is concerned, we can reasonably speak of both business income pursuant to Articles 55 *et seq*., TUIR and liabilities for VAT purposes as required by Article 4 of the D.P.R. no. 633/1972. What we have identified as an occasional speculator may indeed generate the various incomes referred to in Article 67(c.1)(i), TUIR not finding, however, as seen above, subject to VAT due to lack of the habitual requirement. The collector, on the other hand, will not be subject to any taxation.[11]

The following remarks give an overview of the different capital gains taxes existing on works of art in the main European countries.[12]

In Austria, capital gains made from the sale of private assets held for more than one year are tax-exempt.

In Belgium, capital gains on the disposal of cultural property are not taxed if they are carried out as part of management of private assets.

In France, the rate is 5% on sales exceeding EUR 5,000 made by individuals. There is also the possibility to opt for the ordinary scheme of capital gains.

In Germany, generally, capital gains on the disposal of art assets are fully taxable, but capital gains on the disposal of private art assets by individuals are only taxable if the assets were held for a period of less than one year and if the collection is not considered as trade or business.

In Luxembourg, no tax on capital gains is applicable if the work of art is held for more than six months.

[11] F. Migliorini, "Vendita di opere d'arte: pianificazione fiscale", *Fiscomania.com*, 20 August 2018.

[12] Data from: Deloitte, *Fine Art – Direct and indirect taxation aspects, a masterwork of complexity*, https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-en-artfinance-taxmatrix-16092013.pdf (accessed: 2.03.2020).

5. Inheritance tax applicable to the transfer of works of art by inheritance

Another critical profile is that relating to the inheritance tax applicable to the transfer of works of art by succession. The tax is applied on the net value of the inheritance according to different rates established in relation to the relationship between the deceased and the beneficiary of the transfer. They vary from 4 to 8%, but a deductible of one million euros is envisaged for spouses and relatives in a straight line (the deductible is equal to 100 thousand euros for brothers and sisters and 1.5 million euros for disabled beneficiaries).

Works of art declared "cultural heritage" according to the rules of the Code of cultural heritage and landscape[13] before the death of the owner, are excluded from the hereditary assets provided that they have been acquitted the conservation and protection obligations. On the other hand, a tax reduction of 50% of the value of the assets is due if they have not been subjected to a restriction prior to the opening of the succession.

For inherited works of art, a specific rule must be taken into account for which money, jewellery and furniture are considered included in the hereditary assets for an amount equal to 10% of the total net taxable value of the estate, even if not declared or declared for a lesser amount, unless an analytical inventory drawn up pursuant to the civil procedure code does not show the existence for a different amount. In this regard, "furniture" is considered to be the set of assets intended for the use or decoration of homes. This is the so-called presumption of belonging to the hereditary asset of money, jewellery and furniture to the extent of 10% of the asset itself. The law, in fact, in consideration of the easy concealment of this kind of assets, presumes their existence based on a percentage of the assets, although this is a presumption that can be won by the taxpayer by drawing up an inventory. This rule, however, entails an unequal treatment between works of art belonging to the deceased who were intended to decorate the home (which therefore benefit from the 10% presumption) and works of art located in galleries, museums, exhibitions or which are kept in bank vaults, to which the aforementioned presumption does not apply. It is clear that this obsolete discipline induces collectors to use works of art to decorate their homes and therefore discourages their free circulation.

[13] Legislative Decree, 22 January 2004, no. 42, Code of cultural heritage and landscape, *Official Italian Gazette* of 24 February 2004, no. 45.

6. Imports of works of art from non-European states

In case of purchases of works of art perfected in non-European countries, the introduction into Italy (technically "import") is subject to the reduced VAT rate of 10%, payable to customs, through the presentation of a specific customs declaration.

With regard to the importation of art objects, the Ministry of Finance with the Circular of 22 June 1995, no. 177 (*VAT – Special regime for resellers of used goods, art objects, antiques or collectibles)*, had provided that the application of the reduced rate of 10% was subject to the release by the Ministry of Cultural Heritage and Activities of a specific declaration certifying, prior to import, the character of an art object.

Taking into account that the Ministry of Cultural Heritage, pursuant to Article 72 of Code of cultural heritage and landscape, issues the certificate of cultural property only for objects that are by an author no longer living and whose creation dates back to over fifty years, given that, instead, they are objects of art even those made by living artists and whose creation dates back to less than fifty years, the Financial Administration, with Circular no. 24/E of 17 May 2010 (*Methods of applying the reduced VAT rate of 10% on imports of art, antiques or collectibles*), has rectified its previous provisions and specified that for the recognition of works of art it is necessary to refer to the Community provisions on customs matters, and, in particular, to the Combined Nomenclature of the Customs Tariff shown alongside of each asset indicated in the aforementioned Table attached to the D.L. no. 41/1995.

It is clear that the difference in VAT rate between purchases made in Italy (22%) and purchases made in non-European countries (10% VAT on imports into Italy) encourages collectors to buy abroad, penalising the art market in Italy. It should also be noted that the tax rate, although reduced by 10% on imports into Italy, is still higher than that envisaged by other European countries, such as the United Kingdom (5%), France (5.5%) and Germany (7%).

An exception from the above is when the works of art are held abroad by Italian taxpayers. The Circular no. 43/E/2009 (Emergence of assets held abroad) of the Italian Revenue Agency, has included works of art among foreign investments of a financial nature. These are investments that, regardless of the actual production of taxable income in Italy, are monitored in the tax return of resident individuals.

7. Taxation of artistic services performed in a different country than that of the artist's tax residence

An analysis of taxation of foreign artistic services must be prefaced by defining what "artist" means for tax purposes. In the Italian tax system we find a single definition in Article 53(1) of the TUIR. This provision includes income from self-employment also those produced through the exercise of arts and professions.[14] The concept of artist is also present in international law, in the OECD Model Tax Convention on Income and on Capital 2017 (hereinafter: OECD Convention). The definition that we find there differs from the Italian one: in fact, within this model the taxation of the income of artists and sportsmen is regulated by Article 17 which includes, for example, theatrical or cinematographic actors in the category of artists; television presenters; singers and musicians in general; photographers and painters.

The artist is fiscally resident in Italy, pursuant to Article 2 of TUIR, when, for most of the tax period, he maintained his domicile or residence in Italy for civil law purposes. Pursuant to Article 3(1) of the Decree, resident individuals are taxed in Italy for all their income, wherever they are received ("worldwide taxation"), while non-resident individuals are taxed exclusively on income produced in the territory of the state. Article 17 para. 1 of the OECD Convention, on the other hand, establishes that the income received by a theatre, cinema, radio or television artist or a musician, for his personal activity exercised in another state, can be subject to a taxation in this other state (income received status).

The artist who receives income for a service performed abroad is subject to taxation both in the country of execution of the work or service and in the country of tax residence. In fact, in Article 17 of the OECD Convention, the adverb "only" is missing, which would determine the taxing power in a Contracting State. This means that, for the artist, a situation of double taxation could arise. The latter can be eliminated through the application of an exemption criterion or a credit for foreign taxes.

Unlike other self-employed workers, whose taxation methods are defined in Article 5 of the Convention model, the taxation of the artist has some peculiarities. As far as self-employed workers are concerned, they can be subjected to taxation in the state in which they provide the service, only if, in that state, there is a permanent place of business (permanent establishment). Otherwise, their income received abroad is taxable only in their country of tax residence. As far as artists are concerned, however, a particular method of taxation has been envisaged: taxation can take place in a state

[14] J. Staines, *Tax and Social Security – a basic guide for artists and cultural operators in Europe*, IETM 2004–2007.

for the sole fact that it is made there. This, regardless of the existence of a permanent establishment.[15]

In order to avoid situations of double taxation of the same income, the OECD Convention has decided to apply a taxation on the income of the artist who performs foreign services on the basis of the territorial requirement. This mechanism, like the tax credit, allows to avoid double taxation of income and also allows to avoid situations of possible tax evasion. In fact, in the absence of a specific provision such as that contained in Article 17 of the OECD Convention, a successful artist could reside in a state with privileged taxation and occasionally perform in foreign states taking advantage of non-taxation due to the reduced stay.[16]

8. Conclusions

An overview of the Italian tax legislation on works of art leads to a conclusion that the system is more geared towards favouring the "static" position of the private collector rather than the interests of the operators of the art market (galleries, auction houses, etc.). The private art market is characterised by uncertain tax rules that confuse operators, generating a double negative effect on the sale of works of art. On one hand, some collectors could risk being the recipients of notices of assessment that can hardly be dismissed, and the main difficulty appears to be the problem of proof – after many years it might be difficult to find the necessary documentation to justify the original cultural and non-speculative intentions. On the other hand, some subjects, taking advantage of uncertainty of the law, could escape the tax authorities and mask their speculative intent, providing some proof of the collecting purpose of the transactions made. It is therefore evident that the fiscal regime as outlined is not satisfactory.

In conclusion, there is an absence, for the art market, of clear and consistent tax legislation. The Italian law has, in truth, shown signs of interest in the sector by providing for a reform on the circulation of works of art and by preparing a proposal for the revision of crimes against the artistic heritage. There is still a lot to be done to ensure that tax legislation is the driving force of the sector and not an obstacle, not only in Italy but also at the EU level. A coordinated reform is needed in order to give answers to common problems.

[15] J. Sullivan, "Taxation of artists", *Arts Law Centre of Australia*, 30 June 2016.

[16] F. Migliorini, "Tassazione dei redditi degli artisti per prestazioni all'estero", *Fiscomania.com*, 28 June 2020.

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Italian Revenue Agency, Circular no. 43/E/2009, Emergence of assets held abroad, 10 October 2009.

Legislative Decree, 22 January 2004, no. 42, Code of cultural heritage and landscape, *Official Italian Gazette* of 24 February 2004, no. 45.

Italian Revenue Agency, Circular no. 24/E/2010, Methods of applying the reduced VAT rate of 10% on imports of art, antiques or collectibles, 17 May 2010.

Summary

Collecting works of art: Are they taxable? An Italian perspective

This article provides an overview of the tax treatment applicable to individuals, whether private individuals or galleries or auction houses, who buy, sell and exchange works of art. It outlines the existing situation on the matter with a specific focus on Italian legislation. The art sector, in fact, no longer considered niche and has all the prerequisites to acquire an ever greater importance, including in the investment sector as a portfolio diversifier.

Keywords: art, tax regime, Italian tax regime

Streszczenie

Kolekcjonowanie dzieł sztuki: czy podlega opodatkowaniu? Perspektywa Republiki Włoskiej

W artykule przybliżono reżimy podatkowe – ze szczególnym uwzględnieniem włoskiego – obowiązujące osoby fizyczne i prawne, zarówno indywidualnych kolekcjonerów, jak i galerie sztuki czy domy aukcyjne, jeżeli zawierają umowy sprzedaży oraz umowy zamiany dzieł sztuki. Sektor sztuki nie uchodzi obecnie za niszowy i jego znaczenie nadal rośnie, w tym również na rynku inwestycyjnym jako sposób dywersyfikacji portfela.

Słowa kluczowe: sztuka, reżim podatkowy, włoski reżim podatkowy

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What constitutes verifiable evidence: The role of conservators in art crime and cultural heritage protection

1. Introduction

What is value? Only by first understanding the relativism or absolutism of the thing itself can one then designate the appropriate response. When something is desired – whether real or imaginary – we institute the state of value; value is the interest attitude. George Santayana adopts the view, "Impulse makes value possible; and the value becomes actual when the impulse issues in processes that give it satisfaction and have conscious worth".[1]

Throughout our shared history art has been looted, destroyed, interfered with and imitated. Experts avoid litigation, bringing about correlative concerns for the judge or jury to determine the outcome of cases in civil or criminal courts. Art has a tangible commodity, in which regulating laws and market efficiency differs from other trades. Estimating value is a black box in which authorship, aestheticism and significance all play a role.

This article will explore the material and intellectual themes surrounding the process of authentication and attribution: how can expertise and connoisseurship best inform an investigation? How verifiable are provenance claims? How effective and/or problematic can scholarly research be? What is the role of science in authentication? And how do conservators enter the mix? It shall answer these questions by discussing the various methods and techniques in examination and analysis by exploring the three core pathways that together inform an evidentiary framework: history, provenance and technical examination.

[1] G. Santayana, *The Life of Reason: Introduction and Reason in Common Sense*, 1905, p. 135, https://santayana.iupui.edu/wp-content/uploads/2019/01/Common-Sense-ebook.pdf (accessed: 11.07.2020).

2. The market: Issues, needs and education

Criminals can easily adapt as opportunities present themselves. The recent theft of Van Gogh's "Spring Garden" from the Singer Laren Museum on 30 March 2020 highlights the actionability of crimes against art today. The work was on loan from the Groninger Museum, meaning that its display time would be temporary. Despite having no lapse in security measures, the Museum's sudden closure to meet COVID-19 restrictions at the beginning of the pandemic created the perfect Petri dish for the quick planning and implementation of the eventuating theft. Thieves made opportunity of an unstable and uncertain time. In a press conference following the attack, Museum Director Jan Rudolph de Lorm described the act as, "dreadful (…) Art is there for people to enjoy and be consoled by, especially in these difficult times".[2]

Despite high minded rhetoric about art being a "cultural exchange for the benefit of all mankind", the dichotomy of the trade is exposed when archaeological sites in Iraq, Syria and Egypt are transformed into pockmarked lunar landscapes to fill auction house podiums. Australia, for example, is a country that is "especially active" in the acquisition of cultural assets and reserves the right to interpret obligation in order to avoid providing new specific legislation to deal with the issue.[3] As recently as 2015, Egypt's Department for Restitution of Antiquities prevented an auction house in Australia from selling artefacts that had been looted in the crisis since the Arab Spring.[4]

Manacorda and Chappell believe that by refusing to register/record the origin of their collectibles Australian antique dealers impose "a very significant redimensioning of the field of application for domestic legislation containing penal sanctions".[5] With this in mind, is it possible to warn potential buyers of the risk of being defrauded? Due diligence is the process of gathering/disclosing relevant and reliable information about a prospective sale or contract. Due diligence is about asking the right questions; it is about obtaining and verifying information and then applying common sense.

[2] "Van Gogh painting stolen from museum during coronavirus shutdown", *DutchNews.nl*, 30 March 2020, https://www.dutchnews.nl/news/2020/03/van-gogh-painting-stolen-from-museum-during-coronavirus-shutdown/ (accessed: 15.11.2020).

[3] S. Manacorda, D. Chappell, *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*, Springer Science and Business Media, New York 2011, p. 33.

[4] S.A. Hardy, *Illicit Trafficking, Provenance Research and Due Diligence: the State of the Art*, Research Study, 30 March 2016, Adjunct Facility, American University of Rome 2016, p. 10.

[5] S. Manacorda, D. Chappell, *Crime in the Art*…, p. 33.

2.1. Australia: A case-study

In Australia the criminal justice system would appear to be well suited to meet the challenge of art crimes, in particular fraud-related offences. There are nine jurisdictions in Australia "each of which will have its own specific statues".[6] However, success in court is rarely won – and only then with clever, manipulative traversing of a legal minefield that doesn't appear to take art seriously. In the context of Aboriginality the traditions, issues of responsibility and custodianship in Indigenous life create its own variety of challenges. Elizabeth Durack, otherwise identified by the better-known pseudonym "Eddie Burrup", is not the only non-Indigenous person who has or will take advantage of the popularity of Aboriginal art.

In *R v John Douglas O'Loughlin* (2002) NSWDC the defendant O'Loughlin claimed that Clifford Possum had made him an honorary "cousin", giving O'Loughlin the right to embellish and complete Possum's paintings.[7] This case raises the issue of authorship based on thematic content, "a consideration quite absent from traditions of European art".[8] How does one even begin to navigate authorship of *Dreamings* in art through law, as exemplified in this case?

The issue of authorial ethics is complicated. Ingenuine works can be signed legitimately or produced collectively, as with Turkey Tolson or Ginger Riley. The complexity of these situations may inspire new questions such as: is the object an authentic Aboriginal work and is the artist in fact Aboriginal? Are they entitled to use the thematic material he/she is projecting? Since the 1970s Aboriginal art in Australia has been driven by market demand, setting forth an evolution of styles, and whilst legal proceedings require consideration of authenticity "issues are likely to shift to the question of deliberate deception, and the nature of intentional dishonest conduct involved".[9] This creates a complexity not associated with historical or curatorial art attribution enquiries.

The system therefore needs investigators who can collaborate and work across several disciplines, professions, and jurisdictions. Conservators hold intrinsic positions in this network, being highly esteemed for their interdisciplinary training which inspires the development of a range of skillsets across materials, analysis and documentation. Treatments are strongly informed by a thorough understanding of the cultural context of a work, its materials and techniques, with further technical research presenting a major scientific element that has the potential to provide verifiable, forensic proof in art crime

[6] C. Alder, D. Chappell, K. Polk, "Frauds and Fakes in the Australian Aboriginal Art Market", *Crime, Law and Social Change* 2011, vol. 56, no. 2, p. 193.

[7] *R v John Douglas O'Loughlin* (2002) Unreported, NSWDC, 23 February 2002.

[8] C. Alder, D. Chappell, K. Polk, "Frauds and Fakes…", p. 199.

[9] Ibid., p. 203.

investigations.[10] It is evident that due to the endemic cycle of secrecy in the art market autoregulation and self-regulation sometimes do not work. It is therefore up to the individual or institution to practice due-diligence and keep a work's history up to date and record clean.

3. Verifiability: The definition

The burden of proof, or *onus probandi*, consists of two things: the evidential burden and the legal burden.[11] The legal burden implies an obligation to persuade the court "to the appropriate degree" in both civil and criminal cases, whilst the evidential burden requires that a party establish "sufficient evidence relating to a fact in issue".[12] In this, particulars *relevant to the issue* and with *the capacity for proof* can be presented in court. Legal epistemology is therefore realist and positivist, demanding "definite and verifiable evidence" as proof.[13] However, what constitutes the term *verifiable* and what does it mean to have *verifiable evidence*? First, let's explore the etymology of the word *verifiable*.

Verifiable is a collaboration of the verb *verify* and adjective *able*. *Able* not only denotes having the specific power, resources, freedom or opportunity to *do* something but also signifies having the quality or nature to make something possible.[14] To verify is a transitive verb that endorses the following legal definition: "to confirm or substantiate by oath, affidavit, or deposition – verify a motion". The principle of the word is therefore positioned in tautological truth. The type of evidence selected depends entirely on suitability, the quality of execution, relevance and verifiability of what is being asserted.

The word *evidence* originates from the Latin term *evidentia*, which means: "to show clearly, to make clear to the sight, do discover clearly certain, to ascertain or prove".[15] Without evidence there can be no proof. Therefore, if evidence seeks to either support

[10] I. Cook, J. Lyall, R. Sloggett, "Conservation in Australian museums" [in:] *Understanding Museums: Australian Museums and Museology*, eds. D. Griffin, L. Paroissien, National Museum of Australia 2011, https://nma.gov.au/research/understanding-museums/_lib/pdf/Understanding_Museums_whole_2011.pdf (accessed: 10.10.2020).

[11] D. Walker, *Rules of Evidence*, lecture in: "Graduate Certificate in Art Authentication", Centre for Cultural Material Conservation, Melbourne, 1 June 2012, p. 7.

[12] Ibid., p. 8.

[13] R.A. Wilson, *Writing History in International Criminal Trials*, Cambridge University Press, New York 2011, p. 7.

[14] "Able" [in:] *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/able (accessed: 11.07.2020).

[15] K. Debesu, A. Eshetu, "Meaning, Nature and Purpose of Evidence law", *Abyssinia Law*, 4 September 2012, https://www.abyssinialaw.com/about-us/item/932-meaning-and-nature-of-evidence-law (accessed: 20.10.2020).

or not support a proposition then to *verify* is to systematically authenticate or prove that the evidence is incontestable or contestable. In this the admissibility, credibility and weight of evidence *need* to be thoroughly considered before being presented in court.

Forgery and fraud, theft and extortion, money laundering, and document and identity fraud are very hard to prove. "The art industry actively suppresses reliable information about its products – a behaviour that the governing legal regime reinforces".[16] For example, there are no specialist art and cultural property investigation units in Australia to aid with art crime investigations.[17] Investigations are therefore run through one of nine different authorities, such as the Federal and State Police Services, the Interpol National Bureau or Austac.[18] These authorities are responsible for the investigation of crime and thus operate with a combination of statute and common law.

Whilst most developed legal systems encourage efficiency by "either requiring those with reliable information to disseminate it or forbidding them from concealing it",[19] traditional modes for investigating a crime against art, such as interviewing the witnesses or obtaining statements in a fraud-related offence, become "ineffective" because the investigatory trail "tends to lack documentary evidence, which conventional fraud inquiries rely upon".[20] This therefore requires an evidential chain that is multidisciplinary; "one that not only accepts particular evidence that may support the assertion of authenticity, but which can also contest evidence that is not correct".[21]

4. Authentication: Means and methods

4.1. Connoisseurship

How is authenticity translated, transmitted and preserved? What is coherent truth? The value of art is all about perception = (perceived) rarity + (perceived) authenticity + (perceived) demand. Serotonin reacts on a subconscious level; it is more enticing to look for answers

[16] G. Day, "Explaining the Art Market's Thefts, Frauds, and Forgeries (And Why the Art Market Does Not Seem to Care)", *Vanderbilt Journal of Entertainment & Technology Law*, Spring 2014, vol. 16, no. 3, p. 439.

[17] M. James, "Art Crime" [in:] *Trends & Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra 2000, p. 1.

[18] Ibid., p. 1.

[19] G. Day, "Explaining the Art Market's Thefts…", p. 464.

[20] M. James, "Art Crime"…, p. 4.

[21] R. Sloggett, "Considering Evidence in Art Fraud" [in:] *Contemporary Perspectives on the Detection, Investigation and Prosecution of Art Crime*, eds. D. Chappell, S. Hufnagel, Ashgate Publishing Company, Surrey, England 2014, p. 121.

that feed our assumptions. As such, questions around verifiability in connoisseurship have haunted art experts throughout the centuries. Without compelling evidence of who created a painting, experts must examine a number of characteristics such as colour, content and technique in order to determine whether a specific master produced a particular work.[22]

Much of art-historical scholarship as a means for interrogating the claims of generative style is based on the Morellian method, whereby identification of morphological traits is deemed positivist, objective and scientific.[23] The stakes are raised when connoisseurship treats style as evidence for contingent cause. To claim that one can determine the "authorship" of a painting "requires an entirely different level of empirical support than simply showing that one has an experienced-based way of seeing".[24] The approach taken in the exemplary debate between two prestigious representatives at Museum Boijmans van Beuningen stems from Morelli's science of pictology.

Ernst van de Wetering, of the Rembrandt Research Project, and Museum curator Jeroen Giltaij expressed contradictory opinions when asked whether or not the painting "Tobit and Anna" should be attributed to Rembrandt.[25] Both experts deploy their arguments in ways that can be seen to establish the very essence of what makes connoisseurship controversial – when acuity or perception drifts from authenticity to claims of authorship. Whilst there is no danger in using general terms to class an object as "merely or trivially, taxonomic" to ascribe Rembrandt van Rijn's very own personal style as proof of attribution can tip the scales towards treating speculation as inferred fact.[26]

The Federal Court of Australia's guide on "Expert Evidence & Expert Witnesses" states that an expert witness can be expected to "give opinion evidence" and/or "express an opinion that may be relied upon in alternative dispute resolution". Therefore, the problem lies not in opinion alone but rather in whether that opinion has sufficient foundation. Self-confidence and understanding strengthens the ability to make autonomous decisions in the face of adversity but requires a level of ability that takes time and training to mature.[27]

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[22] G. Day, "Explaining the Art Market's Thefts…", p. 478.

[23] D. Ebitz, "Connoisseurship as Practice", *Artibus et Historiae* 1988, vol. 9, no. 18, p. 208.

[24] S.A. Cole, "Connoisseurship all the way down: art authentication, forgery, fingerprint identification, expert knowledge" [in:] *Art Crime: Terrorists, Tomb Raiders, Forgers and Thieves*, ed. C. Noah, Palgrave Macmillan, London 2016, p. 31.

[25] Museum Boijmans van Beuningen (MBVB), *Rembrandt? No, I don't recognise him!*, 20 March 2012, https://www.youtube.com/watch?v=dfE73puKbSU (accessed: 20.08.2019); Museum Boijmans van Beuningen (MBVB), *Rembrandt? Yes, it has to be him!*, 27 March 2012, https://www.youtube.com/watch?v=CJ6oX8XWDPk (accessed: 20.08.2019).

[26] R. Neer, "Connoisseurship and the Stakes of Style", *Critical Inquiry*, Autumn 2005, vol. 32, no. 1, pp. 11–12.

[27] J. Ashley-Smith, "Losing the Edge: the Risk of a Decline in Practical Conservation Skills", *Journal of the Institute of Conservation* 2016, vol. 39, no. 2, p. 121.

4.2. Provenance

Authentic works held within private collections often have no documentation to support claims of authenticity. In contrast, other collectors hold significant provenance trails with no means to explicate the accompanying names, dates and places. Such was the case with "A Nude" by Moise Kisling.[28] The provenance research trail can take an investigator to established archives, filing systems, libraries, catalogues, indexes, and representative inventories – anything that informs a work's genesis and biography; it is a record of more than just the "social life" of an object. With existing art market codes of practice contesting the diminutive act of removing context from cultural heritage, provenance has strengthened to become not only a method of attribution or evidence of authenticity but proof of ownership and treatment of good-faith. "Indeed, stolen art often resembles those with clean titles, frustrating attempts by good-faith buyers to guarantee an unchallenged purchase…it is easy to bring a lawsuit alleging to be the try owner of a painting, the effect of creating a cloud over the work's title. A work loses almost all marketability, and thus value, when other potentially assert a claim over it as few buyers wish to litigate a replevin claim or even possibly risk losing the work. Because few artworks possess such value worth litigating, these disputes often settle".[29]

Theft has ravaged the art industry, yet the response has been to increase secrecy. Day states that a work with strong provenance comes at a premium, and "as a provenance becomes cloudier, its value diminishes".[30] Unfortunately acting on good-faith requires that "one take into account indications of illegality with gross negligence", without the obligation of conducting research.[31] Provenance provides a reconstruction of past events, and for a work to enter the art market at its maximum value it is expected that secure documentation accompanies it. The sad irony is that the cause and effect of transactional secrecy in the market only encourages art theft by reducing the sum of information upon which a consumer may rely.

Thievery isn't the only undesirable behaviour affecting the art market. "(…) the lack of warranties or guarantees accompanying many art transactions mandates that any hopeful purchaser guarantee a work's most essential quality, i.e. its authenticity".[32]

[28] M. Masurovsky, "A Nude by Moise Kisling", *Plundered Art: a perspective from the Holocaust Restitution Project*, 3 April 2019, https://plundered-art.blogspot.com/2019/04/a-nude-by-moise-kisling.html (accessed: 24.07.2019).

[29] G. Day, "Explaining the Art Market's Thefts…", p. 476.

[30] Ibid., p. 477.

[31] G. Wessel, "Dealers and Collectors, Provenances and Rights: Searching for Traces" [in:] *Countering Illicit Traffic in Cultural Goods: the global challenge of protecting the world's heritage*, ed. F. Desmarais, International Council of Museums, Paris 2015, p. 9.

[32] G. Day, "Explaining the Art Market's Thefts…", p. 478.

Indeed, how reliable are provenance claims? Ideally an unbroken list/series of owners could provide crucial information, but what if the work itself is forged? What if the documentation that follows a work into market is forged? And what if forged works are accompanied by forged documentation? Art is a poorly regulated trade; patrons should not underestimate the number of forgeries, or indeed the probability of purchasing a problematic work. Elmyr de Hory alone painted and sold approximately one-thousand forgeries in the styles of Matisse, Van Gogh, and other celebrated masters.[33]

Art dealer John Drewe's expert understanding of the power of provenance gave him "unlimited access" to the world's most renown cultural heritage institutions.[34] Over several years Drewe ingratiated himself with major bodies such as the Tate, Victoria and Albert Museum and the Institute of Contemporary Art. He infiltrated their official records to include both digital and hardcopy provenance documentation, proving to prospective buyers that associate fraudster John Myatt's fake Giacometti's, Braque's and Klee's etc. were "genuine".[35] The "secure" home for countless works' proof of derivation was ransacked and all it took was "the skill of a painter, the hubris of a con man and the organised, planned co-operation of a team of lesser accomplices" to successfully thwart the system.[36]

Understanding the amenability of forged documentation can better prepare an investigator with the skills necessary to avoid the provenance trap. Pre-emptive strategising to digitally eradicate fake or forged provenance is underway. At the 2019 Association for Research into Crimes against Art (ARCA) Art Crime Conference, Massimo Sterpi presented on current platforms being used to fight concerns around provenance.[37] He discussed Verisart, a Blockchain-based artificial intelligence that seeks to combine transparency, anonymity and security to protect records of creation and ownership of artworks and collectibles. According to Sterpi, Verisart "will fight art forgery" by providing an "airtight" authentication methodology that allows for real time verification of artworks using a distributed ledger and hi-resolution image-recognition technology.[38]

Other examples that involve extracting metadata through automatic web scraping include: Plantoid, a database created by artist Primavera de Filippi that theorises an

[33] Ibid., p. 479.

[34] S. Nall, "An Australian Art Dealer's Perspective on Art Crime" [in:] *Contemporary Perspectives*…, p. 102.

[35] M. James, "Art Crime"…, pp. 2, 3; D. Chappell, K. Polk, "Fakers and Forgers, Deception and Dishonesty: An Exploration of the Murky World of Art Fraud", *Current Issues in Criminal Justice*, March 2009, vol. 10, no. 2, p. 400.

[36] S. Nall, "An Australian Art Dealer's Perspective…", p. 102.

[37] M. Sterpi, "Collision or Collaboration: the Economic Impact of Cultural Heritage in Stakeholder Territories", *ARCA Art Crime Conference*, Amelia, Umbria, 22 June 2019.

[38] Ibid.

on-going and automatic chain of contract; Chronicled embeds artworks with microchips, which can be scanned to attain information and indubitably be tracked risk-free; Magnus, compiled through crowdsourcing, contains more than ten million works and their prices; Sothebys' Thread Genius identifies objects and then recommends similar images to the viewer; Maecenas incorporates tokenisation into its cryptography, thus making it impossible to falsify transaction sales. These are just a few examples of artificial intelligence programmes set to aggregate statistics for future provenance claims.

4.3. Forensic science

Scholarly research, connoisseurship and provenance are necessary for any investigatory framework with which one interrogates the substantiality of materials and techniques but forensic science "provides contestable and verifiable evidence of the kind required in legal cases".[39] Conducting technical research to investigate an artwork or antiquity is a necessary step towards establishing verification of authenticity. William Charron, who founded the Court of Attribution for Art, a new body dedicated exclusively to resolving art disputes launched in The Hague on 7 June 2018, summarised in an interview that "in addition, where authenticity cases frequently turn on expert evidence, including in particular forensic science (evaluating a work of art at a molecular level to detect dating anachronisms) and provenance research, I thought that a less-adversarial expert model might work, meaning those kinds of experts would be appointed by the tribunal itself, similar to French and German courts".[40]

To rely solely on connoisseurship and provenance presents a misnomer or burden of diligence that risks loss. Lord Duveen was sued for slander of title in the 1920s after publicly claiming that Mrs Andrée Hahn's Leonardo da Vinci was not what it was purported to be.[41] He put forward a worthy panel of art critics, art historians, several museum directors and a chemistry professor but despite his varied collection of experts Hahn's forensic and scientific analysts trumped Duveen's defence. Hahn's evidence, which included X-radiography, was enough to convince nine of the twelve jurymen that forensic science was the more authoritative source in this case.

Science presents a framework for processing and understanding certain types of information. To understand a given phenomenon the following cyclic pursuit plays out:

[39] R. Sloggett, "Art crime: fraud and forensics", *Australian Journal of Forensic Sciences* 2015, vol. 47, issue 3, p. 1.

[40] M. Fox, "Q&A: Law Alumnus Spearheads New Art Attribution Court", *UVA Today*, 26 July 2018, https://news.virginia.edu/content/qa-law-alumnus-spearheads-new-art-arbitration-court (accessed: 11.07.2020).

[41] R. Sloggett, "Art crime…", p. 2.

making an observation, formulating a hypothesis and performing experiments. Forensic science is frequently called upon in authentication cases to present a 'different kind of evidence' that works as a less-adversarial model.[42]

The use of raking light and microscopic examination is particularly useful for visual examination because close inspection of the materials is required. Ultraviolet (UV) light and infrared (IR) can be used to determine whether any lasting remnants of existing varnish or preparatory layers exist. The increasing need for non-destructive techniques in the investigation of paintings has encouraged the use of nuclear instruments, for example the portable x-ray fluorescence spectrometer (XRF) can be used to take an elemental map of regions of different colours from the surface of a work. XRF can help discern the painter's palette and answer whether or not it is consistent with the attributed artist.

XRF readings present a compact analysis of all layers, surface to preparatory, and their elements. In other words, the "characteristic X-rays from elements in pigments in under layers, down to (and perhaps even including) the ground layer will be present in the spectrum".[43] Therefore, it may be difficult to determine any definitive outcomes from the data provided as ambiguous results are inconclusive. Although there is no substitute for examining the materials and techniques of an artist, a credible database from which to reference one's findings is needed before any definitive statement can be reached.

The long list of analytical tools available for the forensic investigation of materials and techniques include Polarising Light Microscopy, Raman Spectroscopy and Fourier Transform Infrared Reflectography. If visual examination and non-destructive techniques are proving insufficient, sampling with the client's permission can also take place. A section taken from a painting, usually accommodating several paint layers and less than a millimetre in diameter, can be subjected to instrumental analysis. Gas Chromatography and Mass Spectrometry with more recent additions of Synchrotron beam line techniques are used to inform art crime investigations.[44] Another tool used in art authentication for the purposes of providing closer inspection of the pigments in a paint sample would be a scanning electron microscope (SEM).

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[42] M. Fox, "Q&A: Law Alumnus Spearheads…"

[43] L.D. Glinsman, "The practical application of air-path X-ray fluorescence spectrometry in the analysis of museum objects", *Reviews in Conservation* 2005, no. 6, p. 8.

[44] V. Kowalski, R. Sloggett, *Building Evidence for Use in Criminal Cases – Standard Practice and Methodologies – A Case Study in Australia*, The University of Melbourne, [n.d.] Victoria, p. 4, http://authenticationinart.org/pdf/papers/Building-evidence-for-use-in-criminal-cases-%E2%80%93-standard-practice-and-methodologies-%E2%80%93-A-case-study-in-Australia-Robyn-Sloggett-and-Vanessa-Kowalski.pdf (accessed: 20.10.2020).

Yet, new technologies to assist technical research are always being developed. Rutgers University in New Jersey and Atelier for Restoration and Research of Paintings in the Netherlands are currently undertaking studies using Deep Recurrent Neural Network (DRNN). DRNN conducts machine-based algorithms that have been programmed to look for specific features in line drawings by Picasso, Matisse, and Modigliani amongst others. DRNN aims to analyse the mark making of questionable works by orienting the "push" and has so far successfully identified the artist in 80% of examinations undertaken.[45]

5. Reflections: From reactive to pre-emptive

"Conservation: all actions aimed at the safeguarding of cultural material for the future. Its purpose is to study, record, retain and restore the culturally significant qualities of an object with the latest possible intervention".[46] Reflecting upon Cook, Lyall and Sloggett's definition of contemporary conservation one can determine that it is partly the responsibility of conservators to protect cultural heritage. Their principles and practices inform critical, technical examinations and treatments, and can also aid the recovery of lost, stolen, damaged, imitated or illicitly traded heritage. It begins with advocating for the significance of art, antiques and cultural heritage. In *Charles Blackman and ORS v. Peter Gant and Anor* (2010) VSC 22, for example, the police were reluctant to cooperate largely due to reasons of indifference.[47]

The adverse effects of being desensitised to art crimes, often considered "more prankster than gangster" is why the current estimate is that 10 per cent of the art market is "fake or problematic" and only "a fraction of these works are ever identified".[48] The hidden and less conservative estimate or dark figure of crime will continue to persist with no consistent reporting mechanism in place. It is paramount that we acknowledge the scale and capacity of art crime and take the matter seriously. The "L'Arte Di Salvare

[45] M. Sterpi, "Collision or Collaboration…"

[46] I. Cook, J. Lyall, R. Sloggett, "Conservation in Australian museums…"

[47] *Charles Blackman and ORS v. Peter Gant and Anor* (2010) VSC 229; C. Alder, D. Chappell, P. Polk, "Frauds and Fakes…", p. 205.

[48] N. Charney, "Provenance Trap: Understanding the Modus Operandi of Art Forgers", The Association for Research into Crimes Against Art, lecture, Amelia, 25 June 2019; S. Nall, "An Australian Art Dealer's Perspective…", p. 108; K. Polk, L. Aarons, C. Alder, *An Exploration of the Illegal Art Market o Australia*, A Report Submitted to the Criminology Research Council, Department of Criminology, University of Melbourne 2000, p. i, http://citeseerx.ist.psu.edu/viewdoc/summary;jsessionid=F01F50233421C507EE9A10B5E9F6F83D?doi=10.1.1.421.4652 (accessed: 14.10.2020).

L'Arte" exhibition provides the perfect springboard for discussing the benefits of working together, of universal cohesion.

6. Global networks: Objects and the people that care about them, exploring international repatriation as a means for righting past wrongs. "L'Arte Di Salvare L'Arte" and the University of Manchester

The 2019 "L'Arte Di Salvare L'Arte" exhibition at the Quirinal Palace in Rome displayed art salvaged by the Carabinieri of the Department for the Protection of Cultural Heritage (TPC). Some of the most significant works recovered by the Carabinieri were revealed together for the first time, including the Euphronios krater (stolen in the '70s from one of Cerveteri's necropolises); the only complete Capitoline Triad (stolen from the Tenuta dell'Inviolata in 1992); the "Il giardiniere" by Vincent Van Gogh (stolen in 1998 from the Galleria Nazionale d'Arte Moderna in Rome); and a pair of 4th century marble griffins (stolen from the tomb of Ascoli Satriano in 1976).

The last 50 years has seen the Carabinieri Task Force recover about 3 million finds; a significant number. However, this was only achieved with the help of a growing global network. The "L'Arte Di Salvare L'Arte" exhibition highlights the power of international cooperation and indicates that success can really only be achieved with universal acknowledgement, support and response.

In a similar vein, Irit Narkiss and Mark Furness from the Museum of Manchester and John Iris Library reflected upon their experience of art crime at the "Gilding & Decorative Surfaces Group Symposium: Devotional Objects", the Little Ship Club, London, 6 March 2020. The talk focused on how cultural heritage institutions respond to claims of repatriation/restitution, and the consequences of their actions.

A delegation of Traditional Owners from the Australian Institute of Aboriginal and Torres Straits Studies (AIATSIS) have been working with the Manchester Museum, part of The University of Manchester, on a project that has the scope to facilitate the return of cultural heritage back to Country. Funded by the Australian Government to mark the 250th anniversary of Cook's first voyage to the East Coast of Australia, the project not only involved initial secondary source research of institutional holdings but was also followed up with the targeted investigation of online collections and direct contact with community stakeholders.

By developing conversations around the future of their collections and, critically, taking action, the Museum of Manchester leads by personal, professional and sectoral

example. "Repatriation is not about what is lost but about what is gained".[49] Narkiss and Furness refined their "First Pass" collections report during custodian meetings on Country, promoting cross-cultural collaboration and revitalisation. This dialogue has since led to specific reacquisitions being made.

Repatriation/restitution is by no means an easy process and the work currently being implemented at the Museum of Manchester not only addresses unrequited colonialism, which promotes healing and reconciliation, but draws attention to the lasting impact/post-colonial trauma of art crime. The University of Manchester has since identified and plan to return 43 sacred and/or ceremonial objects to the Aranda, Gangalidda Garawa, Nyamal, and Yawuru peoples.[50]

In conservation the principles and ethics resulting from a science-based agenda, inspired by universal values inherited from the Enlightenment, incites detachment from object biographies. At Manchester Museum, it was the act of bringing secret sacred objects back to Country that was most important and necessary for cultural revitalisation. The act unlocked the objects' lore, history, tradition and story and in turn highlights the art of value. Objects don't have needs; they only have the needs of the people that care about them.

7. Conclusion: Reflecting on cohesion

It is impossible to remain isolated and introspective within such a fast-paced environment. Art, antiques and antiquities are exchanged, trafficked and smuggled daily with or without the stakeholder's knowledge. There's no time like the present to integrate frameworks that proactively endorse the protection of our shared cultural heritage.

Whilst science is politically attractive the Arts are not. Contingent valuation questionnaires regarding the economics of cultural heritage have surfaced to provide proof that growing awareness around cultural policy exists but there is a need for comprehensive groups to unite and, ideally, challenge the existing model.[51] The discussion point: fragmentary dialogue concerning art crime requires better interdisciplinary cohesion, came up again and again during the 2019 Art Crime Conference. Training modules like

[49] I. Narkiss, M. Furness, "The return of cultural heritage project: what does it take to unconditionally repatriate?", Gilding & Decorative Surfaces Group Symposium: Devotional Objects Symposium", Little Ship Club, 6 March 2020.

[50] Ibid.

[51] S. Mourato, M. Mazzanti, "Economic Valuatoin of Cultural Heritage: Evidence and Prospects" [in:] *Assessing the Values of Cultural Heritage Research Report*, The Getty Conservation Institute, Los Angeles 2002, p. 52.

ARCA's postgraduate certificate programme and allocating funding towards specific research endeavours, such as *Trafficking Culture*,[52] has and will continue to generate vital interest.

Investigating the authenticity or attribution of a work of art is difficult and costly. It's a process that had been made even more difficult by legal liabilities, such as the threat of being sued. Those who can offer an expert opinion avoid being assertive in fear of potential litigation, defamation of title or producing disparagement.[53] However, as evidenced time and again, the conservation lab/studio is *not* be a neutral space. Conservators have the means, tools and training required to produce evidence that is verifiable in art crime investigations. Flooding the market with bad information needs to stop, and it begins with law aligning on common ground with those that have immediate access to the world's art.

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[52] https://traffickingculture.org/ (accessed: 20.11.2020).

[53] G. Day, "Explaining the Art Market's Thefts…", p. 483.

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Summary

What constitutes verifiable evidence: The role of conservators in art crime and cultural heritage protection

This article will explore the material and intellectual themes surrounding the process of authentication and attribution of works of art: how can expertise and connoisseurship best inform an investigation? How verifiable are provenance claims? How effective and/or problematic can scholarly research be? What is the role of science in authentication? And how do conservators enter the mix? It shall answer these questions by discussing the various methods and techniques in examination and analysis by exploring the three core pathways that together inform an evidentiary framework: history, provenance and technical examination.

The drive to create a robust framework that ensures best practice exists, highlighted time and again by claims of restitution, questionable authorship, falsified documentation and scholarship. Lawsuits involving authenticity and attribution require evidence and proof. Various levels of understanding coexist between all disciplines involved, and allowing these levels of understanding to intersect will implement necessary change.

Keywords: verifiability, evidence, authentication, attribution, provenance, forensic science, fakes, fraud, authorship, conservation

Streszczenie

Co składa się na wiarygodność dowodu: o roli konserwatorów w walce z przestępczością przeciwko dziełom sztuki

W artykule podjęto tematykę ustalania oryginalności i autorstwa dzieł sztuki. Autorka stawia pytanie, jaki jest wkład wiedzy specjalnej w ustalenia faktyczne, w jaki sposób podlega weryfikacji proweniencja, jaką rolę odgrywa tu nauka, wreszcie jakie zadania stoją przed konserwatorami. Aby odpowiedzieć na te pytania, poddaje analizie metody śledcze w świetle trzyelementowej zasady budowania ustaleń, obejmującej historię, łańcuch proweniencji i badania techniczne.

Pojawiające się raz po raz roszczenia restytucyjne, zarzuty podważające autorstwo, sfałszowane dokumenty i wątpliwe ekspertyzy uprawomocniają dążenie do utworzenia sprawnego schematu metodologicznego, dzięki któremu utrwalałyby się dobre praktyki. Procesy sądowe o oryginalność i autorstwo wymagają szczególnych dowodów. Rozmiary wzajemnego rozeznania w obszarach badawczych pomiędzy ekspertami różnych dyscyplin bywają niejednakowe, toteż poszerzanie dyskursu przyczyni się do ogólnej poprawy sytuacji.

Słowa kluczowe: wiarygodność dowodu, sprawdzalność dowodu, oryginalność dzieła sztuki, atrybucja, proweniencja, kryminalistyka, falsyfikat, oszustwo, autorstwo dzieła sztuki, konserwacja

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Assessment of the monument protection system: The need for research in the constructivist-interpretative paradigm

1. Introduction

Current scientific research favours interdisciplinarity – "extended interdisciplinarity is particularly desirable in the study of phenomena in which both aspects – material and cultural – are significant and strongly intertwined with each other".[1] The researcher can and even should often conduct research, select and combine paradigms in an unrestricted manner, because in social sciences the state of coexistence of different paradigms is a normal state.[2]

Multidisciplinarity should prevent the phenomenon of fragmentation of knowledge. As Harold Lasswell observes, the progressive specialisation of sciences may lead to narrowing of their epistemological and methodological perspectives, which may result in a reduction in their understanding and explanation potential.[3]

Feature testing the effectiveness of the protection of monuments should be an interdisciplinary approach to the subject, due to the complexity of the phenomenon which is to protect and care for the monument. In addition to the analysis of legal acts, spatial analysis, and analysis of individual cases, research should be included in the constructivist-interpretative paradigm. Research conducted in this trend focuses on finding answers to the questions "Why?" and "How?". Qualitative research is characteristic of this trend, including popular methods: individual depth interview or focus group.

[1] P. Pawliszak, "Czystość czy zmaza? Czy jest sens łączyć rozumienie z wyjaśnianiem w antropologii i interpretatywnej socjologii?", *Przegląd Socjologii Jakościowej* 2016, vol. 12, no. 4, p. 8.

[2] I. Lakatos, *Pisma z filozofii nauk empirycznych*, Warszawa 1995.

[3] H.D. Lasswell, "The policy orientation" [in:] *The Policy Sciences: Recent Developments in Scope and Method*, eds. D. Lerner, H.D. Lasswell, Standford 1951.

As noted by Andrzej Zybertwicz, "a project rooted in the current standards is more understandable for other researchers, it is also simpler and more transparent internally, one can use the same techniques of collecting and processing data considered as sophisticated".[4] The use of qualitative research in the case of the assessment of the monument protection system may seem controversial and raise many reservations, such as basing sociological research on incomplete induction (logically unreliable inference), generalisation or simplification of results. However, despite the reservations, these studies show perfectly how the studied phenomenon or issue is located in the consciousness of individuals and the various social groups they create.

The study of the monument protection system in the constructivist and interpretative trend is to show, on the one hand, the knowledge of the law of monument protection by the society, on the other hand – to clarify the problems that arise from the interpretation of the law of monument protection, and above all, to provide an opportunity to comment on the current system of protection and care of monuments.

2. Monument protection system

The monument protection system is organised on the basis of the law in force in a given country. In Poland, the basic operation of the monument protection system is the Act of 23 July 2003 on the protection and preservation of monuments (consolidated text: *Journal of Laws* of 2020, item 282, as amended). It is the footnotes that are included in it that are the basis for undertaking activities in the field of monument protection. Article 1 of this Act defines the subject matter, scope and forms of protection and care of monuments, financing of works on monuments, as well as the organisation of monument protection authorities. Kamil Zeidler describes this act as the "constitution for the protection of cultural heritage", which defines powers and duties of conservators and regulates the procedures for dealing with historic buildings.

However, the monument protection system is not only about the law. Kamil Zeidler points to the pillars of the system, apart from law, financing and educating social awareness.[5] Only through research you can acquire quality data consisting of just the abovementioned third pillar of the monuments protection system. Żaneta Gwardzińska also points to, apart from the law that affects the protection of heritage, politics, history and the contemporary understanding of patriotism.[6]

[4] A. Zybertowicz, "Konstruktywizm jako orientacja metodologiczna w badaniach społecznych", *Kutura i Historia* 2001, no. 1, p. 123.

[5] K. Zeidler, *Prawo ochrony dziedzictwa kultury*, Warszawa 2007, pp. 273–290.

[6] Ż. Gwardzińska, *Egzekucja nadzoru konserwatorskiego*, Gdańsk 2019, p. 43.

More specifically, the monument protection system also includes the conservation theory, which is important in the process of applying the law, because it is the basis for the discretionary power of conservators. For the application of the law, the ideal situation would be to have one generally held theory of conservation which is the basis for issuing decisions. However, in practice, it is difficult to talk about a single conservation theory. It is tempting to say that there are not enough conservators for each theory and possibly every "conservator admits several theories depending on the time, place and nature of the object".[7] Basic theory of conservation is contained in scholarly analysis on international instruments, but there is no possibility of formal enforcement rules contained in them – which gives the possibility for states not to comply with them. In practice, this means that when implementing any action, or can refer to any document that one chooses, or one can ignore any of them without consequences.[8] Of course, international agreements such as the Hague Convention, Convention Concerning the Protection of the World Cultural and Natural Heritage and others must also be taken into account. It is in these documents that one can search for normative grounds for issuing decisions. However, many of these documents use indefinite terms which leave some room for discretion to conservators. Important elements of the monument protection system are interactions that occur within it. They have a significant impact on the preservation of cultural heritage. Interactions in the monument protection system do not stop at the owner–representative of monument protection authorities (see: Figure 1). An important element is the people who mediate between these two groups. The group of intermediaries includes restorers, architects, supervision inspectors and renovation technicians. It is a group of people that are often overlooked when attention is being focused only on the owners and the monument protection office; in fact, they are indispensable in the context of the monument protection and care system due to their influence on the preservation of monuments.

The monument protection system consists of many levels, hence examining it or making an evaluation attempt is a complicated process. The basis is the analysis of the law – acts, regulations, which should be treated as the foundation of the monument protection system. The way of interpreting law on the protection of monuments can be found in the jurisprudence, which is considered to be the source of legal interpretation. It should be borne in mind that the effects of the existing regulations and the

[7] K. Zeidler, "O znaczeniu i roli teorii konserwatorskiej w procesie stosowania prawa" [in:] *Współczesne problemy teorii konserwatorskiej w Polsce*, ed. B. Szymigin, Warszawa – Lublin 2008, p. 177.

[8] B. Szmygin, "Teksty doktrynalne w ochronie dziedzictwa – analiza formalna, zasady tworzenia, dalsze działania" [in:] *Vademecum konserwatora zabytków*, ed. I. Stachyra, Warszawa 2015, pp. 11–12.

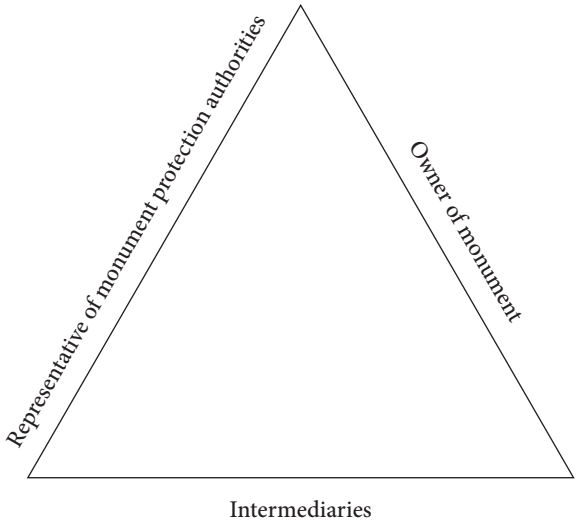

Figure 1. Interactions in the monument protection system
Source: Own elaboration.

conservation theory are visible in space. Therefore, to check whether the system is beneficial for monuments, a careful spatial analysis should be made. Conducting research in the constructivist-interpretative paradigm is complemented by the research on the evaluation of the monument protection system, comprehensively illustrating not only how the public understands the applicable regulations, but also how they are applied by the authorities.

3. Research in the constructivist-interpretative paradigm

Constructivism is not a uniform position, but rather a set of positions in the field of social sciences, as well as natural and mathematical sciences.[9] As noted by Michael Wendland, one can distinguish within the overall constructivist perspective three subtypes: social constructivism, cognitive constructivism and epistemological constructivism

[9] More on this topic see i.a.: P. Berger, T. Luckmann, *The Social Construction of Reality. A Treatise in the Sociology of Knowledge*, London 1991; D. Bloor, *Knowledge and Social Imagery*, Chicago – London 1991; K. Kaźmierska, F. Schütze, "Wykorzystanie autobiograficznego wywiadu narracyjnego w badaniach nad konstruowaniem obrazu przeszłości w biografii. Na przykładzie socjologicznego porównania narracji na temat życia w PRL-u i NRD", *Przegląd Socjologii Jakościowej* 2013, vol. 9, no. 4, pp. 122–139.

(methodological).[10] They all however have one thing in common – they assume that knowledge of the world is constructed in the processes of social interactions. "Constructivism in the area of social research is sometimes understood as a theory or conception of science, knowledge and reality in general; as theoretical orientation; methodology, methodological orientation or the trend of empirical research – in the latter case, the following terms appear in the Anglo-Saxon literature: Social Studies of Science, Social Studies of Knowledge, Studies of Scientific Knowledge, Science and Technology Studies".[11] Constructivism from a sociological perspective refers to the way of creating reality. It is based on the assumption that people construct the reality/world in which they function. Constructivist research focuses on the descriptive analysis of reality. The researcher tries to find out how the participants of the studied world construct reality and how they understand it. As far as possible, "enters" in the studied phenomenon, gathering views about it.[12] It is recognised that the rise and development of constructivism changed the cognitive perspective not only over social sciences, but also over science in general.

In 1979, Gibson Burrell and Gareth Morgan identified four main paradigms in the social sciences: functionalist paradigm, interpretive paradigm, radical humanist paradigm and radical structural paradigm.

The research orientation of interpretativism arose in opposition to functionalism. The need to penetrate into social reality in order to understand the rules of a given society is its basic assumption. Interpretativism "focuses on understanding the fundamental nature of the social world as it is at the level of subjective experience. He is concerned with issues related to the nature of the *status quo*, social order, consensus, social integration and cohesion, solidarity and topicality. This approach is nominalist and antipositivist, voluntaristic and idiographic".[13]

The basic assumption of the interpretative method is an attempt to show and explain the observed experiences and practices from the point of view of their participants. Therefore, the preferred methods of data collection are interview, observation and text analysis. The purpose of their application is to show the actions taken by the individuals, as well as the way in which they interprets these actions and the context of their occurrence. "In constructivist epistemology, man is the creator of the world. Through the

[10] M. Wendland, "Perspektywa konstruktywistyczna jako filozoficzna podstawa rozważań nad komunikacją", *Kultura i Edukacja* 2011, no. 4(83), p. 31.

[11] A. Zybertowicz, "Konstruktywizm jako orientacja…", p. 14.

[12] K. Charmaz, *Constructing Grounded Theory. A Practical Guide Through Qualitative Analysis*, London 2006, p. 240.

[13] B. Bombała, "Kwestia paradygmatu w naukach o zarządzaniu a Kenetha D. Stranga model badania organizacji", *Zagadnienia Naukoznawstwa* 2018, no. 1–4(215–218), pp. 8–9.

process of interpretation, he gives meaning to his environment and structures them into knowable and formable beings. The interpretative approach emphasises the connection between the discovery and creation of the world by man in the process of cognition".[14]

3.1. Qualitative research in the protection of monuments

Research implemented in the constructivist paradigm focuses on answering questions such as "Why?" and "How?" This trend is characterised by qualitative research that reaches individual experiences, allows reaching opinions and the way of interpreting certain facts by the participants or "creators" of the research field. In qualitative research, the so-called "immersion" is important in order to get to know and understand the studied reality better than its participants.[15]

The collected qualitative data is a source of descriptions, opinions and explanations of the processes taking place in specific local contexts. This means that the researcher learns and interprets things in their natural environment. "Qualitative research is not limited to the production of knowledge or interpretation for purely scientific purposes. Often, the intention of researchers is to transform the studied area or to create knowledge useful in practice, allowing the formulation or support of specific solutions for specific practical problems".[16] The use of qualitative research methodology in the field of legal sciences is not a common practice. In 2015, as part of the project by Alicja Jagielska-Burduk entitled "Legal mechanisms of cultural heritage management", group interviews were conducted with the participation of three varieties: collectors, representatives of monument protection authorities and cultural institutions. The research technique used was a qualitative research tool – focus group interview (FGI). This technique consists in a joint discussion of the interview participants with a moderator on a predetermined topic or group of topics. As Steinar Kvale notes, the aim of the focus group is not to reach consensus about, or solutions to, the issues discussed, but to bring forth different viewpoints on an issue.[17] He conducted research that showed a number of postulates raised by the participants taking part in the research. These were primarily the expectations of a wider involvement of entities such as the owners of monuments, collectors, museologists in issuing opinions on legal acts at the stage of the legislative

[14] Ł. Sułkowski, *Recepcja nurtu interpretatywnego w naukach o zarządzaniu*, p. 24, https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/85295/sulkowski_recepcja_nurtu_interpretatywnego_2007.pdf?sequence=1&isAllowed=y (accessed: 25.11.2020).

[15] C. Geertz, *Interpretacja kultur. Wybrane eseje*, Kraków 2005, pp. 35–36.

[16] D. Dejna, *Metoda. Dociekanie prawdy o amiszach*, p. 4, http://www.accept.umk.pl/publications/PDF_DD/2012_DD_1.pdf (accessed: 20.11.2020).

[17] S. Kvale, *Doing Interviews*, London 2008, p. 106.

process, the postulate of building mutual trust of the state towards citizens. The research also revealed the doubts of the respondents regarding the application of the law in practice due to the excessive enactment of various regulations. As noted in the concluding remarks, "focus groups allow obtaining information from specialists, and the reports that are the final results of these studies are an attractive and often more accessible form for people outside the professional circle, allowing for perceiving practical problems of the functioning of heritage protection".[18]

One of the elements of my doctoral dissertation[19] was a chapter devoted to research on the law of protection of cultural heritage in the constructivist-interpretative paradigm. As part of it, I conducted 32 interviews with three groups of respondents – owners of immovable monuments, people working in the monument protection office and with intermediaries between the two groups. The aim of the research was to answer the question: is the current legal system beneficial for monuments and does it take into account the needs and interests of monument owners? The result of the research was the distinction of four types of changes that should be introduced – top-down changes (changes in legal regulations), changes in the conservation doctrine, changes in the work system of entities responsible for monuments and changes aimed at increasing public awareness of the care of monuments.

These interviews, on the one hand, show the knowledge of the monument protection law by the above-mentioned groups, on the other hand – the problems arising from the interpretation of the monument protection law. Above all, they gave the mentioned groups the opportunity to comment on the current system of monument protection and care.

3.2. Interview as a research method for the protection system of monuments

Among the methods used in the mainstream constructivist-interpretative particularly popular is individual semi-structured depth interview, it means based on a scheme developed earlier scenario. On the one hand, according to Barbara Kopczyńska-Jaworska, the script is a tool for controlling the observer himself, as it does not allow him to digress from the subject. On the other hand, as Maciej Piotrowski notices, it is better to use a more or less strict list of dispositions than a questionnaire, i.e. a set of identical and

[18] *Zogniskowany wywiad grupowy jako metoda badania prawa ochrony zabytków*, eds. A. Jagielska-Burduk, W. Szafrański, P. Lasik, Bydgoszcz 2016, p. 149.

[19] K. Schatt-Babińska, *Zabytki nieruchome w rękach prywatnych – historia, zagadnienia ochrony i konserwacji na przykładach obiektów wpisanych do rejestru zabytków w Łodzi*, unpublished doctoral dissertation under the supervision of Professor Krzysztof Stefański, doctoral defense: 16 January 2020, University of Łódź, Faculty of Philosophy and History.

ordered questions in a specific order. A depth interview is semi-structured, including issues and topics that should be raised during the interview, allows for the appropriate shaping of the atmosphere of the conversation, which is not possible in the case of a survey using a questionnaire or a structured interview.

In the case study evaluation of the system of protection of monuments should be used purposive sampling. The so-called "common experience" is crucial in selecting respondents. It allows you to comment on the subject of the study. It should be resorted to selection described by Kaja Kaźmierska, which benefited from Fritz Schütze's concepts and on this basis to choose a "well-informed citizen" – using the knowledge and experience of experts working in the test field. Due to the research issues, the criteria for the selection of respondents are belonging to a one of three group, which function in the monument protection system: monument owners, representatives of monument protection authorities and the so-called intermediary between the two groups.

Interviews can be individual or group. The choice of one of them depends on a researcher and what he would like to get. If essential for the researcher is to analyse the individual case, for example, the case concerning a particular object then appears to be more helpful to use the techniques of individual depth interview (IDI).

The course of the in-depth interview is an individual relationship, the respondent may feel more at ease and the researcher may obtain more information on the subject. According to the assumptions, IDI is supposed to be an interaction with a specific goal: to gain in-depth information and knowledge. The question asked is not standardised and is open-ended. During the IDI, the respondent has the opportunity to express his/her beliefs and motives. Without the presence of other respondents, as in the case of group interview is more inclined to express honest, even controversial or contrary to the views of other opinions.

Focus group interview (FGI) allows, firstly, to test more people in a shorter time, and secondly, to obtain reliable data, because the respondents can correct and complete each other statements. During the group interview, the respondents can interact with each other. FGI is a useful technique when respondents are expected to be creative.

In the case of an interview, it is important to properly arrange the questions or issues to be discussed during the interview: "exploratory questions seek to understand how and why things work as they do confirmatory questions seek to test hypotheses based on new or existing theory. These different types of questions imply different types of methods along a parallel continuum of relatively unstructured to structured methods of data collection and analysis".[20]

[20] C. Gravlee, "Researcg Design and Methods in Medicine Anthropology" [in:] *A Companion to Medical Anthropology,* eds. M. Singer, P.I. Erickson, Chichester, West Sussex 2011, p. 70.

The use of the interview technique in research of the monument protection system allows the respondents to show the knowledge of the law on the protection of monuments, to identify problems arising from its interpretation, and gives the opportunity to comment on the current system of monument protection and care. The presented proposed changes may be analysed in terms of the possibility of their introduction and the effects they may cause. The interviews provide answers to the question about the impact of legal norms on the functioning of the community – they show how the law works and how a given group reacts to it, and how the society is shaped under its influence. The statements of the respondents are also a source of information about the legal culture.

Contextual knowledge is needed to conduct credible research – interviews. Henryk Domański points out that "research hypotheses are based on a specific vision of reality. it is about checking if my vision 'matches' the data".[21]

In the case of this type of research, generalisations are not applied to the entire population – both due to the low level of standardisation and the selection of the sample. The laws of statistics cannot be applied here – interlocutors are not selected randomly, but by stratified sampling – on the basis of representing characteristics important from the perspective of the research area. Social science is not necessarily based on generalisation.[22] It is known that research in the constructive-interpretative trend related to a specific area. When conducting interviews in a city or province, the results cannot be generalised to the population of the entire country. In this type of research, cultural data is important, not social characteristics or trait.

3.3. Inference

Depending on the adopted paradigm and perspectives in social research, both inductive and deductive inference can be used. In the case of research on the assessment of monument protection law, deduction seems to be crucial. But social research is an illustration, a search for exemplification, for new dimensions of already distinguished issues. If a researcher knows what he wants to research, i.e. if he has theoretical concepts at his disposal and looks for their empirical dimensions – experience, opinions and interpretations of experts – then his research should be grounded in the theory of deduction. According to this theory, the role of research is to "test predictions and determine if what makes sense (logic) actually appears in practice (observation).[23] On the other hand, the induction theory assumes that the observations are made first and an attempt

[21] H. Domański, *Socjologia empiryczna a determinizm*, typescript, quoted after: A. Zybertowicz, "Konstruktywizm jako orientacja…".

[22] J. Rex, *Key Problems of Sociological Theory*, London 1998, p. 115.

[23] E. Babbie, *The Practice of Social Research*, Boston 2012, p. 78.

to discover patterns – afterwards. Hypotheses are developed on the basis of the analysis of data from the conducted research. In the case of induction, theoretical propositions are not created using a logical deductive method based on previously adopted axioms or assumptions;[24] the induction methodology is based on creating a theory based on systematically collected empirical data.[25] "Deductive reasoning begins with theory and works toward specifying expectations, or hypotheses (…) these modes of reasoning are inextricably linked in the logic of social research, which seeks to generate (inductive) and verify (deductive) theory about how the world works. Regardless of their epistemological perspective, most researchers engage in both types of reasoning at one point or another. Decisions about which methods to use at any point in time should be informed by consideration of where researchers are in the research cycle".[26]

4. Conclusions

Qualitative sociology, in the constructivist-interpretative trend, assumes that the investigation of social phenomena requires the study of how they function in social awareness. Qualitative research focuses on deepening information about a given phenomenon or behaviour of individuals. The research interview seeks qualitative knowledge conveyed in everyday language and does not pursue quantification. By using words, not numbers, it allows for obtaining various descriptions of many aspects of the life world of the respondents.

Qualitative research can be a useful method in studying the monument protection system. Therefore, in addition to the analysis of legal acts, documents or cultural products, it is worth examining opinions and evaluations using social research methods in the constructivist-interpretative trend, because it is then possible to gain insight into the "humanistic coefficient", i.e. reaching (at least only declared) motivations, justifications social activities. In this way, the researcher is able to judge whether what he identifies as a problem is recognised as such and how it is interpreted.

The results of the IDI and/or FGI complement the research on monument protection law, comprehensively illustrating not only how the public understands the applicable regulations, but also how they are applied by the conservation office. The statements

[24] K. Konecki, *Studia z metodologii badań jakościowych*, Warszawa 2000.

[25] See: B.G. Glaser, A.L. Strauss, *The discovery of grounded theory: strategies for qualitative research*, Chicago 1967; B. Glaser, *Theoretical Sensitivity : Advances in the Methodology of Grounded Theory*, California 1978.

[26] C. Gravlee, "Researcg Design…", p. 73.

of the respondents are also a source of information about the legal culture of the owners of monuments.

Constructivist research completes the cognitive and methodological analysis of applicable legal acts. Qualitative research can be a helpful research tool and bring the desired effects precisely in the area of legal heritage protection. These studies support the legislative process at the stage of formulating initial proposals for changes, but can also be used to evaluate the applicable regulations.

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Summary

Assessment of the monument protection system: The need for research in the constructivist-interpretative paradigm

Research implemented in the constructivist paradigm focuses on answering questions such as: "Why?" and "How?" This trend is characterised by qualitative research that reaches individual experience, allows reaching opinions and way of interpreting certain facts by the participants or "creators" of the research field. Among those used in this trend methods, the individual interview is particularly popular.

In order to test the effectiveness of the law on monument protection, interviews should be conducted with three groups: employees of the monument protection office, owners, intermediaries between these two groups – architects, conservators, supervision inspectors, etc. The interviews provide answers to the questions about the impact of legal norms on the functioning of the studied community groups – they show how the law functions and how a given group reacts to it, and how the society is shaped under its influence. They comprehensively illustrate not only public understanding of the applicable regulations, but also how they are applied by the conservation office.

Thanks to the use of social research methods in the constructivist trend, we gain insights into the "humanistic coefficient" – we reach motivations (even if only declared) and justifications for social activities. This way, it is possible to determine whether what we identify as a problem is considered a problem and how it is interpreted.

Keywords: monument protection system, qualitative research, the constructivist paradigm, the interpretative paradigm

Streszczenie

Ocena systemu prawa ochrony zabytków: o potrzebie badań w paradygmacie konstruktywistyczno-interpretatywnym

Badania realizowane w paradygmacie konstruktywistyczno-interpretatywnym skupiają się na odpowiedzi na pytania typu: dlaczego?, w jaki sposób? Charakterystyczne dla tego nurtu są badania jakościowe, które pozwalają dotrzeć do opinii i sposobu interpretowania pewnych faktów społecznych przez uczestników – tzw. twórców badanego pola. Wśród stosowanych w tym nurcie metod szczególnie popularny jest indywidualny wywiad pogłębiony.

W celu zbadania skuteczności obowiązującego prawa ochrony zabytków należy przeprowadzić wywiady z respondentami, którzy przynależą do jednej z trzech grup – pracownicy urzędu ochrony zabytków, właściciele zabytków oraz osoby pośredniczące pomiędzy tymi dwiema grupami. Wywiady te mogą przynieść odpowiedzi na pytanie dotyczące wpływu norm prawnych na funkcjonowanie badanej grupy. Wynikiem wywiadów jest ukazanie, w jaki sposób funkcjonuje prawo, jak dana grupa na nie reaguje oraz jak kształtuje się społeczeństwo pod jego wpływem.

Wykorzystanie metod badań społecznych w nurcie konstruktywistyczno-interpretatywnym umożliwia uzyskanie wglądu we „współczynnik humanistyczny" – dotarcie do (choćby tylko deklarowanych) motywacji, które leżą u podstaw pewnych działań społecznych. W ten sposób można ocenić, czy to, co identyfikujemy jako problem, jest uznawane za problem i w jaki sposób jest interpretowane.

Słowa kluczowe: system ochrony zabytków, badania jakościowe, paradygmat konstruktywistyczny, paradygmat interpretatywny

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The birth of modern cultural heritage and its legal regulations: An actor-network theory approach

1. Matters at issue

There is little doubt that cultural heritage is a complex phenomenon, consisting of resources and activities, influencing individual decisions and the global economy alike. It includes artefacts, historic sites and natural landscapes but also songs, texts, performances or even local cooking recipes. It engages central and local authorities, museums, curators, hotel networks, airlines, publishers, restorers, tourists, as well as the science and e-communication sectors. Finally, it engages legislature. This phenomenon is far too complex to be examined and explained within a single discipline, or two, or even several. Such a task requires another tool, which – to stay independent and external – should be taken from a concept other than modernity.[1] This is because the concept of common cultural heritage was born out of the modern project, and modernity prefers pure disciplines rather than integrated tools – which we are going to avoid. Said feature of modernity stems from its fundamental concept based on subject–object dichotomy and its anthropocentric structure. This was expressed for the first time when Descartes said *cogito, ergo sum*:[2] In what was, arguably, the first call to place human being in the centre of the world. I quote that declaration as an iconic slogan of the Enlightenment[3] project, as the Enlightenment strongly influenced further crucial historic events of

[1] J. Hartman, "Nowoczesność, modernizacja" [in:] *Słownik filozofii*, ed. J. Hartman, Krakowskie Wydawnictwo Naukowe, Kraków 2010.

[2] R. Descartes, *Discours de la Methode*, 1637, quoted for: W. Tatarkiewicz, *Historia filozofii*, vol. 2, *Historia nowożytna do roku 1830*, PWN, Warszawa 1970.

[3] M. Uliński, "Oświecenie" [w:] *Słownik filozofii*…

the Western world: the American Revolution (1775–1783) and the French Revolution (1789–1805). Though that concept evolved over following centuries, each revolutionary turn (e.g., Kant 1781, Lyotard 1979) retained the central position held by man. This dichotomy has prevailed in many variants: human being–external world, culture–nature, and finally – politics–science. The central question emerging here is of epistemological nature: do we recognise the subject in an appropriate way?

Of those mentioned above, it is especially the latter dualism that is suspected of activating modernity. British scholars Robert Boyle and Thomas Hobbes disputed between 1660 and 1667 over the Boyle's experiment with a vacuum pump, with adversaries generally disagreeing as to what actually happened during the experiment. Hobbes, relying on *a priori* and metaphysical assumptions, doubted the existence of vacuum in nature and the significance of the whole enterprise. For Hobbes, everything made sense, as long as it was secondary to the Agreement he proposed and promoted, consisting in the (voluntary and deliberate) transfer of total temporal power by the people into the hands of Sovereign/Leviathan. Thus, for Hobbes, Boyle's experiment was primarily a manifestation of an undesirable way of organising social life. In this way Hobbes founded a long-term political discourse from which he completely eliminated scientific experiment, and by eliminating science based on experiment, he also eliminated nature from politics.[4] Boyle, on the other hand, relied on real, concrete and credible witnesses – the observers of his actions and their effects were members of the Royal Society, who, as a result of the machine's achievements, testified to the existence of a vacuum, something that had not existed before, and included it into the resources of nature. In his experiment, the observers were as important as the pump itself. They decided what the pump produced. Thus, Boyle founded a long-term political discourse – in the sense of exercising power over scientific research – from which he excluded politics. It was, however, only a convenient appearance, a delusion, because no careful observer of modern history would fail to overlook the fact that the objects produced in both of these areas crossed their borders and were eagerly exploited by the other side.[5] The Enlightenment clearly

[4] S. Schapin, S. Schaffer, *Leviathan and the AirPump: Hobbes, Boyle and the experimental life*, Princeton 1985; B. Latour, *We have never been modern,* Harvard University Press, Cambridge 1993; P. Boës, "What was the air pump dispute between Boyle and Hobbes really about?", 26 March 2012, https://www.academia.edu/26677414/What_was_the_air_pump_dispute_between_Boyle_and_Hobbes_really_about (accessed: 10.11.2020); Ch. Huenemann, "Hobbes, Boyle and the vacuum pump", *3 Quarks Daily* (*Science Art. Philosophy Politics Literature*), 22 December 2014, https://www.3quarksdaily.com/3quarksdaily/2014/12/hobbes-boyle-and-the-vacuum-pump.html (accessed: 10.11.2020); M. Pospiszyl, "Ateologia wielości", *Praktyka Teoretyczna* 2013, vol. 8(2), http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.ojs-doi-10_14746_prt_2013_2_13 (accessed: 12.11.2020).

[5] Z. Bauman, *Modernity and the Holocaust*, Polity Press, Cambridge 1989.

led Western civilisation into the dominance of "culture", pointing at "nature" as a field of exploration and exploitation for mankind's wellness, while Science was acknowledged to be used for this end.

In regard to this text's main goal, it is worth noting, that the second half of the 18th century brought both rational and emotional interest in the past, represented mainly by the fine arts (architecture, sculpture, painting), and leading towards new cultural identities. The activity of French *hommes de lettres* who successfully utilised improved printing technologies[6] made it possible to disseminate knowledge on ancient works of arts and architecture. In the middle of 18th century the German researcher Johann Joachim Winckelmann introduced the scientific approach, as he excavated, collected and interpreted material relicts of ancient Mediterranean civilisations, establishing a new knowledge resource.[7]

However, in the second half of the 20th century, modernity, thought as the Enlightenment based order, was called into question. What we call "the fall of modernity" started with the collapse of big political systems (totalitarian regimes, the iron curtain) and dissolution of some economical orders (command-administrative systems) and aesthetic attitudes (the end of the *avantgarde*). This decay spawned an influential intellectual formation called "post-modernity". While modern man raised epistemological questions (how to interpret the world that I am also part of?), post-modern man raises ontological issues (the world itself is doubtful, and there are many of them, so which world am I looking for?). Modern discourse – one in which a participant may eventually change his or her mind and accept the other's position – turned into a post-modern polylogue, with no chance for agreement. In addition to nature and culture, the area of discourse, i.e. a specific communication event conditioned by the context, has gained great importance. Nevertheless, this was just like multiplication of subjects, with central position still occupied by the human's mind.

Summarising all the above, the answers to the shape of reality depended on the current state of epistemology, and as a result, in a way, the entire discourse looks a little like judging one's own case. Therefore, if modern and post-modern methodologies were found to be powerless and suspicious, some thinkers proposed to replace the question of: "What is it?" with "How does it work?" and the results were at least interesting, if not fruitful. In his 1997 book, French thinker Bruno Latour presented a radical critique of dysfunctional earlier epistemic approaches based on the nature-culture dichotomy, of modern thought as an uncritical continuation of Enlightenment way of thinking at

[6] J. Migasiński, *Filozofia nowożytna*, Stentor, Warszawa 2011.

[7] J. Jokilehto, *A history of Architectural conservation. The Contribution of English, French, German and Italian Thought towards an International Approach to the Conservation of Cultural Property*, D. Phil Thesis, The University of York 1986.

the end of the second millennium, pointing at post-modern[8] concepts as a symptom of extreme epistemological crisis.[9] In consequence, Latour recommends a hybrid concept, something consisting of ontologically different parts, but working effectively as a whole. Material-semiotics,[10] the approach Latour relied on, covers much more than a simple dualistic version of reality. It covers a wide web of heterogenous factors (regardless of their ontological core) which influence each other to reach a state of stability within a certain area. It makes it possible to avoid getting stuck in *a priori* reduced essentials.

Thus, the questions this text aims to answer are as follows:

1) What makes up cultural heritage and how is it "in continuous making" (instead of what is cultural heritage)?
2) To answer this I am going reconstruct the very beginning of cultural heritage: the instant appearance of French national heritage.
3) To reconstruct that process, I am going to investigate which agents were necessary to establish that completely new concept and make its continuation and development possible. More precisely, who/what had to take part?

2. Why Actor-Network Theory?

The hybrid concept we want to explore further in relation to cultural heritage belongs to the vocabulary of Actor-Network Theory (ANT).[11] ANT, arising out of Science and Technology Studies (STS), developed in the 1980s and applied to research on the current state of society, science and technology. The first and pioneering researches were: Michel Callon, Bruno Latour, John Law, Annemarie Mol. As another approach challenging the idea of modernity, ANT introduces reflection on actors, understood as any entities able to act (that is to say, to make a difference). These are not limited to human beings only, but comprise non-human factors as well: things, tools, infrastructures, technologies, ideas, other species, documents, ecosystems. An important point made by ANT is that people usually use paths marked out (limited) by non-human actors. Because of

[8] M. Kowalska, "Postmodernizm" [in:] *Słownik filozofii*…

[9] B. Latour, *We have never been*…

[10] J. Law, "Actor Network Theory and Material Semiotics" [in:] *The New Blackwell Companion to Social Theory*, ed. B. Turner, Wiley-Blackwell, Malden, MA – Oxford 2008.

[11] B. Latour, *Politics of Nature. How to Bring Sciences into Democracy*, trans. C. Porter, Harvard University Press, Cambridge 2004; B. Latour, *Reassembling the Social. An Introduction to Actor-Network Theory*, Oxford University Press, Oxford 2005; R. Dankert, "Using Actor-Network Theory (ANT) doing research", 2011, https://ritskedankert.nl/using-actor-network-theory-ant-doing-research/ (accessed: 17.08.2019); for the recent ANT review see: M. Michael, *Actor-Network Theory: Trials, Trails and Translations*, SAGE Publications Ltd, London 2017.

this, the Actor-Network Theory is described as a "posthumanistic" or "poststructural" approach. It recommends abandoning the "modern" way of thinking by ignoring dichotomies like: culture–nature, subject–object, or human–non-human factors, as these are not able to describe reality. ANT says the actors are described upon their relations with other actors. These relations are not permanent. Thus ANT focuses on changes and reshuffles in the networks it researches. The networks are heterogenous, fluid and fragile. In effect, ANT doesn't seek for constant rules, but envisages particular cases.

The aforementioned hybrid concept is based on the idea of "generalised symmetry", which is a key concept of ANT. All actors have the same impact (power to change the network) regardless of whether are they humans or non-humans. An actor is no longer identified by its essence, but by its relationships with other actors, or more precisely, by what other actors have to do while in its presence, directly or indirectly. It is worth mentioning here, that the terms and concepts in use within ANT space are autonomous and are not in use outside ANT. It appears difficult to find terms in working language to describe these unique concepts, especially if one wants to avoid "*a priori*" reductions, or to stop talking about subjects and objects outright.

As a result, some of the concepts present in ANT space are: "actor", "actant", "human factors", "non-human factors", "black box", "hybrid", "inscription", "mediation", "translation", "purification", "obligatory passing point", "stabilisation", "making a difference", "collective" and "assemblage". Due to expected brevity of this text, I will use only few of them. One is "translation": this is what makes heterogenous entities/actors within a network communicate with each other. Translation is not just a matter of language. It is the transfer of the presence of an entity into a new area rather than the simple juxtaposition of two words covering the same entity, one in its "native" language, and the another in a "foreign" one. Presence matters. It makes a difference in the network. The expected result of translation (and thus a proof of its effectiveness) is interaction of those who were targeted. If they interact, they are already in the network! Often, to reach certain area, lots of translations are necessary to form a chain which contains several embodiments of the initial entity which performs said expansion. It seems obvious that the presence of Leonardo da Vinci's "Mona Lisa" is not acknowledged merely by looking at the painting. If it were, the never-ending stream of visitors would flow through the corridors of the Louvre, due to reasons other than just tourists' curiosity. That would be the very "native" statement about the "Mona Lisa", which is a painting. Instead, the "Mona Lisa" is transferred beyond the Louvre in many different ways. For example, insurance agents do not look at the painting as it is – they just read a series of numbers which tell them its economic value and they act upon that value. They build spreadsheets, establish conditions and limits, make offers, sign contracts etc., an it is the value of the "Mona Lisa" rather than the painting itself that makes them do it. So, translations are

not neutral processes. Translations engage areas which could not be engaged by "native" language. These are elements of ontological shifts along the chain of various embodiments of a certain entity. And still, if there is no interest in such details like insurance, the pigments used by Leonardo, temperature and relative humidity in the Louvre interiors, the "Mona Lisa" exists world-wide as just a "black-box" – an actor which works in a network so smoothly, that there is no interest to examine its internal features – which is another important concept of ANT.

It is becoming clear now that ANT offers something that could not be offered by previous anthropocentric and strictly epistemic systems. The previous approach relied on agreements based on rhetoric and persuasion rather than empirical experience and tried to judge whether certain way of interpreting reality is proper, this way each time coming back to the point of departure. The traditional epistemic question – whether knowledge is acquired correctly – is not the question for ANT. The question is what are the ways the knowledge is acquired. That is a radical shift. The question is not what the envisaged entities are, but what makes them what they are when envisaged. On the basis of that, ANT recommends to "follow the actors". It is similar to ethnographic work, involving observation of practices within newly discovered, never-before-known communities, somewhere on remote islands. However, there is a crucial difference: ANT rejects "communities" and replaces them with "collectives". This is to reflect the fundamental matter of the heterogeneity of the actors and generalised symmetry, which means that both human and non-human actors have power to act. It is necessary to mention that this methodology is recommended to examine ongoing or historic processes within material-semiotic structures rather than stable entities. This, however, is not a weakness or limitation of ANT. The theory says that stability is not a given. The moment of achieving stability is the moment of leaving the stage by being absorbed by a larger actor/hybrid, or remaining there as a "black-box".

Here are the basic ANT methodology guidelines:[12]

1) Research does not concern stable, essential entities but relational and historic processes.
2) Agnosticism applies, and therefore a researcher must:
   a) avoid ontological imputations;
   b) avoid *a priori* reductions;
   c) suspend automatic differentiation of ontological categories;
   d) follow (without prejudice) the actors.

[12] E. Bińczyk, "Program badawczy Bruno Latoura i jego zalety w kontekście badań nad światem współczesnym" [in:] *Teoretyczne podstawy socjologii wiedzy*, vol. 1, eds. P. Bytniewski, M. Chałubiński, Wydawnictwo UMCS, Lublin 2006.

3) Non-human factors:
   a) resist some use of them in scientific or technical practice;
   b) it is impossible to isolate them (as nature itself or pure facts, untainted by human intervention) if they are a source of resistance;
   c) a case study should be carried out each time and the history of emergence of a new actor should be reconstructed.
4) Each actor in the network has a decisive vote, makes a difference (that is to say, making a difference is a result of just being present in the network, which in consequence makes the network different than it would be without the actor in question) and resists (modifies the network).
5) The independence of non-human factors consists each time in a concrete stabilisation of the network of connections.

3. The birth of French national heritage

If one presents the kingdom of France as a material-semiotic structure/network-actor, it is easy to see that this structure/network was almost unchanged for 482 years (the first national assembly of the Estates General was in 1302, summoned by King Philip IV) before and 5 years after the publication of Immanuel Kant.[13] This structure was inherently heterogeneous, it consisted of a king (as a cause), a Second Estate composed of two groups (clergy and aristocracy, the "rest" of the population referred to as the Third Estate, and was also defined by (variable) territorially boundaries, living and inanimate natural resources, artefacts (including distinctive artistic resources) and various technologies (of power, production, communication, commerce, warfare, etc.). On 29 June 1789, six hundred representatives of the Third Estate gathered in the Versailles ballroom in an act of protest against the further functioning of this centuries-old structure in an unchanged form, declared themselves the National Assembly, and demanded real participation in power. In reaction to King Louis XVI's rejection of the changes proposed by the National Assembly, on 14 July 1789 the people stormed the Bastille, and on 26 August 1789 the National Assembly announced the Declaration of the Rights of Man and of the Citizen, a text that irreversibly changed the political history of Europe.

Despite the sudden and rapid dismantling of the foundations of its order brought about by the Revolution, the material-semiotic structure presented at the beginning of the chapter, called the French state, remained functional, albeit with a significant

[13] E. Kant, *What is Enlightenment?,* trans. M.C. Smith, 1784, http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html (accessed: 23.09.2020).

change. The king as the cause was gone, as was the Second Estate as the structure's administrator. The Third Estate became the cause and administrator in one – in its mass of 25 million. Besides that, not much has changed. Of course, there were many new issues to be resolved, among them the problem of the "immovable and artistic heritage that was countless"[14] accumulated for hundreds of years by the privileged estates. Resources of this kind, their legacy and current artistic activity, already had an important place and mission to be fulfilled in the new social order. However, under the new circumstances, the "black-box" that was the "material artistic resources of France" could no longer operate just as it did in July of 1789. In order to achieve stabilisation, it made other actors act in a number of ways. The necessary corrections were: a correction of symbols, a correction of amount of art resources, and a correction of localisation of remaining objects.

The first correction was about ownership rights. All of the objects were, in some way, signed, or marked with the "signatures" of their previous owners. These were the coats of arms of aristocratic families, religious symbols, or images of specific people. It was necessary to cleanse all objects of this stigma, to remove the markings, and apply new symbols if possible. Skilled sculptors and craftsmen were engaged to carefully "erase" thousands and thousands of Bourbon's emblems in their properties. An excellent example of that process is purification of *Chapelle Royale* in Versailles.[15] The importance of the correct attribution of property to the rulers of France is evidenced by the name of the institution responsible for building resources belonging to them: Bâtiments du Roi (1602–1792), Bâtiments de la Nation (1792–1802), Bâtiments de l'Empereur (1802–1815), Bâtiments du Roi (1815–1850), Bâtiments Impériaux (1850–1871), Bâtiments de France (1871 – now).

The second correction resulted from the quantity of objects that changed hands. These resources, despite the spontaneous and/or controlled acts of iconoclasm carried out by the sans-culotte masses, still remained inexhaustible. These iconoclastic acts, by naming them in a hot political message and consolidating in later literature the name of "revolutionary vandalism", dominated the reports about the fate of artistic resources. The term "vandalism" owes its heavy connotation to the fact that it struck the key symbols of the old order. Monuments were toppled from their pedestals, church towers were shortened, and movable artefacts "signed" in any way by the fallen institutions were destroyed *en masse* in various ways. Meanwhile, in the face of the practical lack of resistance and the violent erosion of all structures of *ancien régime*, the French Revolution turned into a sharp conflict between the revolting people and the enlightened

[14] F. Souchal, *Wandalizm rewolucji*, trans. P. Migasiewicz, Fundacja Augusta hr. Cieszkowskiego, Warszawa 2016.

[15] A. Maral, *La chapelle royale de Versailles, le dernier grand chantier de Louis XIV*, Arthena, Versailles 2011.

functionaries of the revolution.[16] And famous (or infamous) sans-culotte iconoclasm dubbed "revolutionary *vandalisme*", an emotional and political demonstration of an option that stood no chance against a "ruthlessly centralised" and desperately mobilised adversary, proved to be irrelevant as a force capable of wiping out the material traces of the old order.

However, no effort – including terror – would be made by the bureaucratic apparatus to protect cultural property; it had no chance in the fight against the state of abandonment, the sensitivity of materials, the forces of nature, and those human activities favoured by the cover of the night. These resources, due to their large mass, could not be effectively controlled or purposefully used in their current locations. These places were both private spaces (monastic and palace estates, lounges, libraries and gardens of the king and aristocrats) and publicly accessible sites (streets, city squares and churches). They were exposed to destruction, planned and natural, despite the fact that they passed from the hands of the king and the remaining 350 000 unseated owners into the hands of 25 million new co-owners. The natural and competent "guards and guardians" left the scene in result of secularisation, emigration, expropriation and executions. The newcomers were absolutely unprepared for the task. Consequently, there had to be a radical reduction in the mass of tangible cultural goods, both real estate and movable works of arts and crafts.

This is illustrated by a case which took place at the beginning of the Revolution. On 14 July 1789, the rebellious people in dramatic circumstances stormed the Bastille, a medieval fortress turned into a prison for opponents of the kingdom. Soon afterwards, one of the participants in the assault, the Parisian builder Pierre François Palloy, obtained an order for structure's demolition, which left him with a huge mass of stone blocks and bricks. Of course, this raw material was recycled, being used to erect new buildings and a new bridge over the Seine. However, Palloy's practice of reshaping stone blocks salvaged during the demolition into miniature *maquettes de la Bastille* was a phenomenon and a kind of symbol of the new approach. That practice has been preserved in historiography[17] as Palloy's more or less sincere contribution to the promotion of revolutionary ideals and the creation of republican traditions. *Patriote* Palloy carried out this mission, *inter alia*, by means of a "letter of recommendation", a kind of certificate with which he attached to the stone *maquettes,* on which he had previously commissioned the text of the Declaration of the Rights of Man and the Citizen to be inscribed, and sent to the authorities of the newly created departments of the republican administration. This is similar to what we find today at stalls on Berlin's Potsdamer

[16] H. Arendt, *On revolution*, Penguin, London 1963.

[17] F. Souchal, *Wandalizm rewolucji…*

Platz and in souvenir shops shelves on Unter den Linden, where one can buy coloured and foil-wrapped pieces of concrete taken from, according to the attached leaflets or printouts, the Berlin Wall.

The third adjustment was related to the dispersed location of the resources in question and manifested itself in relocating those objects that had been qualified for further use within the republican discourse to central institutions specially created for this purpose. These prototype institutions were two museums located in Paris: Musée Central des Arts, opened on 10 August 1793 at the Louvre, and Musée des Monuments Français, opened on 1 September 1795 in a former monastery. Both of these institutions relied on a stream of artefacts that were verified and directed there from all parts of France.[18] The founding reference point in this case was another dualism, which gained great importance precisely during and as a result of the French Revolution. It pertains to a dualism unfolding in time: past–present (anticipating the future). The assumption, which has remained intact until today, was as follows: our (human, European civilisation) position is that of continuous movement in time, progress, acceleration and accumulation. At the same time – for clear understanding and communication – there is need for signs, for anchors in the past, for examples from the past.

In this sense, museums turned out to be perfect institutions: on the one hand, they execute control over the passage of time (resulting from the modern imperative of constant movement and the imperative of organising everything), and on the other hand, they make it possible (by extracting artefacts from their native places) to exercise full control over the story to which these artefacts are harnessed.[19] To describe that, an American culture researcher Rodney Harrison used a very figurative phrase: "putting the past in its place".[20] The reason was that a completely new concept of a political entity, which was the nation state, urgently needs to obtain points of reference to legitimise the origin of its own institutions and economic, social and military practices, using the past as the source of such references. That resulted in the implementation of specific actions (dislocation) aimed at saving works of art residing throughout France, which were naturally deteriorating or threatened with deliberate destruction.

This situation is accurately characterised by the remark made in 1791 by François Puthod de Maison-Rouge, who wrote in the ephemeral art periodical *Les monu-ment*

[18] F. Haskell, *History and its Images. Art. And the Interpretation of the Past*, Yale University Press, London 1995; P. Kosiewski, J. Krawczyk, "Latarnia pamięci. Od muzeum narodu do katechizmu konserwatora" [in:] *Zabytek i historia. Wokół problemów konserwacji i ochrony zabytków w XIX wieku*, eds. P. Kosiewski, J. Krawczyk, Muzeum Pałac w Wilanowie, Warszawa 2012.

[19] M. Wiśniewski, "Machiny postępu, nowoczesności i kontroli nad czasem" [in:] *Coś, które nadchodzi. Architektura XXI wieku*, ed. B. Świątkowska, Fundacja Bęc Zmiana, Warszawa 2011.

[20] R. Harrison, *Heritage. Critical approaches*, Routledge, London 2013.

sou le pèlerinage historique about people who witnessed the transfer of their ancestors' tombstones from church to museums, that they ought to burst with pride at the sight of their family heritage becoming national heritage. In this way a long era of controlled, one-sided communication began, which continues in some museums to this day.

With the French Revolution, the idea of time – which previously did not seem to play a major role (let us remember: the situation in the French state did not change almost in any way for 482 years before and for 5 years after the publication of Immanuel Kant) – suddenly became relevant, intensively counted by successive purification campaigns conducted within the community that had been dormant for several hundred years. Purification – in this article I will use this symbolic term taken from Latour in the sense of distinguishing, ordering, purifying, as an inevitable consequence of each recognised manifestation of duality, not only as part of the juxtaposition of Culture and Nature – immediately took everyday practices in each of the issues that somehow stood in the way of the revolution and, further, in the way of progress. In the field of interest to us here, that is, the care of monuments, this was expressed primarily in the activities described above as the third correction of the material artistic resources, which had become the property of the republic: mass verifications, reductions, dislocations, cataloguing, compiling in previously non-existent orders. Of course, in France there were also those artefacts, mainly architectural objects, which could not be transferred (at all or at once) to central, strictly controlled places. Efforts were therefore made to care for them *in situ*.

The case of the remains of the Bastille, discussed earlier, touches on an extremely important issue, namely – what objects constitute cultural heritage? It was exposed that tangible objects, in an area called the care of monuments, fall into symmetrical relationships with people, ideas, organisations, technologies through translations in the form of "certificates" of authenticity or utility in the area called "cultural heritage", preferably issued by authorised experts or expert bodies.

As an illustration of the above, I include a diagram presenting "French national heritage" as a heterogeneous structure formed by six main actors: "ideas", "material resources", "skilled people", "communication" and "natural factors" (Figure 1).

In comparison to the further list of factors/actors necessary to establish and operate the French national heritage (see conclusions), an actor which might be called "legal regulations" is missing from the diagram. Is "the law" not an actor itself? Arguably it is, though it is the case in other networks, which require other research questions than those raised here and thus – separate research. The law itself is not the focus of this text. In the case of emergence of cultural heritage, I propose envisaging legal regulations through the notion of translation. In the presented examples (the "Mona Lisa", revolutionary vandalism, dismantling of the Bastille) we can observe the power of translation: value of art objects

drive the insurance market, property signs drive acts of destruction, certificates of authenticity drive patriotic emotions and education activities. The aim of translations is to establish a solid network,[21] which can be taken from outside as a smoothly working black box (what is "outside" is another question during ANT-based research, and it is the researcher's responsibility and efficiency to raise a certain problem – and thus target the proper network – to be researched).

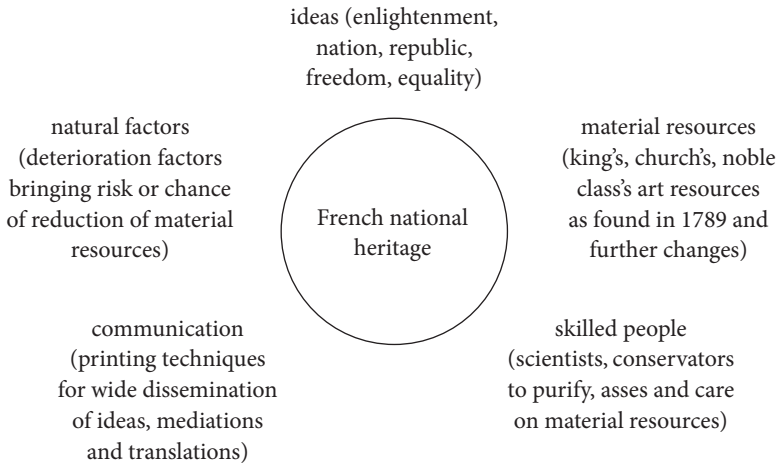

Figure 1. The chief actors in the network constituting French national heritage

Source: Own elaboration.

The presented diagram does not show translations themselves, as those are neither actors nor actor's activities, but rather they are transmissions of the presence of an actor to an area where it cannot be recognised in the source/original incarnation. In other words, translations are "journeys" to and through ontologically different domains. Translations are necessary to build hybrids. The components are the results of purification, and translations are the binder. It is worth remembering that entering into relationships in a different network-hybrid is not a kind of recycling, because purification brings brand new entities (e.g., Boyle's vacuum), which enables the formation of brand new, unique hybrids. In the present case, according to the rules of modernity, expert bodies (commissions) did the work of purification, exploring art resources. Legal regulations mostly and most efficiently did the work of translation, immediately bringing the

[21] B. Latour, *Pandora's Hope. Essays on the Reality of Science Studies*, Harvard University Press, Cambridge 1999.

presence of artistic artefacts to a wide collection of ontologically different areas: the law itself, education, science, security, warfare. The outstanding effectiveness of the law as a tool (medium) results from its universal application.

As mentioned, in 1789, events began to occur at an accelerated rate and the first years of French Revolution witnessed the following:[22]

1) on 2 December 1789, Church property was confiscated;
2) on 17 June 1790, titles and coats of arms were abolished, and three days later it was ordered that all symbols of tyranny, serfdom and inequality are to be destroyed;
3) in August 1790, the *Commission des Monuments* was established at the Louvre;
4) in October 1790, a decree on securing and inventorying goods was issued;
5) from November 1790 to September 1793, the activities of the *Commission des Monuments* were continued;
6) In September 1792, "The Assembly acknowledged that, in sending monuments that may evoke memories of despotism to their destruction, it is also important to preserve and properly care for masterpieces of art capable of fittingly consuming the free time of the free people…";
7) in September 1793, the *Commission temporaire des arts* was established.

The above list presents a record of two parallel processes: extensive purification run by expert bodies (the Commissions) and efficient translations run by legal regulations. Of those mentioned above, the first process is modern. In contrast to this, the second process has been strictly ignored by modernity since the Hobbes-Boyle dispute.

4. Conclusions

The examples analysed in this text show the instant emergence of French national heritage – the prototype for contemporary cultural heritage everywhere – as a vast collection of individual episodes, controversial practices, complex processes and questionable deliberations, the results of which depend equally on human and non-human factors (actors). Cultural heritage, thought of as a material-semiotic structure and reviewed with the methodology of Actor-Network Theory (ANT), proves its complexity and inability to be explained in an appropriate way within a dichotomous space, organised by a direct subject-object relationship. As a hybrid, it stays social, natural and discursive at the same time. Therefore, for the creation and further maintenance of cultural heritage (in terms of its "internal stabilisation" and preservation of the external status of the "black box"), the following heterogeneous causative factors and processes were and are

[22] The list cited after: F. Souchal, *Wandalizm rewolucji…*

necessary: 1) ideas, 2) material resources, 3) skilled people, 4) technologies, 5) natural factors, 6) efficient translations.

However, despite the continuous development of its elements since the fall of modernity, cultural heritage seems to remain in a state of continuous confusion as it continues to bear all of the characteristics of a modern project. For over 100 years, doctrinal documents and legal regulations concerning monuments and their conservation in the form of theories, manifestos, declarations, guidelines or legal paragraphs have been adopted all over the world. There are already dozens of them in place. We can easily state that the modern approach, so efficient during the emergence of French national heritage, does not work in relation to contemporary worldwide cultural heritage.[23] Instead, we can observe the provisional "card by card" approach (e.g., Venice Card, Nara Document, Burra Charter) attempting to impose some sort of "order". These documents are changing or replacing one another in reaction to new elements of purifications entering the scene. But still, there are many attempts at "effective" implementation of regulatory frameworks for world heritage at each level. The result is a sort of chaos, resulting from the coexistence of old, new and newer still guidelines in the conservation discourse, which causes them to lose their normative and practical meaning. Opinion-forming conservation circles consider this state of affairs to be defective and are still looking for opportunities and possibilities to "organise it".[24] I think that we observe an ambiguous and disturbing situation here: helplessness in the face of postmodern polyphony, which is an expression of the inability to establish universal principles of cultural heritage conservation, which results in nostalgia for a modern mono-narrative. That cannot be restored in today's world, except in the game, already on a global scale, when the Hobbesian Sovereign/Leviathan comes.

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[23] J. Koryciarz-Kitamikado, "Laka orientalna w służbie królewskiej. Różnice w podejściu do konserwacji między Wschodem a Zachodem" [in:] *Wilanowski Informator Konserwatorski 2017*, ed. T. Przygońska, Muzeum Pałacu Króla Jana III w Wilanowie, Warszawa 2017.

[24] B. Szmygin, "Teksty doktrynalne w ochronie dziedzictwa – analiza formalna i propozycje" [in:] *Współczesne problemy teorii konserwatorskiej w Polsce*, ed. B. Szmygin, Wydawnictwo Politechniki Lubelskiej, Warszawa – Lublin 2008.

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Summary

The birth of modern cultural heritage and its legal regulations: An actor-network theory approach

This article investigates the instant emergence of the phenomenon called French national heritage, which is the prototype of today's world-wide cultural heritage. The aim of the research is to identify factors which were necessary to form that concept, completely new at the time, and to make its development and continuation possible. To avoid *a priori* reductions and limitations of essential approach, the French national heritage is envisaged as material-semiotic structure, and in consequence, the study is conducted using the methodology and tools recommended by actor-network theory (ANT).

Keywords: actor-network theory, cultural heritage, material-semiotics structure, modernity

Streszczenie

Narodziny nowożytnego ujęcia dziedzictwa kultury i jego prawnej regulacji: podejście z punktu widzenia teorii aktora-sieci

W niniejszym artykule przedstawiono przebieg błyskawicznego uformowania się w latach Wielkiej Rewolucji Francuskiej fenomenu zwanego francuskim dziedzictwem narodowym, które jest pierwowzorem dzisiejszego światowego dziedzictwa kultury. Celem badawczym była identyfikacja czynników (aktorów i środków translacji), które były niezbędne do ustanowienia i wdrożenia tej zupełnie nowej w tamtych czasach koncepcji oraz umożliwienia jej rozwoju i kontynuacji. Jako specyficzne tło narodzin i obecnych problemów opieki nad dziedzictwem kultury został wskazany i scharakteryzowany projekt nowoczesny. Aby uniknąć redukcji *a priori*, francuskie dziedzictwo narodowe zostało ujęte jako struktura materialno-semiotyczna, a w rozważaniach wykorzystano aparat badawczy oferowany przez teorię aktora-sieci (ANT).

Słowa kluczowe: teoria aktora-sieci, dziedzictwo kultury, sieci materialno-semiotyczne, nowoczesność

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Safeguarding shared Intangible Cultural Heritage: A "bridge over troubled water"?

1. Introduction

Within the wider framework of what could be characterised as the modern international cultural heritage law,[1] the field of the so-called "intangible cultural heritage" (hereinafter: ICH) gains more and more ground in the international discourse. The latter, initially described as "oral heritage" or "traditional culture and folklore",[2] constitutes "the living culture of peoples",[3] while the establishment of rules for its protection followed years-long processes of the international community. During at least the last three decades, a remarkably intense law-making activity in relation to the international protection of all types of cultural heritage takes place,[4] concerning not only the review

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[1] L. Lixinski, "Between orthodoxy and heterodoxy: the troubled relationships between heritage studies and heritage law", *International Journal of Heritage Studies* 2015, vol. 21, no. 3, p. 204. Shaped as a distinguishable field of law during the second half of the 20th century. For a brief historical analysis of this shaping see: J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015, p. 4.

[2] The first international instrument that set the base for a holistic approach to the safeguarding of this part of cultural heritage was the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, adopted in Paris on 15 November 1989.

[3] As aptly written by Lenzerini; F. Lenzerini, "Intangible Cultural Heritage: The Living Culture of Peoples", *The European Journal of International Law* 2011, vol. 22, no. 1, pp. 101–120.

[4] F. Francioni, J. Gordley, "Introduction" [in:] *Enforcing International Cultural Heritage Law,* eds. F. Francioni, J. Gordley, Oxford University Press, Oxford 2013, p. 1.

of older instruments but also the adoption of new multilateral conventions and soft-law instruments. Among them, the Convention for the Safeguarding of the Intangible Cultural Heritage (hereinafter: 2003 UNESCO Convention)[5] "officialised" the use of this well-criticised and relatively new term[6] for its subject matter.

ICH seems to be controversial as a regulatory object, as also other types of heritage and cultural expressions could easily be. However, ICH in particular is by its character indissolubly connected to peoples and their communities, being defined by its apparent human dimension[7] and signalling the progressive transition from the notion of "cultural heritage of humanity" towards "cultural heritage of communities, groups and individuals".[8] For what is more, it has an inherent capacity and liberty to "spring up" near and/or on borders, "easily escaping the territorial jurisdiction of the State",[9] since there would normally be no limited habitable area on Earth from which it could possibly be excluded as happens with its bearers. As a result, the relevant regulations have to deal also with the safeguarding of transboundary ICH expressions, what we will also call "shared ICH" hereafter. This is a rather complicated area where the manifestation of the fragile – mostly political – balances and tensions among international community's actors is favoured par excellence, something also reflected at the present UNESCO protection mechanism as well as during statutory intergovernmental meetings and other relevant forums.

This paper will examine the issue of the safeguarding of shared ICH within the 2003 UNESCO Convention's framework. Firstly, it will make a reference to the nature, definition and characteristics of ICH that somehow define its protection's perspectives. Secondly, it will outline the conventional safeguarding mechanism, pointing out those aspects that might *a priori,* in theory, and *a posteriori*, as reflected in State practice, favour or impede the protection of transboundary ICH manifestations in particular. Finally, it will focus on the way the existent system deals with the issue, questioning whether its evolution is needed with a view to a potentially more effective safeguarding of shared ICH.

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[5] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, adopted in Paris by the 32nd session of the General Conference of UNESCO, signed on 17 October 2003, entered into force on 20 April 2006), with 180 States Parties (as of 27.07.2020); UNESCO-ICH, https://ich.unesco.org/en/convention (accessed: 14.10.2020).

[6] R. Kurin, "Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention", Inaugural Public Lecture, Smithsonian Institution and the University of Queensland MoU Ceremony, 23 November 2006, p. 12.

[7] F. Francioni, "The Human Dimension of International Cultural Heritage Law: An Introduction", *The European Journal of International Law* 2011, vol. 22, no. 1, pp. 9–16.

[8] J. Blake, *International Cultural Heritage*…, p. 272.

[9] L. Lixinski, *Intangible Cultural Heritage in International Law,* Oxford University Press, Oxford 2013, p. 22.

2. Dealing with shared Intangible Cultural Heritage within the 2003 UNESCO Convention

2.1. The definition and characteristics of Intangible Cultural Heritage

The 2003 UNESCO Convention in Article 2 para. 1 defines as ICH "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage". Characterised by its intergenerational transmission, constant recreation, interrelationship with the communities' environment, nature and history, ICH provides them "with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity" (Article 2 para. 1 of the 2003 UNESCO Convention). The preservation of cultural diversity – particularly threatened due to the globalisation's onset in contemporary world – remains a main *ratio* of protection,[10] something that should always be kept in mind, especially in front of certain States' tendency to promote the "exclusivity" or "authenticity" of ICH expressions, as noticed in their – relevant to the Convention's implementation – practice.

It is true that a series of terminological questions arise.[11] However, for the needs of the present analysis, it suffices to mention the opinion highlighting the problematic nature of "intangible"[12] as qualifier in the term, which possibly leads to an also problematic use, namely the instrumentalisation of heritage in a manifold way. Despite the criticism, it was the working definition that reached general consensus and was found the most operationally useful,[13] favouring the independence of that new notion from any material

[10] Preamble, para. 3 of the 2003 UNESCO Convention faces ICH "as a mainspring of cultural diversity".

[11] J. Blake, "Preliminary Study into the Advisability of Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage ('Traditional Culture and Folklore')", presented in the UNESCO, International Round Table of experts, *ICH: Working Definitions,* Turin, Italy, 14–17 March 2001, pp. 7–12.

[12] The term "oral and intangible heritage" was firstly institutionally employed in the 1998 UNESCO Masterpieces Programme; UNESCO Brochure, *Masterpieces of the Oral and Intangible Heritage of Humanity* (Proclamations 2001, 2003 and 2005), UN Doc. CLT/CH/ITH/PROC/BR3, 2006 (hereinafter: UNESCO Masterpieces). However, even the 2003 Convention's Entity within UNESCO's Culture Sector has been renamed from "ICH Entity" to "Living Heritage Entity" officially since early 2019, still revealing the "uncertainty" of the term.

[13] UNESCO, Executive Board, Report on the preliminary study on the advisability of regulating internationally, through a new standard-setting instrument, the protection of Traditional Culture and Folklore, 161st session, Paris, 28 May – 13 June 2001, p. 6.

type of heritage,[14] as well as marking the initiation of a new instrument, different from the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on 16 November 1972 (hereinafter: 1972 World Heritage Convention) dedicated to the protection of "tangible" cultural and natural heritage.[15]

Furthermore, prominence is given to "communities, groups and individuals" – bearers of ICH – who are acknowledged as playing "an important role in the production, safeguarding, maintenance and recreation" of it (preamble, para. 7 of the UNESCO Convention 2003). Two significant parameters in comparison to the cultural heritage protection regime existent prior to the 2003 Convention should be underlined. On the one hand, the self-recognition by communities themselves of ICH as part of their heritage, contrary to the perception of the "outstanding universal value" of the world cultural and natural heritage (Article 1 of the UNESCO World Heritage Convention 1972). On the other hand, the representativeness of ICH elements, unlike the former characterisation of the "masterpieces" of cultural heritage.[16] The emerging question, then, refers to the central role accorded to the communities associated with ICH[17] – at least theoretically – and their participation in the safeguarding mechanism,[18] as also reflected at the States Parties' conventional obligations,[19] though remaining unguaranteed while often "top-down approaches" are followed.[20]

In parallel, the dialectical relationship between ICH and space, as happens with persons and their environment,[21] is critical for understanding in principle what is or should

[14] M. Vecco, "A definition of cultural heritage: From the tangible to the intangible", *Journal of Cultural Heritage* 2010, vol. 11, pp. 323–324.

[15] W. van Zanten, "Constructing New Terminology for Intangible Cultural Heritage", *Museum International, ICOM* 2004, vol. 56, issue 1–2, p. 39.

[16] UNESCO Masterpieces 2001, 2003, 2005.

[17] J. Blake, "UNESCO's 2003 Convention on Intangible Cultural Heritage: the implications of community involvement in 'safeguarding'" [in:] *Intangible Heritage*, eds. L. Smith, N. Akagawa, Routledge, Abingdon, United Kingdom 2009, p. 45.

[18] In the context of inscriptions on the Convention's listing mechanisms, this is in practice "proved" through the requirement for their *"prior, free and informed consent"* (in the form of letters of consent accompanying the nomination file, as it is expressed at least until today); Operational Directives for the Implementation of the Convention for the Safeguarding of the ICH, adopted by the General Assembly of the States Parties to the Convention at its 2nd session (UNESCO Headquarters, Paris, 16–19 June 2008), as amended into their last version (2018), para. 1 (U.4.), para. 2 (R.4.), para. 7 (P.5.) (hereinafter: UNESCO, Operational Directives 2018).

[19] Mostly in: Articles 11b and 15 of the UNESCO Convention 2003.

[20] See the most recent comment of the Evaluation Body on the issue: Intergovernmental Committee for the Safeguarding of ICH (hereinafter: IGC), Report of the Evaluation Body on its work in 2020, UN Doc. LHE/20/15.COM/8, 2020, para. 42.

[21] Communities recreate their ICH "in response to their environment and their interaction with nature"; Article 2 para. 1 of the UNESCO Convention 2003.

be the connection between ICH and State territories. Beyond the apparent connection of all those "place-based" ICH elements and cultural spaces[22] or cultural landscapes[23] associated with ICH, any other reference to place – again, at least in principle – should not be interpreted as establishing any fixed link between ICH and a delimited geographical space, but merely as highlighting the role of the social, political or natural context in the recreation of cultural practice.[24]

As a step further, ICH's character reveals its capacity to transcend national borders par excellence. In fact, there are ICH elements which could be described as "being present" in the territories of more than one States[25] or "present" wherever their people are.[26] Besides, "political geography" that shapes modern States does not always overlap with "cultural geography" that forms communities of specific heritage elements. This issue has some rather important dimensions in association with refugee crisis and migration,[27] people of diaspora,[28] nomadic communities and minorities present in a territory, as well as cross-border communities with common cultural characteristics.[29] This means that ICH cannot reasonably be defined in relation to territories, as is the case with culture itself,[30] despite any direct or indirect attempt on the basis of the 2003 Convention's provisions.[31]

[22] T.M. Schmitt, "The UNESCO Concept of Safeguarding ICH: Its Background and Marrakchi Roots", *International Journal of Heritage Studies* 2008, vol. 14, no. 2, pp. 95–111.

[23] See some examples of this connection between ICH and cultural landscapes inscribed in the UNESCO World Heritage List in: G. Caballero, "Crossing Boundaries: Linking Intangible Heritage, Cultural Landscapes, and Identity", 5 September 2017, pp. 4–10, http://openarchive.icomos.org/id/eprint/1814 (accessed: 28.10.2020).

[24] C. Bortolotto, "Placing ICH, owning a tradition, affirming sovereignty: the role of spatiality in the practice of the 2003 Convention" [in:] *The Routledge Companion to Intangible Cultural Heritage*, eds. M.L. Stefano, P. Davis, Routledge, Abingdon, United Kingdom 2017, p. 48.

[25] C. Amescua, "Anthropology of ICH and Migration: An Uncharted Field" [in:] *Anthropological Perspectives on Intangible Cultural Heritage,* eds. L. Arizpe, C. Amescua, Springer, Cham – Heidelberg – New York 2013, pp. 103–120.

[26] W. Logan, "Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice", *International Journal of Heritage Studies* 2012, vol. 18, no. 3, p. 241.

[27] R. Nettleford, "Migration, Transmission and Maintenance of the Intangible Heritage", *Museum International, ICOM* 2004, vol. 56, issue 1–2, pp. 78–83.

[28] J. Blake, *International Cultural Heritage Law*…, pp. 282–283.

[29] See the examples mentioned in: UNESCO, Intangible Heritage Beyond Borders: Safeguarding Through International Cooperation-Regional Meeting, *Background paper*, Bangkok (Thailand), 20–21 July 2010.

[30] M.C. Vernon, "Common Cultural Property: The Search for Rights of Protective Intervention", *Case Western Reserve Journal of International Law* 1994, vol. 26, no. 2, p. 446.

[31] See the criticism for "the mapping of cultures into bounded and distinct places", which was a dominant trend at the time of the adoption of the 2003 UNESCO Convention when UNESCO was facing post-colonial developments in: C. Bortolotto, "Placing ICH, owning a tradition…", p. 48.

2.2. The conventional safeguarding mechanism

The core notion around which the UNESCO Convention 2003 is built is that of "safeguarding",[32] which means "measures aimed at ensuring the viability" of ICH (Article 2 para. 3 of the Convention), and encompasses a wider approach to the sensitive issue of the legal protection of "a living body",[33] with a view to ensure the circumstances and processes under which it is being created, preserved and transmitted rather than protect it against any threat, "physically" or "*in situ*".[34] It, then, functions parallelly at two levels, a national and an international one.

At the national level, each State Party "shall take the necessary measures to ensure the safeguarding of the ICH present in its territory" (Article 11a of the UNESCO Convention 2003, also at Articles 12, 13, 23) and "shall endeavour" to adopt measures such as, among others: a general policy promoting the function of ICH in society, appropriate legal, technical, administrative and financial measures (Articles 13, 14 of the Convention). Special emphasis is given on the identification and definition of the various ICH elements present in its territory (Article 11b of the Convention), mainly achieved by drawing up – regularly updated and adjusted in each State's particular circumstances – inventories (Article of 12 of the Convention). At the international level, States Parties concerned may submit their proposals for the inscription of elements and good practices to the Intergovernmental Committee for the Safeguarding of ICH (hereinafter: IGC)[35] which establishes, keeps up to date and publishes the "Representative List of the ICH of Humanity" (RL), the "List of ICH in Need of Urgent Safeguarding" (USL) and the "Register of Good Safeguarding Practices"[36] (hereinafter mentioned also as the Lists). Furthermore, States submit periodic reports on the legislative, regulatory and other measures taken for the implementation of the Convention to the IGC (Article 29 of the Convention), which in its turn submits them to the General Assembly

[32] For the explicit choice of the term "safeguarding" unlike "protection" in the 2003 Convention, see: UNESCO, Meeting of the "Restricted Drafting Group", Preparation of a preliminary draft International Convention on the ICH, Paris, 20–22 March 2002, para. 17.

[33] UNESCO Brochure, *Questions and Answers about ICH* 2009, p. 3; UNESCO-ICH, https://ich.unesco.org/en/kit (accessed: 30.11.2020).

[34] C. Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, London – New York 2010, pp. 14–18.

[35] Articles 5–9 of the UNESCO Convention 2003; UNESCO-ICH, https://ich.unesco.org/en/functions-00586 (accessed: 20.10.2020).

[36] Articles 16–18 of the UNESCO Convention 2003; "Browse the Lists of ICH and the Register of good safeguarding practices", UNESCO-ICH, https://ich.unesco.org/en/lists (accessed: 22.11.2020).

of the States Parties,[37] a process that somehow counterbalances the absolute absence of a compliance mechanism.[38]

In this context, place becomes a pivotal axis for safeguarding ICH through the establishment of the prerequisite of its "presence" in a State's territory, which has some important implications with reference to transboundary manifestations. Besides, a serious concern was raised in this regard even during the drafting period but it seems that the Convention took a clear position.[39] Firstly, it implies that ICH is defined on the basis of current State territories, despite the fact that no such strict geographical condition is included in its conventional definition and does not necessarily correspond to its nature as presented above. Secondly, a crucial territorial clause is enshrined in the safeguarding mechanism, reflected at all of its aspects, limiting, re-characterising, re-constructing or re-adjusting ICH elements in order to "fit them better in" the listing patterns and, thus, questioning the possibilities for an effectively holistic safeguarding. Thirdly, the listing mechanisms under the 2003 Convention eventually function as a favourable stage for ensuring the wide "approval" and application of the aforementioned territorial clause as reflected in the purely State nominations for inscription.[40]

Aside from any relevant criticism on the controversial choice of Lists[41] as the predominant international protection means,[42] the credibility of the evaluation and

[37] Article 4 of the UNESCO Convention 2003; UNESCO-ICH, https://ich.unesco.org/en/functions-00710 (accessed: 20.10.2020).

[38] P. Kuruk, "Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention For the Safeguarding of ICH", *Macquarie Journal of International and Comparative Environmental Law* 2004, vol. 1, p. 133.

[39] "It was suggested that the idea of 'present' is important as providing the necessary temporal element that characterises ICH as evolving and migratory. A further suggestion was a formulation such as 'with links with the population situated on the territory'. [An alternative proposal not supported was 'practised by its citizens']. (…) Although the issue of transboundary ICH was raised, it was felt that any reference to extra-territoriality of State jurisdiction should be avoided" in: UNESCO, First meeting of the select drafting group of a preliminary international convention on ICH. Final Report, Paris, 20–22 March 2002, Discussion of Unit 8 – Article 4, p. 7.

[40] In practical terms, a section titled "geographical location and range of the element" is enshrined in the nomination forms: UNESCO-ICH, https://ich.unesco.org/en/forms (accessed: 23.11.2020).

[41] UNESCO, 2nd Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention for the Safeguarding of ICH, *Position des Etats Membres eu egard au principe de liste(s) du patrimoine culturel immaterial – 7 Octobre 2002,* Paris, 24 February – 1 March 2003.

[42] Their establishment was inspired by the 1972 UNESCO World Heritage Convention which initiated the World Heritage List (Article 11) and came as a natural continuity of the 1998 Proclamation of "Masterpieces" since the elements then inscribed were directly incorporated in the Representative List of the ICH of Humanity according to the 2003 Convention (Article 31);

inscription procedure itself[43] or any other deficiencies regarding their character and function,[44] one should highlight the way Lists could be easily used by States for other purposes, even contrary to the Convention's spirit, especially on the ground of this territorial clause. While some form of hierarchy, elitism and fragmentation among ICH elements (whether or not included in the Lists) is inevitable – "lists itemise culture" as it was aptly written[45] – and while representativeness and equality among them is questioned, there is a tendency promote inscribed objects as "national products" in the international market.[46]

In particular, various elements are either directly presented as exclusively "national" or their "national character" is stated even in their definition and title.[47] In other cases, States use the Lists "as a race or contest, seeking to have elements inscribed before other States manage to do so",[48] in order to somehow get a patent or copyright on elements present only in a certain State's territory, unique and having a sole "country of origin".[49] Within this framework, the principle of representativeness could lead to some

N. Aikawa-Faure, "From the Proclamation of Masterpieces to the Convention for the Safeguarding of ICH" [in:] *Intangible Heritage*…, pp. 13–14.

[43] R. Smeets, H. Deacon, "The examination of nomination files under the UNESCO Convention for the Safeguarding of the ICH" [in:] *The Routledge Companion*…, pp. 32–33.

[44] A global reflection process at the level of the IGC on the nature and purposes of the listing mechanisms is ongoing officially since 2018. The current Covid-19 pandemic did not allow this to proceed significantly since the announced category VI expert meeting which was going to take place in March and then in September 2020 at UNESCO was postponed for 2021, along with the meeting of the Open-ended intergovernmental working group; UNESCO-ICH, https://ich.unesco.org/en/expert-meeting-on-listing-01112 (accessed: 29.11.2020); see the progress done until today in: UNESCO-ICH, https://ich.unesco.org/en/global-reflection-on-the-listing-mechanisms-01164 (accessed: 30.11.2020).

[45] V.T. Hafstein, "Intangible heritage as a list: from masterpieces to representation" [in:] *Intangible Heritage*…, p. 105.

[46] J. Blake, *International Cultural Heritage Law*…, p. 244.

[47] E.g., elements inscribed on the RL: "Albanian folk iso-polyphony" (2008), "Palestinian Hikaye" (2008), "Georgian polyphonic singing" (2008), "Fado, urban popular song of Portugal" (2011), "Ethiopian epiphany" (2019), "Traditional Turkish archery" (2019); Armenia's nomination's title of "Lavash, the preparation, meaning and appearance of traditional Armenian bread as an expression of culture" was changed as "in Armenia" after reactions by Azerbaijan and Iran and finally inscribed in 2014, while also as "Flatbread making and sharing culture Lavash, Katyrma, Jupka, Yufka" by Azerbaijan, Iran, Kazakhstan, Kyrgyzstan, Turkey in 2016.

[48] IGC, Evaluation of nominations for inscription in 2011 on the List of ICH in Need of Urgent Safeguarding, UN Doc. ITH/11/6.COM/CONF.206/8 Add., 2011, para. 26

[49] See such an analysis on the basis of the inscription of "Karagöz" by Turkey on the RL in 2009 and its "conflict" with Greece for the shadow theatre of "Karagiozis" in: B. Aykan, "'Patenting' Karagöz: UNESCO, nationalism and multinational intangible heritage", *International Journal of Heritage Studies* 2015, vol. 21, no. 10, p. 949.

"conflicting" inscriptions of the same elements by different States claiming "ownership" over them.[50] This issue has already been discussed at the stage of files' evaluation. For example, the Consultative Body decided not to present to the IGC two nominations on the grounds that "they were identical to one another" during the 2011 cycle and noted that "the communities concerned were overlapping",[51] while the Evaluation Body recently stated in a paragraph titled "shared heritage" that "as the Body recognizes the right of every State Party to nominate an element within its territory even if it is practised elsewhere, it was not influenced in its evaluations by the existence of similar elements", and encouraged States to work together towards "the possibility of extended nominations".[52] Consequently, a grey zone is in any case created with reference to transnational/transboundary ICH elements.

2.3. The parameter of transboundary Intangible Cultural Heritage manifestations

In principle, States Parties "undertake to cooperate at the bilateral, subregional, regional and international levels" (article 19 of the UNESCO Convention 2003) and are encouraged to develop joint initiatives "particularly concerning elements of ICH they have in common" (UNESCO, Operational Directives 2018, para. 86). Besides, States recognise that ICH safeguarding "is of general interest to humanity" (Article 19 para. 2 of the UNESCO Convention 2003), while declaring "aware of the universal will and the common concern to safeguard" it (preamble, para. 6 of the UNESCO Convention 2003), something consistent with the characterisation of cultural diversity as "common heritage of humanity" by the subsequent the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted in Paris on 20 October 2005 (preamble, para. 2). For what is more, UNESCO system has from its first steps included a provision for submission of "multi-national nominations" for inscription of elements "found on the territory of more than one State Party" on the two Lists and of "subregional or regional programmes, projects and activities as well

[50] E.g., the inscription of the same type of 'Mongolian traditional art of Khöömei throat singing' on the RL by China in 2009 and Mongolia in 2010, of the same traditional horse-riding game as "Chovqan a traditional Karabakh horse-riding game in the Republic of Azerbaijan" by Azerbaijan in 2013 on the USL and as "Chogān a horse-riding game accompanied by music and storytelling" by Iran in 2017 on the RL, as well as of the same festival as "Gangneung Danoje festival" by the Republic of Korea in 2008 (originally proclaimed in 2005) and as "Dragon Boat festival" by China in 2009 on the RL.

[51] IGC, Report of the Consultative Body on its work in 2011, UN Doc. ITH/11/6.COM/CONF.206/7, 2011, para. 16.

[52] IGC, Report of the Evaluation Body on its work in 2019, UN Doc. LHE/19/14.COM/10, 2019, para. 34.

as those undertaken jointly by States Parties in geographically discontinuous areas" on the Register.[53] A "mechanism to encourage multinational files" by publicly declaring – on a voluntary basis – the intention for a future nomination has also been initiated without countable success, since it has been used only eight times and with no concrete outcomes until today.[54]

However, it is normal that the preparation of a multinational proposal is absolutely dependent on the consent of the concerned States. As a result, nothing could be done if one of them does not want to move on to it, does not have the sufficient resources to do so, has not ratified the Convention or has rival relations with the other one(s). Furthermore, this complex process discloses its own narrow limits for an effective safeguarding of shared ICH, while some important issues on the matter are underlined even in the latest report of the Evaluation Body.[55] So, for the first years a reluctance has been noted, corresponding to the tendency of submission of one-State nominations in a States Parties' attempt to present "their own" ICH. Yet, States reflexes prove to be faster than the ability of the system to adapt to this tendency and we have already today reached a point where a worrying trend to "fabricate" multinational nominations out of combined individual ones and with no real underlying cooperation is noted,[56] following the priority accorded to multinational files to be treated per cycle by the IGC.[57]

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[53] UNESCO, Operational Directives 2018, paras. 13, 14; The extension of an existent inscription is also encouraged in paras. 16–19, while the initial provision referred only to the Lists and not the Register: UNESCO, Operational Directives 2008, paras. 3, 20. The issue of simplifying the procedure for the extension of multinational nominations to new States Parties, having its origins in the 14th session of the IGC, has already attracted States' interest in the context of the ongoing global reflection on the listing mechanisms; IGC, *Decision 14.COM 14*, 2019, para. 13; IGC, Item 4 of the Provisional Agenda: Towards a reformed listing system, UN Doc. LHE/21/16.COM WG/3, 2021, p. 9, para. 21.

[54] UNESCO-ICH, https://ich.unesco.org/en/mechanism-to-encourage-multinational-files-00560 (accessed: 26.11.2020); Established as an on-line resource following the: IGC, *Decision 7.COM 14*, 2012, para. 4.

[55] IGC, Report of the Evaluation Body on its work in 2020, UN Doc. LHE/20/15.COM/8, 2020, para. 40

[56] Ibid., para. 40 (iii).

[57] A ceiling to the maximum number of files examined per cycle was proposed for the first time; see: IGC, *Decision 6.COM 15*, 2011 and finally endorsed in: UNESCO, General Assembly of the States Parties to the 2003 Convention, Resolution 4.GA 5, 2012. The ceiling is accompanied by priorities, one of which is the multinational nominations; see: UNESCO, Operational Directives 2018, para. 34(ii). The trend is measurable in the fact that the multinational files examined this year have impressively increased: 2017 – 4, 2018 – 7, 2019 – 5, 2020 – 16. For the 2021 cycle, 16 multinationals files could be examined (including backlog files) but only 5 will be treated after application of the ceiling and priorities rules.

It is noteworthy, though, that UNESCO explicitly recognises the problem around "shared ICH"[58] and, at a declaratory level, the existence of communities "having an open character, not necessarily linked to specific territories".[59] An attempt was also made to approach the issue during a regional consultation meeting of government representatives and experts,[60] which, despite concluding on some critical comments on "diffuse heritage and communities", ends up with attributing the non-correspondence of States Parties towards the international cooperation clause to questions of willingness and politics, again with no practical proposal. Nevertheless, the concern on managing those cases is apparent and characterised by ambiguity. At the same time that the IGC encourages nominations on "elements shared by different communities",[61] it reminds States of the "sensitivities" and the "necessity to take care when elaborating" multinational nominations, as well as their "sovereign right to nominate elements found on their territory, regardless of the fact that they may also exist elsewhere",[62] while the Subsidiary Body invites them "to demonstrate their concern for and responsibility towards ICH and its safeguarding that goes beyond national borders".[63]

However, States Parties' and the IGC's dominant conception of the relation between respect for sovereignty and safeguarding of shared ICH is still very narrow and could be briefly described in the following statements. On the one hand, "although nominations are to be elaborated with the widest possible participation of the community (…) concerned, each State's respect for the sovereignty of its neighbours constrains it from involving community members living outside of its own territory".[64] On the other, "nominations to the RL should concentrate on the situation of the element within the territory(ies) of the submitting State(s), while acknowledging the existence of same or similar elements outside its(their) territory(ies), and submitting States should not refer

[58] "Examples of ICH shared across international borders are plentiful. (…) When safeguarding an element is at stake, better results will be achieved with the full participation of the whole community, regardless of its geographic location"; IGC, Mechanism for sharing information to encourage multinational nominations, UN Doc. ITH/12/7.COM/14, 2012, paras. 1–3.

[59] UNESCO Brochure, *Implementing the Convention for the Safeguarding of the ICH*, 2009, p. 8; UNESCO-ICH, https://ich.unesco.org/en/kit (accessed: 30.11.2020).

[60] UNESCO, Intangible Heritage Beyond Borders…

[61] IGC, *Decision 9.COM 10*, 2014, para. 5.

[62] UNESCO, Aide-mémoire for completing a nomination to the RL of the ICH of Humanity for 2016 and later nominations, 2015, p. 20, para. 45, available at: https://ich.unesco.org/en/forms (accessed: 29.11.2020).

[63] IGC, Report of the Subsidiary Body on its work in 2014 and examination of nominations for inscription on the RL of the ICH of Humanity, UN Doc. ITH/14/9.COM/10 Add.3, 2014, para. 33.

[64] IGC, Mechanism for sharing information to encourage multinational nominations, UN Doc. ITH/12/7.COM/14, 2012, para. 2.

to the viability of such ICH outside of their territories or characterize the safeguarding efforts of other States".[65]

Finally, it is notable that these positions are linked to the proposals towards the two Lists and not the Register, for which another grey zone is created. Thus, in the case of a programme, project or activity carried out for the safeguarding of a shared heritage manifestation and/or in the context of a cross-border community but not by State actors or actors that could cooperate with both or all the States concerned, it does not seem feasible that it could ever be nominated under the current system. However, the requirement for a preexistent inscription of the ICH element concerned on the National Inventory of the submitting State, as applies for the two Lists, is not in effect for nominations to the Register, something that could facilitate a wider approach to the issue of shared ICH safeguarded by a certain programme, project or activity constituting a good practice.[66]

3. Conclusions

The present analysis ran through the safeguarding mechanism established under the 2003 UNESCO Convention, focusing on the case of shared ICH. By examining the existent legal framework, an important inherent contradiction is revealed. At the same time that the Convention underlines ICH's strong links with its people, it tries to establish solid links with State territories, something that results in limiting the object of protection in a way incompatible with its admittedly cross-border character and "excluding" several manifestations from this framework's patterns. Despite any theoretical recognition of the issue's complexity, no practical tool has yet been adopted beyond the encouragement and growing tendency for the submission of multinational nominations to the Convention's Lists, a process which manifests its shortcomings too.

By arguing solely in favour of international cooperation – which usually happens to serve as panacea – seems insufficient and hasn't led to effective safeguarding at least until today, partially because it is exactly the lack of State cooperation that creates the

[65] IGC, *Decision 6.COM 13*, 2011, para. 11; see also an analysis questioning the lawfulness of the IGC's decisions on this territorial condition, which however concludes in favor of it, in: B. Ubertazzi, "The Territorial Condition for the Inscription of Elements on the UNESCO Lists of ICH" [in:] *Between Imagined Communities and Communities of Practice*, eds. N. Adell, R.F. Bendix et al., series: Göttingen Studies in Cultural Property, vol. 8, Universitätsverlag Göttingen 2015, pp. 111–119.

[66] It is notable that only one multinational nomination has ever been inscribed on the Register (2009): "Safeguarding ICH of Aymara communities in Bolivia, Chile and Peru" by those three States.

deficiencies. In fact, UNESCO's system for the safeguarding of ICH, in trying to compromise a community-oriented approach with a State-centred one, has vested States Parties with "powers" they would be really reluctant to "share" with the actual beneficiaries of the whole safeguarding mechanism, namely the people connected to their ICH or – in order to use the 2003 Convention's wording – ICH communities, groups and individuals.

In order, thus, to deal with ICH beyond borders, the overcoming of the constraints of a mechanism defined by strong sovereignty-based arrangements[67] is needed. In this regard, concerning, indicatively, the listing mechanisms in the context of the ongoing global reflection for their reform, a new provision that would address some of the gaps mentioned earlier could be adopted. Namely, the possibility of communities to submit their own nominations for ICH elements' inscriptions on the two Lists and good practices' inscriptions on the Register, on the basis of proved special links to certain ICH manifestations and involvement in a certain good safeguarding practice, independently of the State to the jurisdiction of which they are subject or the prerequisite of ICH presence in a given territory. Although this would need to conquer a series of obstacles, such as the definition[68] of the "ICH community",[69] which would be reflected also at the national level in the inscriptions on National Inventories, it would probably lead to a more effective safeguarding of shared ICH which cannot "fit in" the territorial condition and find its place in the Lists until today. At the end of the day, the proposals would be subject to the same evaluation process and the IGC would still reserve the power of the final decisions.

However, even if this step – or others that could be proposed in this direction – seems to be premature for the actual period of the Convention's life, it is not unrealistic. On the contrary, it is inspired by the discussion around the possible establishment of a right to ICH, which gains more and more ground in the international discourse. On

[67] L. Lixinski et al., "Identity beyond Borders: International Cultural Heritage Law and the Temple of Preah Vihear Dispute", *ILSA Quarterly* 2011, vol. 20, issue 1, p. 37; see also: F. Francioni, "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity", *Michigan Journal of International Law* 2004, vol. 25, p. 1210.

[68] See a comparative analysis on the "heritage community" of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society signed in Faro on 27 October 2005 (hereinafter: the Faro Convention) and the "communities, groups and individuals" of the ICH Convention in: L. Zagato, "The Notion of 'Heritage Community' in the Council of Europe's Faro Convention. Its Impact on the European Legal Framework" [in:] *Between Imagined Communities*…, pp. 153–160.

[69] UNESCO Convention 2003 does not contain a definition of "community". We interestingly find the definition of "heritage community" for the first time in a relevant regional instrument in Article 2 paras. 1–2 of the Faro Convention.

the one hand, the latest developments in the field of human rights law[70] towards the expansive progressive interpretation of cultural rights – especially the right to participate in cultural life[71] – so as to contain in its scope the right of access to and enjoyment of cultural heritage should be taken into consideration. On the other, this debate is somehow "transplanted" at the UNESCO level with the adoption of the Ethical Principles for ICH Safeguarding, among which Principle 2 declares: "the right of communities, groups and individuals to continue the practices, representations, expressions, knowledge and skills necessary to ensure the viability of the ICH".[72] Although they constitute a soft-law, thus non-binding, instrument and function merely as a code of conduct, their adoption reveals the existence of a dynamic tendency of inter-State discussion towards the recognition of a right to ICH.

Besides, the ICH international protection field remains new and evolving, thus a dynamic one, with all the instability as well as creativity when it comes to legal proposals that this evokes. Its current phase of evolution, following a consistent – more than decennial – application of the 2003 Convention after its entry into force in 2006, reveals still a process of transformation where maybe a re-orientation and re-position of the crucial questions at stake, rather than absolute answers to the already apparent deficiencies, would prove more effective. ICH intrinsically raises the question of limits,[73] either if that means the limits between different areas of law and the figurative frontiers raised between all actors involved in its safeguarding or the real inter-State borders. Safeguarding ICH seems challenging, insofar as the demand for a more active involvement of ICH bearers in the implementation of the system intensifies. The tensions manifested among States as also among communities within and beyond the same State, in the context of rather politicised debates especially in decision-making processes, are evident, while aspects of the existing regulation serve their maintenance instead of elimination. This

[70] Human Rights Council, Agenda item 3-Report of the independent expert in the field of cultural rights, Farida Shaheed, 17th Session, 21 March 2011, paras. 77–79 and Resolution 33/20: Agenda item 3-Cultural rights and the protection of cultural heritage, 33rd Session, 27 September 2016, preamble: paras. 4–5 and 1; Committee on Economic Social and Cultural Rights, General comment No. 21: Right of everyone to take part in cultural life, 43rd Session, 21 December 2009, paras. 11, 13, 16, 49, 50; Nonetheless, the Committee has never proceeded with adopting views in a case examining art. 15 para. 1a and as a result no practical example of the application of this interpretation exists so far.

[71] Article 27 para. 1 of the Universal Declaration of Human Rights, adopted in Paris on 10 December 1948; Article 15 para. 1 of the International Covenant on Economic, Social and Cultural Rights, signed in New York on 16 December 1966.

[72] IGC, *Decision 10.COM 15.a*, 2015, Annex.

[73] P. Dube, "The Beauty of the Living", *Museum International, ICOM* 2004, vol. 56, issue 1–2, p. 123.

happens when States Parties "take advantage of" a mechanism that in practice prioritises their own interests over communities' ones while perpetuating the Convention's grey zones and the absence of specific legal guarantees.

In an imagined picture inspired by the famous album by Simon and Garfunkel, safeguarding shared ICH could be described as a "bridge over troubled water". In an attempt to visualise ICH world map, if States' relations provoke the "troubled waters" and ICH itself is the flowing water that connects cultures and peoples, the international regime for its safeguarding should be functioning as "a bridge" above any kind of borders rather than the foundations for the construction of more artificial "intangible walls" in a field where they were never supposed to exist.

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Summary

Safeguarding shared Intangible Cultural Heritage:
A "bridge over troubled water"?

The paper examines the issue of the safeguarding of shared Intangible Cultural Heritage (ICH), namely transboundary manifestations that cannot be defined on the basis of their "presence" in a given territory, within the 2003 UNESCO Convention. Firstly, it refers to the characteristics of ICH somehow defining its protection's perspectives. Secondly, it outlines the conventional mechanism, pointing out those aspects that might *a priori* in theory and *a posteriori* reflected in State practice favour or impede the protection of shared heritage in particular. Finally, it focuses on how the existent system deals with the issue, questioning whether its evolution is needed with a view to a potentially more effective safeguarding. In an attempt to visualise ICH world map, if States'

relations provoke the "troubled waters" and ICH itself is the flowing water that connects cultures and peoples, the international regime for its safeguarding should be functioning as "a bridge" above any kind of borders rather than the foundations for the construction of "intangible walls".

Keywords: Intangible Cultural Heritage, international law of culture, safeguarding, shared cultural heritage, transboundary cultural heritage manifestations, UNESCO 2003 Convention

Streszczenie

Ochrona wspólnego niematerialnego dziedzictwa kultury: „most nad wzburzoną wodą"?

Tematem artykułu jest ochrona wspólnego niematerialnego dziedzictwa ludzkości, ściślej – transgranicznych przejawów tego dziedzictwa, czyli takich, których nie sposób ująć jako „znajdujące się" na danym terytorium w rozumieniu konwencji UNESCO z 2003 r. Autorka przedstawia definicję tego dziedzictwa oraz omawia sposoby jego ochrony, następnie opisuje mechanizm konwencji UNESCO z 2003 r., ze szczególnym uwzględnieniem zagadnień, które *a priori* lub w praktyce państw członkowskich mogą mieć znaczenie dla dziedzictwa wspólnego, wreszcie – ocenia efektywność systemu, a zwłaszcza to, czy potrzebne są zmiany. Obrazowo ujmując, jeżeli dziedzictwo niematerialne jest jak rzeka łącząca ludy i kultury, i jeżeli relacje między państwami mogą wywołać stan wzburzenia wód, to system ochrony wspólnego niematerialnego dziedzictwa mógłby zadziałać jak most przeciwdziałający traktowaniu dziedzictwa jako pretekstu do tworzenia barier.

Słowa kluczowe: niematerialne dziedzictwo kultury, międzynarodowe prawo kultury, ochrona, wspólne dziedzictwo kultury, transgraniczne przejawy dziedzictwa kultury, konwencja UNESCO z 2003 r.

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Cultural property protection in NATO present CIMIC doctrine as euro-atlantic milestone for implementation of 1954 Hague Convention

1. Introduction – wide context

"Peacekeeping is not a job for soldiers, but only soldiers can do it" – these words, by Dag Hammarskjöld,[1] seem to resonate today more clearly than ever.[2] Paradoxically, a soldier trained for combat can also be the best possible defender of whatever needs protection. When thinking about the protective tasks of a single soldier, one usually thinks about the protection of personnel, weapons, or buildings useful from a military point of view. The protection of cultural property, as an element of civil-military cooperation, began to play an increasingly important role in the catalog of tasks for NATO soldiers after the experiences of the conflict in the Balkans. However, to understand the role of the armed forces in the protection of cultural property, one should turn to the initial regulations dealing with them – international humanitarian law of armed conflicts.

International humanitarian law is traditionally divided into two groups: *ius ad bellum* (which means "right to go to war") and *ius in bello* ("right conduct in war"). The difference between these concepts is simple – first one concerns the morality of initiating the conflict (*a priori*) and the second is focusing on moral conducting hostilities

[1] Dag Hammarskjöld – Secretary-General of the United Nations from 10 April 1953 until 18 September 1961. Lawyer, economist, diplomat, and Nobel laureate (posthumously), see: "Second United Nations Secretary-General", www.un.org/depts/dhl/dag/bio.htm (accessed: 30.11.2020).

[2] W. Stam, "International Day of UN Peacekeepers, a day of reflection", 29 May 2019, www.thehagueuniversity.com/about-thuas/thuas-today/news/detail/2019/05/29/international-day-of-un-peacekeepers-a-day-of-reflection (accessed: 30.11.2020).

(*a posteriori*).[3] In modern terms, the division covers three normative levels. The first is the prevention of armed conflicts – *ius contra bellum*. The second is the already known *ius in bellum*, which defines the limits of the freedom to choose means and the way of fighting. The third area is humanitarian law, the purpose of which is to protect civilians who are not party to the conflict and those who have ceased to be party to the conflict – prisoners of war or combatants.[4] And this branch of international law, especially during the conflict in the Balkans, became an impulse for the create modern regulations on the cultural property protection (CPP).

2. History of Civil-Military Co-operation (CIMIC)

Military operations entail destruction of infrastructure of the countries in which they take place. They often result in deep economic and humanitarian disasters. In the second half of the 20th century, many governmental and non-governmental organisations (including foundations, agencies and associations) focused on combating the effects of these crises across the world, primarily through assistance provided to the civilian population. In 1999 alone, during the SFOR mission in Bosnia and Herzegovina, nearly 50 organisations were involved, bringing together more than 8,000 civilian workers and volunteers to help those in need. The genesis of civil-military cooperation was connected to the need to reach heavily mined areas with humanitarian aid. NATO soldiers established safe routes for humanitarian convoys and cleared areas, based on information on the location of minefields obtained from the warring parties to the conflict. Thus, the concept of organised civil-military cooperation was developed from a grassroots initiative, the priority of which was to ensure the security and assistance of the civilian population.[5]

At present, each allied country has a specialised CIMIC department, and the Hague has the CIMIC Center of Excellence for the entire NATO (CCOE). The Center is constantly researching, publishing, and disseminating knowledge on improving CIMIC through, inter alia, detailed, thematic studies.[6] One of them is cultural property protection.

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[3] C. Guthrie, M. Quinlan, *Just War: The Just War Tradition: Ethics in Modern Warfare*, London 2007, pp. 11–15.

[4] M. El Ghamari, "Współpraca cywilno-wojskowa wobec prawa humanitarnego" [in:] *Współpraca cywilno-wojskowa w zarządzaniu kryzysowym. Seminarium naukowe*, ed. J. Kręcikij, MSWiA, Warszawa 2007, p. 123.

[5] L. Bagiński, C. Marcinkowski, *Współpraca cywilno-wojskowa w operacjach pokojowych*, Warszawa 2000, p. 46.

[6] Y. Foliant, *Cultural Property Protection Makes Sense: A Way to Improve Your Mission*, Hague 2015, p. 5.

3. History of cultural property protection

The history of damaging or destroying cultural property is as long as the history of mankind. Sun Tzu's remarks about the conquest in his *opus magnum* "The Art of War" were accurate. The treatise was well known in Asia but almost unknown in Europe until the beginning of 18th century, when Jean-Joseph-Marie Amiot translated the work of the Chinese strategist into the Western language. The translation however did not bring anything new to the European military experiences in terms of the destruction of cultural property.[7] First thoughts about CPP came from ancient Greece, about *shameful* practices of plunder and destruction of works of art – words expressed by Polybius and Cicero.[8] In the Middle Ages, the Catholic Church implemented the first formal restrictions against these above-mentioned crimes – but limited to buildings and objects of worship. Pope Urban II in 1095 proclaimed the inviolability of churches and monasteries during the war, and ordered the restitution of relics of saints, sculptures, utensils, and bells stolen from the Gniezno Cathedral (Poland).[9]

These notions survived until the industrial revolution, when Clausewtiz's idea of war spread throughout Europe and armed conflicts to some extent became more *organised*. The Brussels[10] and St. Petersburg[11] declarations to some extent limited the possibilities of destroying and seizing cultural property. The 20th century brought the growing importance of the protection of cultural property in international law. The years 1899 and 1907 brought two Hague Conventions on humanitarian law, and it was the latter of the two that contained the first provision concerning the obligation to protect cultural property. The rule included in Article 27 of the Hague Convention of 18 October 1907 however, stipulating that cultural property "provided they are not being used at the time for military purposes", is provided with the condition *autant que possible* – as far

[7] Lei Sha, *Translation of Military Terms in Sun Tzu's The Art of War*, Binzhou 2017, p. 195.

[8] S.E. Nahlik, *Grabież dzieł sztuki. Rodowód zbrodni międzynarodowej*, Wrocław 1958, pp. 75–78.

[9] W. Kowalski, "Międzynarodowo-prawne aspekty ochrony wspólnego dziedzictwa kulturowego. Od sporów do współpracy" [in:] *Ochrona wspólnego dziedzictwa kulturowego*, ed. J. Kowalczyk, Warszawa 1993, p. 15.

[10] Project of an International Declaration concerning the Laws and Customs of War, signed in Brussels on 27 August 1874; P. Żarkowski, "Ochrona dóbr kultury w czasie wojny w świetle prawa międzynarodowego", *Krakowskie Studia Międzynarodowe* 2016, vol. XIII, no. 3, p. 163.

[11] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, signed in Saint Petersburg on 29 November/11 December 1868; M. Piątkowski, "Międzynarodowe prawo humanitarne wobec zastosowania broni zapalającej w konflikcie zbrojnym", *Bezpieczeństwo – Teoria i Praktyka* 2017, no. 2, pp. 150–152.

as possible. Consequently, it has in fact become *lex imperfectae*, opening up an endless repertoire of ways to circumvent this provision.[12]

While the Hague Convention of 1907 could not solve the problem, the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, signed in Washington D.C. on 15 April 1935 (Roerich Pact of 1935) had potential to provide full protection of cultural property. Unfortunately, the range of the treaty was limited (only 21 signatories) and the imminent outbreak of the Second World War meant that any work by the League of Nations on a modern system for the cultural property protection was suspended. However, the destruction brought by the war gave a new impulse, forcing the international community to develop a new answer to the problems of contemporary armed conflicts. Thus, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was developed, adopted on 14 May 1954 at the United Nations Educational, Scientific and Cultural Organization (UNESCO) General Conference in Hague. The convention was groundbreaking – it was an act regulating the issues of cultural property protection comprehensively, from their definition, through forms of protection and obligations of the parties, to justifications.

The delegates present at the conference in The Hague divided into two factions – supporters of the primacy of military necessity and supporters of "humanitarianisation" of armed conflicts. Representatives of the former, led by the American col. Perham, sought to make it possible to take advantage of the widest possible range of exceptions to liability for the destruction of cultural property.[13] The American delegation, supported primarily by the British, clashed with the views of opponents of freedom in shaping the rules of engagement. This faction was mainly composed of the Greeks, Poles and Spaniards, who perceived the convention as a great opportunity to preserve their cultural heritage.[14] Today the doctrine is eclectic in its approach, indicating that due to the nature of the regulations and the penal nature of their sanctions, the possibility of applying the freedom of military necessity should be treated as an exception, which means

[12] Article 27 of Hague Convention: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand".

[13] S.E. Nahlik, "International Law and the Protection of Cultural Property in Armed Conflicts", *Hastings Law Journal* 1976, vol. 27, issue 5, p. 1085.

[14] H. Schreiber, "Komentarz do Konwencji o ochronie dóbr kulturalnych w razie konfliktu zbrojnego wraz z Regulaminem wykonawczym do tej Konwencji oraz Protokołem dóbr kulturalnych w razie konfliktu zbrojnego" [in:] *Konwencje UNESCO w dziedzinie kultury. Komentarz*, ed. K. Zalasińska, Warszawa 2014.

that they must be interpreted narrowly.[15] The provisions of the 1954 convention lasted 40 years until the experiences of the Balkan war prompted the contracting parties to make amendments. Additional the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, signed in Hague on 26 March 1999 (hereinafter: the Second Protocol to the Convention) brought more *lex plus quam perfectae* to the Convention, defining a catalogue of crimes against cultural property (protected under the Convention) and proposing regulations facilitating the prosecution of perpetrators – from extradition to mutual legal assistance.[16]

However, despite the fact that the Hague Convention of 1954 contains provisions to protect monuments *a priori*, there are still cases of irreversible destruction of cultural heritage sites – including those included in the UNESCO World Heritage List (established by the Convention concerning the Protection of the World Cultural and Natural Heritage, signed in Paris on 16 November 1972). In an armed conflict, civilian personnel, archaeologists and conservation services may not be able to provide sufficient protection for cultural property. That is why it is crucial for a new actor to appear in the structure designed by the Hague Convention of 1954 – the armed forces.

The involvement of the armed forces in the protection of cultural property was defined by the Hague Convention of 1954 already in Article 7.[17] The parties to the convention were burdened with two main obligations: 1) Development and implementation of instructions, regulations, and provisions to increase the awareness of personnel (both civilian and military) in the field of protection of cultural heritage; 2) Preparation of organisational units or teams of persons competent for cooperation with civil authorities in the field of safeguarding of cultural goods.

The Second Protocol to the Convention enhances the high contracting party duties, with *inter alia* planning of emergency measures. It also extends the catalogue of the conflict participants to include armed groups, responding to the challenges of the present day.[18]

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[15] K. Sałaciński, "Dziedzictwo kultury w konfliktach zbrojnych – prawo, praktyka, nowe wyzwania" [in:] *Ochrona dziedzictwa kultury w konfliktach zbrojnych w świetle prawa międzynarodowego i krajowego. 60 lat konwencji haskiej i 15 lat jej protokołu dodatkowego*, eds. E. Mikos-Skuza, K. Sałaciński, Warszawa 2015, p. 30.

[16] A. Przyborowska-Klimczak, *Rozwój ochrony dziedzictwa kulturalnego w prawie międzynarodowym na przełomie XX i XXI wieku*, Lublin 2011, p. 21; K. Prażmowska, "Sprawa Al Mahdiego przed Międzynarodowym Trybunałem Karnym: przełomowy wyrok czy stracona szansa?", *Studia Prawnicze KUL* 2019, no. 2(78), pp. 300–301.

[17] C. Wegener, *The 1954 Hague Convention And Preserving Cultural Heritage*, Archaeological Institute of America, 2010, p. 2, www.store.archaeological.org/sites/default/files/files/Wegener%20v2.pdf (accessed: 30.11.2020).

[18] K. Hausler, P. Bongard, M. Lostal, "20 Years of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in Armed Conflict: Have All the Gaps Been

4. The meeting point

The North Atlantic Treaty Organization is a political and military alliance formed in 1949. The alliance functions in many spheres – including organising, training, military equipment of allied armies, personnel resources, infrastructure, and interoperability. Common procedures in situations and in time of war guarantee the Alliance's effective implementation of security policy objectives.[19] One of the most important pillars for an entire organisation is operational standardisation, which is mainly expressed in the form of common doctrines.[20] A doctrine as understood by NATO is a document containing basic principles according to which the forces of an allied state conduct their activities in the area of joint operations. It contains fundamental principles by which the military forces guide their actions in support of objectives.[21] Using a comparison to the law of the European Union, the doctrine would correspond to some features of the Council or Commission regulations.[22] The content of the doctrines is developed and accepted by the Military Committee Joint Standardization Board, and sent to the member states for the translation and implementation stage.[23]

Doctrines in NATO cover the most important areas of international cooperation that require a common approach to problems. Thus, we can distinguish the doctrine of military reconnaissance, conduct of joint operations, logistics or training doctrine. Among them is also the doctrine of civil-military cooperation, which is the point of contact for the world of culture and war.

5. Why is it important

At a first glance the current issue of CIMIC doctrine may not seem particularly prominent, but this impression disappears if its provisions are studied in more detail. So

Filled?", *EJIL:Talk! Blog of the European Journal of International Law*, 29 May 2019, www.ejiltalk.org/20-years-of-the-second-protocol-to-the-1954-hague-convention-for-the-protection-of-cultural-property-in-armed-conflict-have-all-the-gaps-been-filled/ (accessed: 30.11.2020).

[19] Z. Groszek, "Współpraca cywilno-wojskowa w NATO – istota, cele i podstawowe funkcje", *Przedsiębiorczość i Zarządzanie* 2018, vol. XIX, fasc. 8, part II, p. 220.

[20] J. Dereń, "Standaryzacja w siłach zbrojnych sojuszu w aspekcie procesu planowania obronnego NATO", *Bezpieczeństwo – Teoria i Praktyka* 2012, no. 3 (VIII), pp. 49–50.

[21] *Doctrine* [in:] *AAP-06 – NATO Glossary of Terms and Definitions*, NATO 2019, p. 44, https://www.coemed.org/files/stanags/05_AAP/AAP-06_2019_EF.pdf (accessed: 15.11.2020).

[22] C. Fretten, V. Miller, *The European Union: a guide to terminology procedures and sources*, London 2016, p. 14, https://commonslibrary.parliament.uk/research-briefings/sn03689/ (accessed: 25.10.2020).

[23] T. O'Harrah, *Military Committee Standardization Activities*, Brussels 2018, p. 6.

far, the cultural property protection was a "hot potato" in NATO legislation. CPP was within area of responsibility of both civil-military cooperation and international humanitarian law, and it was not always certain where the borderline between military and civil jurisdiction was. There was heterogeneity in the allocation of CPP competences to CIMIC teams and to *ad hoc* units assigned solely to the implementation of obligations under Article 7 of the Convention. The experiences in Iraq have brought reflections on the hardly predictable impact that criminal offences against cultural heritage can have. A notable example of this phenomenon is the event where, as a result of terrorist acts against mosques in Samara, a large number of civilians began to migrate to other parts of the country, which could significantly hinder stabilisation activities, and certainly affect the status of the mission.[24] This situation only confirmed the assumptions of the planners to update the doctrine of civil-military cooperation (AJP 3.19).[25] However, can a doctrine be regarded as a normative act equivalent to a statute? Being scrupulous, a doctrine should be implemented (as opposed to its simple translation) and put into the activities of the armed forces of the allied state. Present doctrine recognises cultural property protection as a cross-cutting topic.

Until 2018, cultural property protection was considered an interesting, but not necessarily important topic. This changed in 2018 – the AJP update raised the CPP rank to the level of cross-cutting topic. Today these subjects are considered important from military and political point of view. They can have various effects on the course of the mission, but they are beyond the agency of the soldiers. A cross-cutting topic does not belong to one specific military discipline or branch. So how did the protection of cultural property become a cross-cutting topic in the course of operations? When considering this issue, one should bear in mind the context of global security. Recent years have brought irreparable losses to cultural heritage in every corner of the world – from the destruction of Buddha statues in Bamiyan,[26] to the destruction of the Citadel in Aleppo[27] and mausoleums in Timbuktu.[28] Each of these activities had their origins, and NATO is learning the lessons and is trying to increase the security of still existing World Heritage sites.

[24] UN Report A/HRC/28/18, Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, 15 March 2015.

[25] https://www.cimic-coe.org/resources/external-publications/ajp-3.19-eda-v1-e.pdf (accessed: 30.11.2020).

[26] ABC News, "U.N. Confirms Destruction of Afghan Buddhas", 6 January 2006, www.abcnews.go.com/International/story?id=81406&page=1#.UA4FSrQe5TI (accessed: 30.11.2020).

[27] BBC, "Syria civil war: Bomb damages Aleppo's ancient citadel", 12 July 2015, www.bbc.com/news/world-middle-east-33499609 (accessed: 30.11.2020).

[28] BBC, "Timbuktu shrines damaged by Mali Ansar Dine Islamists", 30 June 2012, www.bbc.com/news/world-africa-18657463 (accessed: 30.11.2020).

6. Conclusions and next steps

The next stage in constructing a unified, coherent system for the cultural property protection may be the engagement of non-military defence units in activities aimed at increasing the security of cultural goods. Potentially, these activities could involve the police, border services, fire brigades or other paramilitary organisations. It is necessary to take decisions extremely carefully, bearing in mind the nature of objects in question – priceless, tangible achievements of civilisation. Another potential development area will be the dissemination of knowledge about the operationalisation of culture in the activities of the armed forces. The possibility of using knowledge of some aspects of local culture by commanders operating outside their own countries will certainly improve the effectiveness of military operations – both classic, as understood by Clausewitz – and modern asymmetric operations.[29]

The interest in the subject is still growing – new publications in this area appear on a regular basis. Some NATO member states have implemented the protection of cultural property in their training system, and some have developed their own guides on the activities of the armed forces in this area.[30] UNESCO has also produced its own guide.[31] This movement is highly promising. One thing is certain – this area of military activity is being discussed more and more widely, and more and more decision-makers are getting involved. If this trend improves chances that the cultural heritage will be passed intact on to future generations, then it deserves nothing but praise.

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[29] K. Trochowska, "Operacjonalizacja kultury w przeciwdziałaniu zagrożeniom asymetrycznym", *Zeszyty Naukowe AON* 2013, no. 3(92), p. 51.

[30] PFT 5.3.2, *Handbook on The Protection of Cultural Property in the Event of Armed Conflict*, France 2020, www.c-dec.terre.defense.gouv.fr/index.php/fr/content-english/our-publications/57-content-in-english/233-pft-5-3-2-handbook-on-the-protection-of-cultural-property-in-the-event-of-armed-conflict%20-%201 (accessed: 30.11.2020).

[31] R. O'Keefe, C. Péron, T. Musayev, G. Ferrar, *Protection of Cultural Property – Military Manual*, UNESCO, Sanremo 2016, www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/MilitaryManuel-En.pdf (accessed: 30.11.2020).

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Summary

Cultural property protection in NATO present CIMIC doctrine as euro-atlantic milestone for implementation of 1954 Hague Convention

The provisions of the Hague Convention lasted 40 years, so that the experiences of the 90' wars compelled the international community to adopt clarifying protocols. However, each signatory state was free to interpret the provisions of the Convention. The latest NATO Allied Joint Doctrine for Civil-Military Cooperation recognises cultural property protection as a cross-cutting topic, which may have a significant impact on missions. It is the very first time that an alliance has distinguished protection of cultural property and treats it not only as part of international humanitarian law.

Keywords: international humanitarian law, cultural property protection, civil-military cooperation, blue shield, NATO, cultural heritage, UNESCO, CPP, CIMIC

Streszczenie

Kwestia ochrony dóbr kultury w nowelizacji doktryny CIMIC Sojuszu Północnoatlantyckiego jako kamień milowy w implementacji postanowień konwencji haskiej z 1954 r.

Postanowienia konwencji haskiej z 1954 r. przetrwały ponad 40 lat aż doświadczenia konfliktów zbrojnych lat 90. skłoniły społeczność międzynarodową do uchwalenia protokołu dodatkowego. Jednocześnie każde z państw-sygnatariuszy miało swobodę własnej interpretacji postanowień konwencji. W ostatniej nowelizacji doktryny współpracy cywilno-wojskowej NATO uznano kwestię ochrony dóbr kulturalnych za temat przekrojowy, co może mieć znaczący wpływ na prowadzenie działań sojuszniczych. Po raz pierwszy Sojusz wyróżnił ochronę dóbr kultury jako coś więcej niż element międzynarodowego prawa humanitarnego konfliktów zbrojnych.

Słowa kluczowe: międzynarodowe prawo humanitarne konfliktów zbrojnych, ochrona dóbr kultury, współpraca cywilno-wojskowa, błękitna tarcza, NATO, dziedzictwo kultury, UNESCO, CPP, CIMIC

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Communist monuments: Cultural heritage or cultural nuisance?

1. Introduction

Monuments dedicated to heroes, commemorating victorious battles and glorifying warriors or gods have a rich history. They embody public memory, praise the power of the victorious and the glory and wealth of the communities that built them. Sometimes they are an expression of strength and values of those who govern the area, especially if they become an instrument of propaganda and domination. Some have survived for millennia in their unchanged form while others have disintegrated into dust. They were created in accordance with canons of art and technology of their times and therefore some of them were understood only by their contemporaries; today, for many people, reliefs, inscriptions or symbols from the past are merely decoration, and their meaning is only recognised by art historians or religious scholars.

Yesterday's heroes often do not deserve this name today. The political, social and political changes that took place in 1989 in the countries of the communist bloc in Europe and the regaining of independence by the countries under the USSR's rule resulted in the rejection of communist ideology, although not everywhere and not at once. The whirlwind of history has turned not only the states, but also the heroes standing on the pedestals. In many cases, the inhabitants spontaneously destroyed monuments for Dzerzhinsky, Lenin or other icons of communist power. Today, however, in many European cities, more than 30 years after the 1989 Autumn of Nations, communist monuments still glorify the former Soviet regime that some consider to be a form of occupation.

The issue of monuments that commemorate communist heroes is essentially the subject of political, sociological and historical discourse. For example, Dominika Czarnecka

presented the situation of monuments erected to memorialise the Red Army.[1] Mariusz Czepczyński has interpreted post-socialist icons in the cultural environment.[2] The individual memorials were also examined in the context of the "hero" put on the pedestal.[3] The questions raised in the studies also concern the artistic value of the objects, their spatial context as well as their current evaluation and identification. Jagoda Mytych analysed the discourse that took place around specific monuments in Warsaw, saddle between Gorce and Pieniny Mountains and Rzeszów.[4] Ewa Ochman posed the problem regarding contemporary identification of Soviet war memorials.[5] An important academic work edited by Marek Domański and Tomasz Ferenc outlines the phenomenon of war memorials in the historical, cultural, geographical and artistic contexts.[6]

Among these studies there are few legal analyses. More recent works include research on communist naming,[7] decommunisation activities in the jurisprudence of administrative courts,[8] changes in street names[9] and voivode's supervision in the context of the Decommunisation Act.[10] They are the result of legislative work which introduced

[1] D. Czarnecka, "Pomniki wdzięczności Armii Czerwonej w Polsce Ludowej i w III Rzeczypospolitej", *Dzieje Najnowsze* 2013, no. 4, pp. 93–100.

[2] M. Czepczyński, "Interpreting Post-Socialist Icons: From Pride and Hate Towards Disappearance and/or Assimilation", *Human Geographies* 2010, no. 4(1), pp. 67–78.

[3] K. Kącka, "Upamiętnianie jako zadanie i wyzwanie władz administracyjnych. Sprawa pomnika wdzięczności Armii Czerwonej w Toruniu" [in:] *Współczesne wyzwania administracji rządowej i samorządowej,* ed. D. Plecka, Toruń 2013, pp. 305–323; W.B. Łach, "Generał armii Iwan Czerniachowski – bohater czy zbrodniarz wojenny?", *Acta Universitatis Lodziensis. Folia Historica* 2019, no. 11(103), pp. 155–171; A. Sakson, "Konflikt o pomnik generała Armii Czerwonej Iwana Czerniachowskiego w Pieniężnie na Warmii, czyli spór o domenę symboliczną na pograniczu polsko-kaliningradzkim. Studium przypadku", *Pogranicze. Studia Społeczne* 2016, no. 27(2), pp. 131–147.

[4] J. Mytych, "Pionki na biało-czerwonej szachownicy: polityczny i medialny dyskurs o pomnikach na przykładzie 'Czterech śpiących', 'Organów' Hasiora oraz rzeszowskiego Pomnika Walk Rewolucyjnych, *Naukowy Przegląd Dziennikarski* 2018, no. 2, pp. 65–94.

[5] E. Ochman, "Soviet war memorials and the re-construction of national and local identities in post-communist Poland", *Nationalities Papers* 2010, no. 38(4), pp. 509–530.

[6] *Pomniki wojenne. Formy Miejsca Pamięci*, eds. M. Domański, T. Ferenc, Łódź 2016.

[7] B. Kwiatkowski, "Regulacja ustawy o zakazie propagowania komunizmu lub innego ustroju totalitarnego na tle procesów zmian nazewnictwa ulic Krakowa, *Kwartalnik Prawo – Społeczeństwo – Ekonomia* 2018, no. 2(1–2), pp. 191–201.

[8] T. Kulicki, "Ustawa dekomunizacyjna w orzecznictwie sądów administracyjnych (part 1)", *Prawo i Praktyka Temidium*, March 2019, pp. 51–55; R. Krupa-Dąbrowska, "Pomnik na cześć Armii Czerwonej nie narusza przepisów – wyrok WSA", *Rzeczpospolita*, 22 May 2019.

[9] K. Bandarzewski, "Nadawanie nazw ulicom a samodzielność samorządu gminnego (uwagi na tle regulacji tzw. ustawy dekomunizacyjnej)" [in:] *Konstytucyjne umocowanie samorządu terytorialnego*, eds. M. Stec, K. Małysa-Sulińska, Warszawa 2018, pp. 311–336.

[10] K. Szlachetko, "Instrumentalizacja nadzoru nad samorządem terytorialnym na przykładzie regulacji zarządzenia zastępczego wojewody w sprawach związanych z dekomunizacją przestrzeni publicznej", *Samorząd Terytorialny* 2018, no. 6, pp. 48–60.

the Act of 1 April 2016 on the prohibition to propagate communism or another totalitarian ideology in public space through proper names of organisations, public authorities, buildings, public facilities and monuments (consolidated text: *Journal of Laws* of 2018, item 1103), which is known as the Decommunisation law.

The law has provoked a lively discussion, which continues to this day, mainly in the daily press and social media.[11] There were conferences organised on specific objects, e.g. in Olsztyn[12] and Rzeszów.[13] As part of this discussion, it is necessary to consider the issue of judging actual and legal decommunisation actions in the context of the cultural heritage protection issue. It should be remembered that sometimes such unwanted monuments were designed or made by well-known artists, recognised and appreciated even today. The question arises, should we preserve or destroy this troublesome heritage? Is it necessary or useful to leave a monument be, but with some added footnote-type piece of information about cultural and historical context? Can we move it to a neutral place? It also raises another question: would it be enough?

In response to these questions, an interpretation of the applicable laws in Poland and an overview of the available doctrine and case law will be provided. The work will be supported by the views of the practitioners in the field of art history, cultural studies and other fields of science, who approach this issue with regard to the cultural policy of the countries.

2. Communist monuments

The countries of Central Europe were undoubtedly liberated from the Third Reich's grip with the help of the Red Army, only that one form of totalitarian control has been substituted with another, amounting to colonisation of many nations.[14] Ukraine, Belarus, Lithuania, Latvia, Estonia, Poland, Hungary, Czechoslovakia, Romania, Bulgaria and other European countries remained in the Soviet sphere of influence with the tacit consent of the Allied countries. The Soviet Union's position was the result of its military

[11] "Pomniki, które depczą pamięć – Andrzej Paterek von Sperling o ustawie dekomunizacyjnej", *Rzeczpospolita*, 11 August 2018; W. Ferfecki, "W Polsce wciąż stoją komunistyczne pomniki. Nie wiadomo ile", *Rzeczpospolita*, 30 December 2019.

[12] https://zabytki.olsztyn.eu/zabytki/aktualnosci/article/zachowac-zmienic-zburzyc-losy-pomnikow-w-czasach-przemian-konferencja-naukowa.html (accessed: 12.10.2020).

[13] https://rzeszow.wyborcza.pl/rzeszow/1,34962,17838160,Cala_sesja_o_pomniku__W_czwartek_na_Uniwersytecie.html (accessed: 12.11.2020).

[14] J. Fedor, S. Lewis, T. Zhurzhenko, "Introduction: War and Memory in Russia, Ukraine, and Belarus" [in:] *War and Memory in Russia, Ukraine and Belarus,* eds. J. Fedor, M. Kangaspuro, J. Lassila, T. Zhurzhenko, Palgrave Macmillan, Cham 2017.

strength, its aggressive politics and the weakness of the West. The domination lasted for years, until 1989, when the economic situation enabled many countries to free themselves from dependence and regain full sovereignty. However, for several decades the Red Army was glorified as a liberator. Thus, monuments were erected to commemorate them, and no visible difference was being made between common Soviet soldiers and active installers of the new regime who are regarded today as criminals. There was only one trend – the liberators should be given monuments, and these included symbols such as red star, PPSh,[15] T-34 tank or divisional gun ZIS. By design of the communist authorities, these symbols were meant to convey Soviet patriotism built around the warrior-liberator myth (*voin-osvoboditel'*)[16] and, at the same time, to deny the crimes committed on the liberated lands. In parallel, monuments were erected to Lenin, Stalin, Dzerzhinsky, Marx, Engels and local communist leaders. Even the obelisks dedicated to local heroes included references to friendship with the Red Army or communist symbolism, whether or not such connections were historically accurate.

The entire scheme of erecting monuments of this sort was about propaganda – visual omnipresence of the communist idea required them to be placed in central squares or at the intersection of main streets. The design of obelisks or monuments was commissioned to contemporary artists, among which we find recognised names such as Xawery Dunikowski ("Silesian Insurgents Monument" at Saint Anna's Mountain (Góra Św. Anny) and "Monument of Gratitude to the Red Army" in Olsztyn), Władysław Hasior ("The Organ" in the Pienin Mountains was originally a monument "In Memory of the Fallen in the Struggle to Consolidate the People's Power") and Alina Szapocznikow (her sculpture "Friendship"[17] was originally placed in the main hall the Palace of Culture and Science in Warsaw[18]). Despite prominent names of some of the designers, many of these fixtures presented little or no artistic value.

The changes initiated in Poland in the autumn of 1989 resulted in destroying monuments erected to the past authorities; one notable example was dismantling the Dzerzhinsky monument in Warsaw by the Public Road Administration to the applause of the gathered people in November 1989. Some monuments were destroyed completely,

[15] PPSh-41 (*pistolet pulemyot Shpagina*), or Shpagin's machine pistol, was a standard issue weapon of a Soviet soldier during the World War II; the iconic shape of the gun became synonymous with the popular image of Red Army.

[16] K. Bruggemann, A. Kasekamp, "The Politics of History and the "War of Monuments" in Estonia", *Nationalities Papers* 2008, no. 36(3), pp. 425–448.

[17] The sculpture was sold at auction in 2019 for 1.7 million PLN – ca. 450.000 USD, https://desa.pl/pl/wyniki/rzezba-i-formy-przestrzenne-m1j9/przyjazn-1954-r/ (accessed: 27.11.2020).

[18] "Między ideologią, Putinem i sztuką wysoką, Wywiad z W. Baraniewskim", *Rzeczpospolita*, 29 December 2019.

some were given additional inscriptions, others were remodelled by cutting out red stars and other communist symbols. Simultaneously, some of the monuments, after being removed from their original location, were stored in various places managed by public or private authorities. The most famous are Memento Park in Budapest, the Socialist-Realist Art Gallery in Kozłówka and Grutor Park in Lithuania – each of these created with a different concept in mind. Decommunisation also meant that a large proportion of communist labels and proper names disappeared relatively quickly from the streets of towns and cities, not only physically (by the removal or physical destruction of the plaque) but also by way of official action.

At present, there are several dozen or perhaps several hundred objects remaining in public space in Poland that raise objections. Some of them are not properly maintained and fall into disrepair, others are renovated and some are even exposed and accentuated (for example by additional lighting). Some are given new meaning by renaming, removing communist symbolism or adding new, non-original elements. There is no doubt these monuments are testimony to a bygone era, but are they also cultural heritage?

3. Cultural heritage

Cultural heritage is often associated with prominence – it is made up of large buildings, castles or temples, easily recognisable man-made structures and works. We appreciate what is monumental, but the monumental is ultimately about remembrance. Memory, on the other hand, is often local, and the significance of an object may also be local. These differences in terms of value, locality or universality, artistry or lack of it, monumentality or micro-scale make it difficult to determine unequivocally and objectively what heritage is in terms of culture. To quote Craig Forrest, "all that we are is an expression of the culture that we inherited, and which we may manipulate and pass on to future generations".[19]

However, this approach is as broad as the very term "culture" and as diverse as the values we wish to convey to our heirs. For legal purposes, however, a definition should be concise, unambiguous and substantive, and must allow assessment as to the scope and content of cultural heritage. It is worth to invoke in this context various definitions adopted in international instruments, such as the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, signed in Hague on 15 May 1954 (hereinafter: the

[19] C.J.S. Forrest, "Defining 'Underwater Cultural Heritage'", *International Journal of Nautical Archaeology* 2002, no. 31(1), pp. 3–11.

1954 Hague Convention) or the Convention Concerning the Protection of the World Cultural and Natural Heritage adopted in Paris on 16 November 1972 (hereinafter: the 1972 UNESCO Convention). The Hague Convention defines cultural goods in Article 1(a): "movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above". The 1972 UNESCO Convention in its Article 1 defines "cultural heritage" as "monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view".

These definitions are largely descriptive: they list examples of sites that can be considered as part of the heritage. They also include an axiological element, by indicating an exceptional universal value as a qualifier of this heritage. Similarly, the term "of great importance for the cultural heritage of a nation" denotes value. Great importance refers to significance for the nation and not to commercial value.[20] This approach allows the state authorities to identify the goods that are important for a certain nation.[21] The exception clause, even in general terms, is also about value. Of course, it can be assumed that the concepts of "universality" and "exceptionality" are mutually exclusive,[22] but it can also be assumed that the context of uniqueness must be deciphered from a standpoint of a larger community. In other words, something may have value for the world's heritage while being undermined and disputed locally.

At the same time, it should be remembered that cultural heritage is a living phenomenon: on one hand there is development of historical, archaeological and anthropological research and, on the other, there are changes in public attitude and memory due to political, social and cultural factors. A nation is constantly being created and updated

[20] Ibid.

[21] H. Schreiber, "Komentarz do art. 1" [in:] *Konwencje UNESCO w dziedzinie kultury. Komentarz*, ed. K. Zalasińska, Warszawa 2014, p. 38.

[22] K. Piotrowska-Nosek, "Komentarz do art. 1" [in:] *Konwencje UNESCO…*, pp. 243–244.

through education and the cultivation of memories, so its heritage is also a reflection of memory and knowledge. Assuming after Janet Blake that the identification of cultural heritage is based on an active choice as to which elements of this wider "culture" are considered worthy of preservation as "heritage" for the future,[23] the notion of heritage as a self-updating aggregation of objects and ideas becomes substantial.

Cultural heritage items have patrimonial function as long as they contain four elements: authenticity, antiquity, meaning and beauty.[24] The absence of any of these allows the heritage to be rejected. There are however dark and lamentable aspects of our collective experience that, from objective standpoint, need remembering, but without raising them onto pedestal or treating as heritage. Genocide, war, slavery and the totalitarian regimes are undoubtedly such products of past generations. They are like an unwanted inheritance that can and sometimes must be rejected: we want to cast out of memory the shameful testator and everything he did, not only because of shame, but also to respect the victims of murders and martyrdom. The decision on what is to be expelled from the collective memory is a political decision that corresponds to the current social mood. The decision is taken by the state authorities – sometimes by international bodies – recognising what is and what is not worthy of protection and preservation for generations to come.[25] It should be noted, however, that the denial or omission of a heritage element affects the future identification of a nation or ethnic group. At the same time, there is a risk that the choice made for current political purposes in the future will not allow new generations to recognise the early symptoms leading to totalitarianism, war and crime. The important aspects must therefore be preserved, both momentous and glorious, as well as embarrassing and reprehensible, but it should be done in a proper form and with a proper moral evaluation dictated by historical knowledge.

4. Totalitarian ideology in public space

The attempt to push out the memories of our history is multidimensional. One of them is the political context that affects the content of legislation. In 2016, the Polish Parliament adopted the Decommunisation law. The explanatory memorandum to the Senate draft stated that law cannot allow the promotion of communist symbols and other

[23] J. Blake, "On Defining the Cultural Heritage", *International and Comparative Law Quarterly* 2000, no. 49, pp. 61–85.

[24] N. Heinich, "The making of cultural heritage", *Nordic Journal of Aesthetics* 2010–2011, no. 22(40–41), pp. 119–128.

[25] J. Blake, "On Defining the Cultural Heritage…", pp. 61–85.

totalitarian regimes because such actions would demoralise society.[26] At the same time, the Senate draft made reference to Article 13 of the Constitution of the Republic of Poland of 2 April 1997 (*Journal of Laws* of 1997, no. 78, item 483, as amended; hereinafter: the Polish Constitution) which prohibits the existence of totalitarian and authoritarian organisations. The essence of the act is to restrict local governments in naming of buildings, facilities and public utilities which would commemorate persons, organisations, events or dates symbolising communism or another totalitarian system. There has also been public approval for the removal of monuments glorifying the Red Army and the shortening of the deadline for removing banned names. At the same time, Article 1(2) of the Decommunisation law extends the prohibition to monuments referring to individuals, organisations, dates and events symbolising the repressive, authoritarian and non-sovereign system of power in Poland in 1944–1989.

As far as monuments are concerned, Article 5a(1) of the Decommunisation law stipulates that they may not commemorate or otherwise promote individuals, organisations, events or dates symbolising communism or another totalitarian regime, and here the term "monuments", according to Article 5a(2), expressly includes mounds, obelisks, columns, sculptures, statues, busts, commemorative stones, slabs, plaques, inscriptions and signs. It should be noted, however, that the meaning of the term "monument" for the purposes of this Act differs from the definition of a "monument" set forth 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) or the Act of 7 July 1994 – Construction Law (consolidated text: *Journal of Laws* of 2020, item 1333, as amended). Systemic interpretation would be misleading. The 2016 law appears to operate within narrower understanding of the word, where a "monument" is not a "relict", but a "memorial stone", a structure purposefully erected in order to remember a person, an event or an idea. Therefore, a linguistic definition should be adopted, according to which a "monument" is "a sculptural or architectural-sculptural work in the form of a statue, obelisk, slab, building, etc., erected in honour of a person, to commemorate".[27]

It must be noted that this textual approach, supported by teleological considerations, leads to a conclusion that the prohibition on promoting Communism is not absolute, because monuments not exposed to the public at all, or located in cemeteries or other places of final rest, exposed to the public as part of artistic, educational, collector's, scientific or similar activities for purposes other than the promotion of a totalitarian system, and monuments inscribed in the register of monuments, either alone or as part of a greater whole – are not to be removed.

[26] Senate draft act on the prohibition to propagate communism or another totalitarian ideology in public space, Senate Draft No 302 of 19 February 2016.

[27] *Słownik języka polskiego*, vol. 2, *L–P,* eds. H. Szkiłądź, S. Bik, C. Szkiłądź, Warszawa 1994, p. 795.

Recognition of a monument as communist or totalitarian requires some attention as to what "to commemorate" or "to symbolise" actually mean. In linguistic interpretation, "to commemorate" means "to remember, to recall, to preserve, to record something for future generations,[28] while "to promote" means "to spread, to disseminate ideas, slogans, thoughts; to unite someone for an idea, action, etc.; to carry out propaganda".[29] The verb "to symbolise" means "being a symbol" and "to represent, to express something with symbols". A symbol, in turn, "is a conventional sign which performs a function as a substitute for a certain object (a concept, a state of affairs) and brings this object to mind (evoking the reactions associated with it)".[30] It can therefore be assumed that a symbol must be obvious, widely recognisable and unequivocally interpreted. As the Supreme Administrative Court stressed, the indefinite term serves to leave a greater margin of appreciation, while at the same time it requires the demonstration that the conditions set out in Article 1 of the Act are met in a specific situation.[31] The Court expressed a similar opinion in another case (which, perhaps not incidentally, was also heard by the same panel), pointing out that "the name of a given street symbolises a totalitarian system, if its designation is unequivocally associated with a given system, it is universally recognisable and so distinct that its independent use allows for identification with a given ideology. Only then one can state that the name of such a street symbolises a totalitarian system".[32]

A different interpretation of the term "to symbolise" – this time in the context of commemorating a certain historic figure – stresses that in "judging (…) symbolic character should take into account current awareness of the society itself (including the lack of negative connotations, unambiguous associations). As a rule, this is not a sufficient negative premise to conclude that a given name does not symbolise communism within the meaning of Article 1(1) of the Act [the Decommunisation law], or does not promote it within the meaning of Article 1(2) of the Act. (…) Symbolisation or propagation within the meaning of the discussed regulations should be understood in an objectified manner and should relate basically to a person's biography, his or her achievements, merits and other circumstances which justified naming a building or a public facility or device after him or her".[33]

[28] *Słownik języka polskiego*, vol. 3, *R–Z*, eds. H. Szkiłądź, S. Bik, C. Szkiłądź, Warszawa 1994, p. 607.

[29] *Słownik języka polskiego*, vol. 2, *L–M,* p. 937.

[30] *Słownik języka polskiego*, vol. 3, *R–Z*, p. 381.

[31] Judgment of the Supreme Administrative Court of 3 April 2019, II OSK 3079/18.

[32] Judgment of the Supreme Administrative Court of 20 March 2019, II OSK 3391/18.

[33] Judgment of the Supreme Administrative Court of 11 June 2019, II OSK 1200/19, LEX no. 2753956

It seems that the objective approach as accentuated in the latter judgment is most appropriate. The assessment of a figure, an event, an organisation honoured with a monument should be made as objectively as possible, free from emotion and in line with current historical knowledge.

The historical narrative imposed in 1944–1989 included figures who were unambiguous communist symbols (such as Lenin and Dzerzhinsky) and some lesser known persons or organisations supporting the introduction of a non-sovereign system of power in Poland. The degree to which a figure is publicly recognisable is not, however, an adequate criterion. Public perception is ambiguous, subjective and ephemeral, and decisions on the presence of symbols in the public space must be grounded in facts. Also, the permanent growth in the urban fabric and changes in the urban topography is not a sufficient argument in favour of protecting such an object. Complementing or even replacing communist symbolism with educational elements will make it possible to neutralise the intended propaganda effect. Unfortunately, half-measures sometimes are not enough.

Whether a given monument fits the legal categorisation as promoting or commemorating communist figures, organisations, events or symbols is almost entirely determined by a specific piece of evidence – an opinion of the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation. This body is responsible for assessing whether the prerequisites for a communist monument are met. The removal is an administrative act of the voivode who decides primarily on the basis of this opinion. Despite being dominant piece of evidence, the opinion does not enjoy a legally privileged status and it is supposed to be evaluated in the light of the provisions of administrative proceedings, which means – on equal footing with other pieces of evidence. This position was confirmed *inter alia* by the judgment of the Regional Administrative Court in Warsaw in 2020, in which the Court stated that "the opinion of the Institute cannot be the sole and decisive proof of the removal of the monument in this case. The examination of evidence shall permit any document or other medium of information to be admitted as evidence to establish the facts of the case correctly. The obligation to consider all evidence is closely linked to the established principle of free evaluation of evidence".[34]

Procedural issues notwithstanding, it seems appropriate to pass the substantive assessment on to a specialised body. If it is the will of the state, as part of its cultural policy, to eliminate communist and other totalitarian symbols from public space, then this requires a substantive assessment. If such an entity already exists, it would amount to

[34] Judgment of the Regional Administrative Court in Warsaw of 22 January 2020, VII SA/Wa 1677/19.

mismanagement to have the administrative body of the first instance each time seek the opinion of an outside expert, within the framework of evidentiary proceedings based on the Code of Administrative Procedure. However, the omission of the social factor is doubtful. The procedure should not be about participation of interested veteran or political-historical organisations, but rather an actual determination of the reception of the monument by the local community. It is not a matter of assessing political emotions, but of determining whether the current positive social assessment is maintained after confronting the facts of life those who were brought up on the pedestals, such as the betrayal of the Second Polish Republic, crimes committed by Communists, participation in the apparatus of totalitarian terror, etc. It is necessary to balance and assess precisely to what extent the monument is an expression of communist propaganda and to what extent leaving it would be mere whitewashing of the communist regime.

5. Right to an unwanted heritage

It is the people that decide what they want to keep in their memories. The cultural heritage is not permanent, it is constantly changing and evolving. For a long time now, the removal of swastikas and monuments dedicated to the Third Reich as part of the denazification campaign has been uncontroversial. This process is not entirely finished, either, and the challenges posed by the current use of buildings of Nazi origin in Germany are still very much alive.[35] The question may arise as to whether the symbols of communist terror are to remain on the pedestal? The answer is clear to everyone. At the same time, while the assessment of the Third Reich is unequivocally negative, the assessment of the achievements of the Red Army, its mythologisation and the fact that the central point of Russian national identification is based on the Great Patriotic War, is unresolved. For the Russians, for those who fought in the Red Army, its image is that of a liberator and its deeds were heroic. For many, however, it is a symbol of individual and society-wide suffering that has remained for years in the countries of Central and Eastern Europe subjected to the Soviet Union. Those who lost their lives in the fight against German totalitarianism cannot be brushed off and trampled underfoot, which is why respect for the graves of Red Army soldiers and saving monuments in cemeteries dedicated to the fighters is most commendable. At the same time, there is no acquiescence or praise to communist criminals, to communist secret police, to communism and its icons with all its false propaganda. Leaving monuments of gratitude to the Red Army or glorifying

[35] S. Macdonald, *Difficult heritage. Negotiating the Nazi Past in Nuremberg and Beyond,* Routledge, London – New York 2009.

Dzerzhinsky should be treated as if they were unexploded bombs and mines left behind. These objects can potentially be used by social, cultural and political forces both to build and to destroy.[36] The context of an obelisk for the Red Army's fallen located in a war cemetery is different from the reception of a fixture located in a dominant square in the city centre. The removal of monuments to slave traders in the United States or Great Britain – even if they are famous for their victorious battles – is an expression of identification of society and of the nation. In the same way, removing communist remainders from the streets is a remembrance and respect for the victims of totalitarian terror. This removal makes it possible to eliminate the dissonance of unwanted cultural heritage and respect the memory of the victims. When one looks at communist monuments, one can also look at the four values defining cultural heritage: authenticity, antiquity, meaning and beauty. The negative opinion of historians undoubtedly results in the absence of the element of authenticity, and is even an example of falsification. The condition of antiquity, especially in the case of buildings erected in the era of socialist realism, remains fulfilled, even if one can have significant doubts about monuments from the late 1970s and 1980s. Beauty is probably rare in the case of these propaganda works. Also today's insignificance speaks in favour of transferring communist heroes to the museum and putting them in the right context within a closed exhibition space.

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[36] J.E. Tunbridge, G.J. Ahworth, *Dissonant heritage – The management of the past as a resource in conflict,* Chichester, England 1996, p. 32.

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Summary

Communist monuments: Cultural heritage or cultural nuisance?

Monuments to Lenin, Dzerzhinsky and the Red Army stand in many places in Europe. They are being spontaneously destroyed, removed from city squares and streets or moved to neutral places. Sometimes artistic value has saved them from destruction. Poland has introduced legal regulations to remove communist and other totalitarian symbols from public space. These regulations arouse much emotion in society. The article is an attempt to answer the question whether nations have the right to remove unwanted and troublesome heritage. The current historical, political and cultural context of monuments glorifying communism does not allow them to remain in their original location. Sometimes communist monuments should be permanently removed from public space and thus erased from public awareness.

Keywords: cultural heritage, decommunisation, communist monuments, public space

Streszczenie

Komunistyczne pomniki: dziedzictwo kultury czy kulturowa uciążliwość?

Pomniki Lenina, Dzierżyńskiego czy też te gloryfikujące Armię Czerwoną stoją w wielu miejscowościach w Europie. Są spontanicznie niszczone i usuwane z placów i ulic, przenoszone w neutralne miejsca. Zdarza się, że mają wartość artystyczną ratującą je przed zniszczeniem. Polska wprowadziła regulacje prawne nakazujące usunięcie symboli komunistycznych i wszelkich innych totalitarnych z przestrzeni publicznej. Przepisy te budzą dużo emocji w społeczeństwie. Artykuł jest próbą odpowiedzi na pytanie, czy narody mają prawo do usunięcia niechcianego i kłopotliwego dziedzictwa. Aktualny kontekst historyczny, polityczny i kulturowy pomników gloryfikujących komunizm nie pozwala na pozostawienie ich w pierwotnej lokalizacji. Czasem pomnik należy trwale usunąć z przestrzeni publicznej, a tym samym ze świadomości społecznej.

Słowa kluczowe: dziedzictwo kultury, dekomunizacja, pomniki komunistyczne, przestrzeń publiczna

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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"[1] have been proposed in academic discourse, but there is little doubt that apart from monuments of history[2] this heritage consists of *musealia* (museum exhibits[3]), library materials,[4] or archive materials,[5] the latter ow which will be the focus of the following commentary.[6] 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

[1] 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. Trzciński, J. Wawrzyniak, Warszawa 2002, pp. 132–133.

[2] 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).

[3] 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).

[4] 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).

[5] 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).

[6] 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.[7] 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.[8] 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[9] 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

[7] 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.

[8] 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).

[9] As applicable on the 1st 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.[10] 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

[10] 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[11] (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.[12] The language of the law was different; in the case of the offence covered by Article 54 of

[11] 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.

[12] 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 dawn 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".[13]

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,[14] 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".[15]

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).

[13] 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.

[14] 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).

[15] 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/wgdruku/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.[16] 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

[16] 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.[17] 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.

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[17] 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. Trzciński, *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.

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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 piec 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

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The French legal system for the *patrimonialisation* of historical trials (*Archives audiovisuelles de la justice*)

1. Introduction

In the second Book of the French Cultural Heritage Code of 20 February 2004 the French lawmakers, having envisaged the general regime applicable to archives, focused on the *Archives audiovisuelles de la justice* (Audiovisual Archives of Justice) as a special legal category.[1] Regulations contained in Articles L221-1 to L222-3 are based on the Law of 11 July 1985[2] and therefore constitute a subtype of "archives" legally defined in Article L211-1 as "all documents, including data, whatever their date, place of storage, form and medium, produced or received by any natural or legal person and by any public or private service or body in the exercise of their activity".[3] Through this system, in addition to the physical files (paper and digital) relating to a judicial procedure, the French law provides for keeping audio or video record of a trial which preserves interactions between judges, parties and witnesses, including record of the reactions and emotions in addition to spoken words. As Minister of Justice remarked in 1985, "the heart of judicial life is not to be found in the files themselves, in the writings. It is at the hearing, in its vicissitudes, during the debates and their incidents, and in the interventions of the participants that the essential part is played out".

Recording for the purposes of audiovisual archives of justice thus constitutes a major exception[4] to Article 38 *ter* of the Law of 29 July 1881 on freedom of the press, which

[1] *Rép. pén. Dalloz*, v° Archives, par H. Conchon, n° 49 et s.

[2] Loi n° 85-699 du 11 juillet 1985 tendant à la constitution d'archives audiovisuelles de la justice (JORF 12 juillet 1985 n°0160 p. 7865).

[3] Robert Badinter, Ass. Nationale, séance du 3 juin 1985, p. 1382.

[4] What precised Cons. const. 6 décembre 2019, n° 2019-817 QPC. See commentary in: *AJ pénal* 2020. 76 note Christine Courtin.

prohibits the use in a courtroom of "any device for recording, fixing or transmitting speech or image".[5] The purpose of this provision was to keep order in the court proceedings, to protect the rights of the parties and to guarantee the proper exercise of authority and impartiality of the judiciary.[6] It was supplemented by Article 308 of the Code of Criminal Procedure, which prohibits, as a matter of principle, the recording of the trial from the opening of the hearing.[7] The President of the Court may however, upon motion filed before the hearing, allow recordings to be taken, but only when the proceedings have not yet started and only with consent of the parties or their legal counsel and of the public prosecutor's office.

Not all trials are being recorded in this manner. The framework in question is designed to preserve only the most important legal disputes, ones that may have value or consequences that go beyond the immediate interest of the parties or the ordinary, day-to-day maintaining of public order. In other words, the record of the trials that have significance to the life of the entire nation become a part of national heritage. This article analyses the phenomenon of and legal framework for *patrimonialisation* (introduction of these records into the *patrimoine*, the national heritage) in two aspects – its origin (the moment of constitution of these archives) and legacy (in particular, communication of the records to the general public).

2. Genesis and purpose of the Law of 11 July 1985

The Law of 11 July 1985 on the audiovisual archives of justice was proposed by the Minister of Justice and "Keeper of the Seals", Robert Badinter. France was, at the time, in a particular historical moment for national memory: major trials for war crimes and crimes against humanity following the Second World War were about to start, in particular the

[5] Judged in accordance with the constitution by: Conseil constitutionnel, 6 décembre 2019, n° 2019-817 QPC; *AJDA* 2019. 2521; *D.* 2019. 2355; ibid. 2020. 1324 obs. EM. Debaets et N. Jacquinot; *AJ pénal* 2020. 76 étude C. Courtin; *Légipresse* 2019. 666; ibid. 2020. 118 note E. Derieux; ibid. 127 chron. E. Tordjamn, G. Rialan et T. Beau de Loménie; *Constitutions* 2019. 590 Décision; *DSC* 2020. 99 obs. E. Dreyer; *Légipresse* 2020. 118 obs. E. Derieux.

[6] For this reason, hearings before the Constitutional Court are filmed and broadcast live on its website, as there are no defendants, only the law is judged in its conformity with the Constitution and the court does not judge the case.

[7] Loi n° 54-1218 du 6 décembre 1954 complétant l'article 39 de la loi du 29 juillet 1881 sur la liberté de la presse en vue d'interdire la photographie, la radiodiffusion et la télévision des débats judiciaires (JORF 8 décembre 1954 287 p. 11445) codified by order n° 58-1296 du 23 décembre 1958 modifiant et complétant le code de procédure pénale (JORF n° 0300 du 24 décembre 1958 p. 11711).

trial of Klaus Barbie. But these years were also witness to considerable transformations in the methods of university research in history, in particular by ascribing greater importance to oral testimony and history of representations, by constructing history in a more ascending way from the individual level.[8]

Marie Cornu noted that parliamentary debates were already questioning the nature of recordings made during trials.[9] What is the ultimate purpose of the 1985 law? Is it about freedom of information or about preserving records for future historians? At first glance it is the former: audiovisual recording is a means of immediate, here-and-now public access to information; however, it might also serve as a long-term memory bank, a source of faithful narrative as to the actual course of the trial. The 1979 Law on archives, adopted shortly before, attempted to reconcile these two dimensions in a contemporary design of transparency of the administration; the related Law of 1978 on various measures to improve relations between the administration and the public is similar in this regard.[10]

Members of parliament wanted to make it possible for citizens to learn, if not in real time, then at least with minimum delay, how justice was being administered in relation to particularly important historical events.[11] To quote *rapporteur* of the 1985 law Charles Jolibois, the video recording was then thought to be "a useful counter-power in the fight against the confiscation of justice by specialists".[12] In this way, the key concept of "public hearing" went beyond the ordinary free access by the spectators, and included a more active form of broadcasting of the proceedings of the trial outside the courthouse.[13]

One must note that this conception was rightly considered detrimental to the issues of peacefulness and balance of court debate. Mixing media with judicial procedures endangers witnesses and favours vengeful populism. A broadcast is likely to undermine the rights of the defence. The nature of this enhanced public access is a game-changer. It is no longer a question of mere documentation, but rather of a new way of conducting a trial in contemporary times, a way in which discourse happens not only between the interested parties. As the *rapporteur* wrote, "justice is not a show". In light of this objec-

[8] A change that had already been taken into consideration by the major law of 3 January 1979 on archives.

[9] M. Cornu, "La constitution légale d'une mémoire orale du procès: les archives audiovisuelles de la justice", *Matériaux pour l'histoire de notre temps* 2019, no. 131–132, pp. 61–64.

[10] Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public (JORF 18 juillet 1978 p. 2851).

[11] About the role of the video captation on justice: J.-P. Jean, "La retransmission en direct des procès", *Cahier d'histoire de la justice* 2019, p. 99.

[12] Charles Jolibois, Rapport, Sénat, n° 385, p. 8.

[13] Ph. Théry, "Justice et médias: faut-il une caméra dans la salle d'audience?", *Quarterly Civil Law Review* (*RTD civ.)* 2006, p. 147.

tion, the 1983 Braunschweig Commission had recommended, with educational interest in mind, that television broadcasts be held under the strict control of the judge and a dedicated commission for a provisional period of two or three years.[14] This proposal however was met with reluctance in judicial circles and was never implemented.[15]

The 1985 Law is clearly about heritage. As Minister of Justice stated, it is a matter of "safeguarding, in the interest of history, the documents relating to judicial life" by preserving "the memory of our judicial life, by recording the trials which are of primary interest to it".[16] The recordings made "for the benefit of history" are meant to be of intellectual importance and therefore cannot be used "to comment on or illustrate news items".[17] The 1985 Law adopts logic of safeguarding a living judicial cultural heritage, which is, from temporal standpoint, not the same as the "current affairs" type of interest that is characteristic of the media. Moreover, the use of the recorded archive only takes place after "stabilisation of the judicial truth definitively acquired".[18] The administrator of the archives is therefore a custodian of the recordings, and may only be consulted for historical purposes.

3. The constitution of a documentary material for the history

Article L221-1 of the Heritage Code provides that all public, administrative or judicial hearings may be recorded if the "recording is of interest for the constitution of historical archives". The recording is, in principle, complete. The Consultative Commission on Audiovisual Archives of Justice (CCAAJ) was in charge of encouraging the constitution of a visual judicial heritage for historians until its abolition in 2013.[19] The commission also ruled on the possible interest of recording hearings upon request: the order of 20 February 2003, ratified by the law of 9 December 2004 on the simplification of the law, made it compulsory to refer the matter to it. The CCAAJ was sacrificed on the altar of "administrative simplification": today it is up to the head of the administration wing

[14] "Rapport sur la publicité des débats judiciaires sur la photographie, la radiodiffusion et la television" [in:] *Mettre l'homme au Coeur de la justice hommage à André Braunschweig*, Paris 1997, p. 162.

[15] A. Chauleur, "La constitution d'archives audiovisuelles de la justice: législation et premiers enregistrements 1985–1995" [in:] *Mettre l'homme au Coeur*…, p. 186.

[16] Robert Badinter, Ass. Nationale, séance du 3 juin 1985, p. 1382.

[17] Robert Badinter, Ass. Nationale, séance du 24 juin 1985, p. 1599.

[18] Y. Poirmeur, *Justice et médias*, Paris 2012, p. 170.

[19] Article 7 of the decree n° 2013-420 du 23 mai 2013 portant suppression de commissions administratives à caractère consultatif et modifiant le décret n° 2006-672 du 8 juin 2006 relatif à la création, à la composition et au fonctionnement des commissions administratives à caractère consultatif (JORF n° 0118 du 24 mai 2013).

of a court of each instance to decide whether or not to record a trial, namely the Vice President of the Tribunal des conflits,[20] Vice President of the Conseil d'Etat, President of the Administrative Court, First President of the Court of Cassation or First President of the Court of Appeal (Article L221-2 C.patr.). However, under Article 69 of Justice Reform Act No. 2010-222 of 23 March 2019, recording is carried out automatically upon request by the public prosecutor's office in cases regarding "crimes against humanity or acts of terrorism".

In addition to the above, audio-visual recording may also be ordered by the presiding judge upon motion of the public prosecutor's office or of the parties (Article R221-1 C. patr.). Except in cases of urgency, the decision whether or not to record the proceedings must be taken within eight days before the set date of the hearing. Article L221-3 requires the judge to obtain "the observations of the parties or their representative" when registration is envisaged.[21] The president sets the time limit and procedures for communicating this opinion.[22] The parties to the proceedings receive a copy of the application for registration and may consult the supporting documents at the secretariat of the court (Article R221-3 C. patr.).[23] However, the judge remains free to make his or her own decision in this matter and this decision is not considered a "jurisdictional act" subject to typical adversarial debate.[24] The opinions of the parties need only be collected

[20] In reality its president. Indeed, as Jean-Baptiste Thierry noted, since the law n° 2015-177 of 16 February 2015 relating to the modernisation and simplification of law and procedures in the fields of justice and home affairs, there is no longer a function of vice-president at the Tribunal des conflits; J.-B. Thierry, "Filmer pour l'histoire: l'enregistrement pour la constitution d'archives historiques de la justice", *AJ Pénal* 2020, p. 458, note 12.

[21] But the judge is not obliged to hear the observations of the parties and of the public prosecutor (and at the time of the Consultative Commission of the Audiovisual Archives of Justice) when he is about to pronounce a refusal of registration: Conseil d'État 29 juillet 2002 n° 240050 et 240278, *Lebon*; *AJDA* 2003. 47 (request for registration of a litigation procedure before the National Council for Higher Education and Research).

[22] When the advisory commission existed, if it could not give an opinion within the time limit, the opinion was given by its Chairman or by the member of the Commission delegated by him, which was sufficient for the validity of an order to refuse registration: Cass. Crim. 26 avril 1989, Bull. Crim. n° 171; *RSC* 1990. 113 note A. Braunschweig (concerning the order on the application of 25 September 1988 to the First President of the Paris Court of Appeal for registration of the hearing of 10 October 1988 of the 17th Criminal Division of the Paris Court of First Instance).

[23] It was on the basis of this dossier that the Consultative Commission on Audiovisual Archives of Justice gave its opinion until 2013. The suppression of the commission therefore makes it difficult to interpret the reasons for recording or non-recording, in particular as regards the reasons for the heritage and "historical" nature of the trial.

[24] And consequently escapes the requirements of Articles 6§1 and 6§2 of the European Convention on Human Rights (ECHR). On this aspect: *AJ pénal* 2017. 498 note David Aubert (sous cass. crim. 29 septembre 2017).

and the judge is not bound by their submissions.[25] The decision to allow or dismiss the motion must have written reasons and is transmitted to the parties and to the public prosecutor's office. If the decision is affirmative and the trial is to be recorded, the Ministry of Justice must be informed (Article R221-5 C. patr.). The parties' options as to appeal against the decision are limited: Article R221-6 provides that within eight days following notification of the decision, the person contesting it may lodge an appeal for annulment, but this appeal does not have a suspensive effect. If the appeal succeeds and the final decision is to prohibit recording, the recording already made may be destroyed by court decision.

The method and technical scope of the actual recording is specified by the Decree No. 86-74 of 15 January 1986 and the options are, at the judge's discretion, either audio-visual or audio-only recording.[26] However, only the first method seems to be of interest and is in use today. The actual recordings are made by specialised companies operating under supervision by Ministry of Justice (D. 221-14 C. patr.). The cameras are installed in the courtroom at appropriate positions upon direction of the Presiding judge who is responsible for maintaining order in the hearings. In any case, the recording is purely descriptive. There is no artistic aspect to the filming. Article L221-4 as amended by Law of 9 December 2004 specifies that the video recording of the trial must be made "from a fixed point", under conditions that do not prejudice "either the smooth running of the proceedings or the free exercise of the rights of the defence", and in accordance with a precise protocol set by the Ministry of Justice – with very discreet cameras and focusing on the only person who has the floor.

It is undeniable that the very presence of a camera in the courtroom, both for the accused and for the prosecution, changes the relationship with other individuals, with the court and with the judiciary in general. According to opponents of the regulation, there is a risk of disturbing free speech that the trial should entail. From this point of view, the *patrimonialisation* of the trial has a modifying effect on its purpose. Here, however, the historical interest of the recording takes precedence, so much so that case law considers that the historical interest prevails over the individual rights of the accused, in particular their privacy.[27] There are also fears – particularly in court cases involving

[25] Cass. Crim. 29 septembre 2017 n° 17-85774; *Dalloz actualité* 9 oct. 2017, obs. W. Azoulay; *AJ Pénal* 2017. 498, obs. D. Aubert; *Légipresse* 2017. 526; *ibid.* 603 Etude N. Mallet-Poujol; *JAC* 2017, n° 51, p. 6, obs. P. Noual; *CCE* 2017, n° 12, comm. 99, obs. A. Lepage.

[26] Décret n° 86-74 du 15 janvier 1986 pris pour l'application de la loi n° 85-699 du 11 juillet 1985 tendant à la constitution d'archives audiovisuelles de la justice (JORF 17 janvier 1986 p. 824).

[27] Cass. Crim. 16 mars 1994 n° 94-81.062; Bull. crim. n° 105; *D.* 1994. 103; *RTD Civ.* 1994. 832 obs J. Hauser; *JCP* 1995. II. 22547 note J. Ravanas.

intentional acts – that defendants who know they are being filmed might make the trial "a platform for the glory of their acts and ideology";[28] this is particularly likely in terrorist cases. The presiding judge can always order to stop the recording, temporarily or permanently, if he or she considers that the recording disturbs the trial in an abnormal manner. Moreover, the defendants' contentions that the mere fact that their speech was being recorded limited their freedom of expression (by altering their testimony and constraining their right to defend themselves), diminished presumption of innocence and practically erased the right to be forgotten – were overruled by the Criminal Division of the Court of Cassation.[29] According to the case-law, the recording is therefore a legitimate limitation of rights on grounds of historical public interest.

Once the trial is over and the work of the audiovisual production team is completed, the recordings are sent to the administration of the Archives de France[30] by the President of the Court. From this point on the Archives' administration is "responsible of their conservation".[31] The magistrate must report any incident that may have occurred during the making of the recordings when handing over the files to the Director General of Heritage at the Ministry of Culture. The secretariat of the court keeps a copy of the minutes in its archives. Article R221-17 of the Heritage Code provides that "the modalities of conservation, classification, inventory, and consultation" of these audiovisual archives of justice are regulated by a joint decree of the ministers of budget, justice and culture.

[28] Crim. 29 sept. 2017, n° 17-85.774, *CCE* 2017, n° 12, comm. 99, obs. A. Lepage.

[29] Cass.Crim. 17 février 2009 n° 09680.558 Bull. crim. n° 40; *Dalloz actualité* 26 février 2009 obs. S. Lavric; *D.* 2009. 634; *AJ pénal* 2009. 235; *RSC* 2009. 924, obs. J.-F. Renucci. Réaffirmé par Cass. Crim. 29 septembre 2017 *préc.*

[30] However, the full audiovisual recordings of the three trials for crimes against humanity which took place in France between 1987 and 1998 are stored at the *Institut National de l'Audiovisuel* (INA) with duplicates at the National Archives. The other audiovisual archives of the judiciary are kept exclusively at the National Archives. Following a technical service agreement signed in December 1991 between the Ministry of Justice, the Ministry of Culture (*Direction des Archives de France*) and the INA, in order to entrust the latter with this task, three agreements were successively signed (13 January 1993 with respect to the Barbie recordings, 13 October 1997 with respect to Touvier and 30 June 2000 with respect to Papon) by virtue of which the INA was entrusted with three missions: "the transfer of the original material on a reliable medium and the making of two back-up copies" (1993 agreement for the Barbie trial), the "preservation of an original copy of the recordings considered as a 'second original' as well as a copy of the minutes of the recordings of the hearings and the payment slip of the recording" (agreements for the three trials) and "the communication to the public of the recording, ensuring its consultation, reproduction and distribution in whole or in part" (agreements for the three trials).

[31] As a side note, *Archives de France* as the administrator may deposit these recordings with a third party. This was the case for the recordings of the AZF trial entrusted to the departmental archives of Haute-Garonne.

4. Communication and consultation of recordings

Under the initial system set up by the 1985 Law, consultation is free after a period of twenty years, unless there is prior authorisation. Subject to exceptions, reproduction and diffusion are free after fifty years. The system was revised by the law of 15 July 2008 on archives which, like the whole of this law, opens up access to the archives more widely.

The principle of free access, which concerns archives in general, is limited in the case of audio-visual archives of justice. Article L222-1 of the Heritage Code provides that "the audiovisual or sound recording is accessible for historical or scientific purposes as soon as the proceedings have ended with a decision that has become final".[32] These two conditions – finality and scientific purpose – must be met jointly, and the burden of proof as to the purpose of access is on the applicant.[33]

In addition to these, the Law adds another limitation in the form of a fifty-year-rule. For a period of fifty years, the reproduction or dissemination of all or part[34] of the recorded proceedings must be authorised by the president of the Tribunal de Grande Instance de Paris[35] or by a judge whom he assigns for this purpose[36] in accordance with

[32] However for the judgment CA Paris 22 janvier 2003 14e ch. A; D. 2003 p. 1393 note Germain Latour (concerning the Papon conviction of 22 January 2003 and the authorisation of early broadcasting by the Gayssot law of 13 July 1990 for the benefit of the television channel Histoire), a sentencing decision is not final within the meaning of the Law of 11 July 1985, as long as the convicted person has the right to have his conviction reviewed.

[33] This interest seems to be interpreted flexibly. According to Julie Brafman, the wife of one of the witnesses in the Papon trial appears to have been able to view the recordings of the trial: "Procès Papon: la mémoire suspendue à un film", *Libération*, 15 septembre 2020, p. 7).

[34] In principle the broadcaster must ensure a balance between the parties' points of view. The Tribunal de grande instance de Paris, citing Article R222-2, had issued an order of 18 October 2004 with respect to the television channel "Histoire". The channel had chosen to produce a 24-hour television program on the Papon trial in the form of weekly two-hour programs, including 8 hours of audiovisual archives of the trial. The archive material contained fragments of pleadings of the lawyers for the civil parties and the requisitions of the two magistrates of the Public Prosecutor's Office present at the hearing. The pleadings of the defence attorneys and the testimonies for the defence were excluded. The court required the television station to give the floor to the parties on the set to avoid any risk of bias. Although full broadcasting would ensure impartiality, such solution was hardly practical as no one would watch a television programme that ran for hundreds of hours. The judge's solution was therefore reasonable. It should be noted that the Klaus Barbie and Paul Touvier trials, which were also broadcast by the television station, did not, however, give rise to such a dispute.

[35] A Parisian jurisdiction that bears witness to the "centralist" conception of justice in France, but also to the French-style to make history from the capital.

[36] One can undoubtedly think that the legislator introduced this precision concerning the hypothesis of capturing an administrative lawsuit or in case of particular issues.

the forms provided for in Article 494 of the Code of Civil Procedure (Article R222-1 C.patr.). Before authorisation is granted, the judge may order investigation if necessary. The judge's order is reasoned and a copy of the decision is kept at the court registry. According to Article R222-2 the judge may impose special conditions on the reproduction or broadcasting of the recording. The order may be contested by the applicant with an appeal filed within fifteen days. There is an exception to the fifty-year-rule: since the amendments introduced by Article 15 of the Gayssot law, recordings may be available for reproduction and broadcasting, in full or in part, as soon as a judgment is reached in cases of crimes against humanity or acts of terrorism.[37] Article L222-2 amended by the same law specifies that the provision may apply retroactively to trials already recorded and which can then be freely broadcast, fifty-year-rule notwithstanding.

In any case, after fifty years, the recordings, regardless of the type of trial, are freely reproducible and can be distributed.

The case-law has also made it clear that judges are exempt from the rules as to temporary restrictions on access to the recordings. A judge, under the Article 379 of the Code of Criminal Procedure, may obtain any document "useful for the establishment of the truth" without any delay.[38] For the same reasons, the depositions taken in a filmed trial may be allowed as evidence in another trial; this was the case with the Klaus Barbie trial.[39]

5. Diversity of the trials so far

Despite the broad textual scope of the regulation, recording for the audiovisual archives of justice happened in very few trials. This fact is hardly helpful in filling the gap between public perception of justice and actual performing of judicial functions. This observation prompted some scholars to call for extending the regulations so as to cover more, not just the extraordinary, "non-standard" trials, as soon as the risk of disrupting the trial is eliminated.[40] It should be noted that while the decision whether or not to invest public assets to this end will be a source of disagreement, the legal challenges tend to relate more to the conditions for opening and accessing these archives rather than to

[37] Loi n° 90-615 du 13 juillet 1990 (JORF 14 juillet 1990 p. 8333) tendant à réprimer tout acte raciste antisémitisme ou xénophobe qui modifia l'article 8 de la loi du 11 juillet 1985 sur la constitution d'archive audiovisuelles de la justice.

[38] Cass. Ass. Plén. 11 juin 2004 n° 98-82-323 (n° 517 P); *D.* 2004. 2010; *ibid.* 22005. 684 obs. J. Pradel; *AJ pénal* 2004. 325 obs. P. Remilleux; *Ibid.* 327 obs. P. Rémilleux; *JCP* 2004. IV. 2597.

[39] Cass. Civ. 2e 17 mars 2005 n° 02-14.514 (n° 445 FS-P+B+R) Bull. civ. II, n° 72; *D.* 2005 p.1051; *RLDI* 2005. 122.

[40] J.-B. Thierry, "Filmer pour l'histoire…", p. 458 (conclusion).

the decision itself.[41] As a side note, only strictly judicial court cases were recorded so far and no administrative court case ever was, although at least one application has been submitted in such case.[42]

The 1985 Law initially applied to criminal and intentional acts only. The Law was designed around the idea of building a judicial memory of the repression of crimes against humanity or war crimes. The following trials of Nazis and Nazi collaborators during the Vichy regime were filmed first: Klaus Barbie (1987, 185 hours of hearings), Paul Touvier (1994, 108 hours) and Maurice Papon (1998, 380 hours). The next wave comprised of trials of crimes committed by the Chilean regime in 2010[43] and cases regarding the Rwandan genocide, with Pascal Simbikangwa in 2014 (including appellate proceedings in 2016) and Octavien Ngznei and Tito Barahira in 2016 (including appellate proceedings in 2019). The trial of the Holocaust denier Robert Faurisson was also recorded in 2007.

Recording for the purposes of audiovisual archives of justice was later extended to include a second category of trials – criminal negligence, usually in cases with high media interest. France has experienced a series of "disasters" that have left their mark on public opinion (Mont Saint-Odile crash, Mont Blanc tunnel, accident to the liner Queen Mary, the growth hormone affair et al.). The first case of this sort to be recorded was the Contaminated Blood trial (1992–1993); then in 2017 the search for responsibility for the explosion of the AZF factory in Toulouse in September 2001, when the explosion of a stockpile of ammonium nitrate – an event similar to the widely publicised port explosion in Beirut in 2020 – caused the death of some thirty people, injured thousands and damaged the city.

Finally, the third and newest category is terrorism. Yves Mayaud noted that these cases will unfortunately multiply in the future "as terrorism develops in increasingly odious and barbaric forms"[44] and because France has been particularly affected. Thus, the trial of the fourteen defendants indicted in the Court of Assize for participating

[41] Civ. 1ère, 30 juin 1987, D. 1987. Somm. 364, obs. Julien. – Crim. 16 mars 1994, n° 94-81.062, Touvier, *Bull. crim.* n° 105; *JCP* 1995. II. 22547, note Ravanas. – Crim. 17 févr. 2009, n° 09-80.558, AZF, Bull. crim. n° 40; *Gaz. Pal.* 8-9 avr. 2009, p. 13, note Desprez. – Cass., ass. Plén., 11 juin 2004, n° 98-82.323, Papon, Bull. ass. plén. n° 1, *JCP* 2004. I. 182, obs. Dreyer.

[42] Ordonnance du Président du Conseil national de l'enseignement supérieur et de la recherche du 5 novembre 2001 (confirmed by Conseil d'État 29 juillet 2002 n° 240050).

[43] Trial of seventeen Chileans, mostly soldiers, prosecuted for the murder of four Franco-Chileans during the repression that followed the 1973 putsch. It should be noted that this trial, which took place from 8 to 17 December 2010 at the Paris Assize Court, surprisingly was given very little coverage in the media. The memory of the audiovisual archives will therefore compensate for the media silence of television.

[44] Y. Mayaud, "Terrorisme – Poursuites et indemnisation – Procédure interne", *Répertoire de droit pénal et de procédure pénale*, Dalloz, Février 2020, no. 457.

in the terrorist attacks of January 2015 against Charlie Hebdo and the Hyper Cacher began, despite the COVID-19 pandemic, in the Autumn of 2020, in front of cameras. It has been decided to record this trial for the audiovisual archives of justice.[45]

6. The nature of the "historical interest"

Each time an application for registration is made, the presiding judge is the only person to decide on the source materials that will eventually be subject of historical research. There are three aspect to the criterion of historical interest: the first one is history itself, the other two – the course of the trial and the establishment of facts.

In 1985, when the law was being drafted, the historical significance of Nazi collaborators' cases was never disputed. This is perhaps the reason why the term "historical interest" was introduced into the text without a proper legal definition.[46] If we refer to the language of Article L221-1 of the Heritage Code, the recording must be of "interest for the constitution of historical archives". The problem, however, is far from obvious. To quote Marie Cornu, what is the "protected legal cultural interest" exactly?[47] Does this historical aspect refer to the facts in question or to the trial itself? The history of justice and judicial memory are constantly intermingled when it comes to assessing the interest of audiovisual recording.[48]

The 1985 Law speaks of "historical archives" and not of historical interest in constituting them. The lawmakers thus seemed to be aware of the difficulty of judging the historicity of the facts or of the trial. It is therefore the conservation process that is historic. History is linked to the way in which memory is preserved. Although it is highly likely that the legislature expressed a conviction of obviousness centred on the Barbie trial; according to *councillor* Jean Fourre, it undeniably uses a vocabulary "narrower in scope than simply archiving and more modest in inspiration than the search for historical interest".[49]

Given the polysemy of the adjective "historical", one must admit it denotes both the nature of the facts and of the trial, but above all – their resonance on society. The *rapporteur* Charles Jolibois considered that historicity should be "understood in a very broad sense" by including "the historical event, of course, but also the sociological history,

[45] Paris, Ordonnance du premier président, 30 juin 2020, n° 315/2020.

[46] Rapp. Ass. Nat n° 2717; Rapp. n° 385 Sénat et Rapp. Commission mixte paritaire n° 436.

[47] M. Cornu, *Le droit culturel des biens. L'intérêt culturel juridiquement protégé*, Bruylant, Bruxelles 1996, p. 206.

[48] On this subject: N. Mallet-Poujol, "De l'intérêt à constituer des archives audiovisuelles de ma justice", Cours et tribunaux, *Légipresse*, n° 355, décembre 2017, p. 2.

[49] J. Fourre, "L'enregistrement audiovisuel des audiences de justice", *Les petites affiches*, n° 58, 14 mai 1986, p. 15.

which can include for future generations the memory of our daily judicial life" on the sole condition that the recording facilitates "the understanding by future generations of what was ours",[50] in particular by integrating the "evental, political or sociological dimension" of trials that deserve to be "preserved for history".[51]

Aside from what Warren Azoulay calls an "abstruse criterion",[52] one surmises, however, that the historicity of the facts in question is not to be confused with the historicity of the trial. This is why in 2017 the President of the Paris Court of Appeals did not grant a request for registration of the civil parties in the case of the attacks in Toulouse and Montauban perpetrated in March 2012 against military personnel and a Jewish school by Mohammed Merah. The perpetrator of these killings was dead and the case concerned accomplices and arms suppliers. The absence of the main perpetrator was undoubtedly a major factor in assessing the historical significance of the trial. Indeed, one could no longer expect his testimony detailing his background, his plan and its execution. No perpetrator means the cathartic dimension of the hearing is also absent, and so is the historical interest justifying its recording. In his denying order the judge thus considered that despite the "extreme seriousness of the facts against the accused and the context in which the crimes committed took place" and "despite the international context dominated by current events on terrorism", the case did not present "an interest that would justify the recording of the proceedings in order to enrich the historical archives of justice.[53] The parties on appeal claimed "manifest error of assessment",[54] but the judges of the Court of Cassation did not agree. It is therefore clear that terrorist litigation does not, in the eyes of the rather restrictive jurisprudence of the *Cour de cassation*, have a systematic historical interest. The qualification is subject to case-by-case assessment. This seemed to be the prevailing judicial opinion on this point – until recently.

The author of the present article has previously questioned this change in the position of the French justice system, in particular the historical dimension of the 2020 Charlie Hebdo and the Hyper Cacher trial.[55] The historical dimension of this trial is in its content. If it is historical, its significance is of symbolic nature and, to a certain extent, lies in a precedent-like example for future cases regarding similar acts. No one can

[50] Charles Jolibois, Sénat, 24 juin 1985, p. 1600.

[51] Charles Jolibois, Rapport, Sénat, n° 385, p. 15.

[52] W. Azoulay, "Constitution d'archives historiques de la justice: un critère d'intérêt encore abscons" (note sous Cass. Crim. 29 septembre 2017 n° 17-85774), *Dalloz Actualité*, 9 octobre 2017.

[53] Cass. Crim. 29 septembre 2017 n° 17-85774 (F-P+B); AJ Pénal 2017. 498, obs. Aubert.

[54] This is a rare case, not of contestation of the registration authorisation by the defendants, but of refusal of registration by the civil parties.

[55] R. Bretel, "Du procès historique à l'histoire d'un procès", Cercle K2, 1 septembre 2020, https://cercle-k2.fr/etudes/du-proces-historique-a-l-histoire-d-un-proces-434 (accessed: 10.10.2020).

deny the historical character of the attacks of January 2015, where apparent motif of the shooters was to punish cartoonists for exercising freedom of speech. The public outcry against the crime was also historic in its proportions: a series of nation-wide marches brought together 4 million French people, most notably in Paris with the presence of 44 foreign heads of state. However, does the trial itself have also a historical dimension? The magnitude of the facts, the degree to which the perpetrators violated values deemed fundamental and the political angle cannot be confused with the trial itself. As in the Merah trial, this one is only a peripheral trial since the main perpetrators either died or fled to Syria. The defendants are merely operational supporters of the criminal acts, and only one individual is indicted as an accomplice in a terrorist act.

Admittedly, some aspects of this trial do make it extraordinary. First of all, one must note its scale, as it brings together more than two hundred parties and a hundred lawyers. Secondly, it is a model for future reference in terrorism cases that the country will experience in the years to come, especially for the upcoming trial concerning the attacks on the Bataclan auditorium, which will begin in 2021. In all these cases the main perpetrators are dead. Finally, there are symbolic aspects at play – a crime of considerable magnitude is being met with equally large-scale response from the authorities. All these considerations however do not dissipate concerns for possible distortions given the media dimension and the pressure from public opinion. In the same way, we must be very careful about the memorial significance of the trial. While the victims will naturally be able to speak again in court, taking over the narrative and will be active in recounting the horror that happened to them,[56] a criminal trial must remain focused on the perpetrators who are to respond to the acts they are accused of; a trial is not supposed to be built around the pain of the victims, however legitimate, or upon direct construction of an empathetic memory and resilience for a nation. The historical dimension of the 2020 trial therefore seems real, but lies less in its content than in its form. The historical nature of the facts, particularly in terms of their media or symbolic impact, does not seem to be decisive. Moreover, contrary to the comments by *rapporteur* Philippe Marchand, who in 1985 referred to the trials of the Landru and Marie Besnard killers and the Auriol massacre,[57] no current criminal cases have been recorded under Article L221-1 of the Heritage Code. Historicity is therefore well characterised in the trial.

The case concerning the explosion of nitrogen fertiliser stockpile in the AZF chemical factory in Toulouse was different in nature. At first glance, the case did not merit recording; it was "merely" a factory accident, in which the authorities sought responsibility for negligence. But the order of the First President of the Toulouse Court of Appeal authorised

[56] On this aspect: E. Jeuland, *La justice des émotions,* IRJS éditions, Paris 2020, pp. 479.

[57] Philippe Marchand, Assemblée nationale, 3 juin 1985, p. 1381.

the recording due to the fact that the trial concerned of one of the greatest industrial disasters France has ever known. The trial was to require several weeks of debate and opinions of highly specialised experts who were to discuss the causes of the explosion. In addition to that, the measures taken to organise the trial were extraordinary, requiring the rental of a huge courtroom with video broadcasting in adjoining rooms to accommodate the hundreds of people present – victims, lawyers, court personnel, spectators and the media. Moreover, the judges pointed to the magnitude of loss – both in terms of lost lives and material damage – and its overall impact on the city and the inhabitants of Toulouse. The main victim was the city, as a place with its inhabitants. The disaster deeply affected the physiognomy of the urban agglomeration since the explosion completely razed a portion of the city. Finally, the AZF factory had been established since 1919 and was part of the history of Toulouse; the judges invoked an interest in the constitution of a "living memory" concerning the disappearance of part of the city's heritage.

There is therefore historicity through symbolism. And the historical dimension, in its legal sense,[58] even aside from the facts, concerns the aura of the proceedings. Thus "the notion of historical interest should not be understood as applying only to legal cases which, by their very subject matter, are likely to have a historical interest, but also to all cases which are likely to make history in the history of justice", and whose heritage interest manifests itself in the way they are conducted. This is undoubtedly in the context in which the decision to record the trials of the attacks of January 2015 are to be understood, where the historical interest is external rather than internal. It is the trial itself, together with its political and sociological dimensions that mark its historical interest more than its content.

It is worth to note in this context that the documents and materials on proposals, discussions and drafting of the 1985 Law indicate that the lawmakers did not originally wish to limit the application of the system to trials with a historical dimension and extended it "to trials that illustrate the daily functioning of the judiciary and which, one day, may be of interest to historians, as well as to magistrates or lawyers of future generations" since "the creation of audiovisual documents helps future generations to understand what our own was".[59] In other words, the Minister of Justice – the actual proponent of the Law of 1985 – imagined the possibility of recording ordinary judicial life. This day-to-day record, supposedly to be made in order to encourage "the preservation of a few examples so that historians of justice may later know how our daily justice system functions", was never actualised.

[58] J. Pradel, "Les techniques audiovisuelles, la justice et l'histoire", *Recueil dalloz* 1986. chron. 113.

[59] CA Toulouse, Ordonnance du 15 janvier 2009 autorisant l'enregistrement audiovisuel des audiences de leur procès pour homicides et blessures involontaires qui s'ouvrira le 23 février 2009 devant le tribunal correctionnel de Toulouse.

7. The implementation of the process of *patrimonialisation*

The judge deciding on authorisation of recording must be able to think about the case beyond its immediate, contemporary characteristics and must ask himself if the facts, and even more so if the entire trial is of interest to posterity.[60] This entails adoption of the logic of "sorting",[61] which is typical for a mindset of an archivist. Reaching this historical perspective is problematic and the decision making process must involve a certain degree of modesty; the threshold for "audiovisual archives of justice" is rarely unquestioned. On one hand, the casuistic approach to the historical significance is delicate and the judgement on the materials needed to construct history in the future is often subjective. Is it proper to limit the number of recorded cases in light of the exceptional nature of the 1985 Law? Or should it be widely allowed? Where do the needs of history end? What is the standard of diligence in the process of authorising it?

Under current law it is up to the judge alone to grant or to reject a motion for authorisation of the recording of the upcoming trial for the "living memory of justice".[62] The court is sovereign in their decision and the Court of Cassation only controls the "manifest error of assessment". However, the decision is almost always about prediction rather than scientific approach. This should lead to humility.[63] This framework accentuates the importance of rules of procedure concerning decision-making, which should include voices of experts assisting the judge – historians and image professionals – which is no longer the case today. Would it reasonable to entrust, as a rule, the decision on authorisation of recording to an expert, a person operating outside the judicial system? This solution appears promising because under the current regulation the magistrate is both "a judge and a party" – the judge decides on shape and possible

[60] On the occasion of the decision to capture the AZF trial by the order of 15 January 2009, the former Minister of Justice Robert Badinter stressed that it was regrettable that the technical means of the time did not make it possible to keep films of the various trials in the Dreyfus case in order to better write its history. (F. Bissy, C. de Bragança, "Les images du procès et l'entrée des caméras dans les salles d'audience", *Légicom* 2012, p. 83). An example he had already given in 1985 to express the interest that the recording of proceedings before the Cour d'assise in Paris and the Conseil de guerre in Rennes would have had (Robert Badinter, Sénat, 24 juin 1985, p. 1598).

[61] In the provisions on archives, the expression "historical interest" is moreover essentially found in articles L212-2 and L212-3 on the elimination of archives that do not become cultural heritage.

[62] Rapport de Charles Jolibois n° 385, Sénat, 19 juin 1985, p. 3

[63] Concerning the prudence of the present time with regard to history: C. Vivant, *L'historien saisi par le droit. Contribution à l'étude des droits de l'histoire,* préface Ph. Pétel, avant-propos R. Rémond, series: Nouvelle Bibliothèque des Thèses, vol. 68, Dalloz, Paris 2007, pp. 525 et sur les archives audiovisuelles (pp. 138–142).

constraints of a trial he or she is about to preside over. The judge will also decide in the event of an action for invalidation. The questions of legitimacy of the present system in light of the *nemo iudex in causa sua* argument remain valid. All the more so, as Jean-Baptiste Thierry has pointed out, since registration, which is obligatory when the public prosecutor requests it, demonstrates the power of the "control exercised by the institution over what it wishes to show".[64]

Aside from the question of "who decides", the question of checks and curbs over the merits of the decision is a major weakness of the current system. Marie Cornu is correct to warn of risk of arbitrariness and argues that procedural guarantees must be strengthened by providing greater control, at least of decisions to refuse capture.[65] It is surprising that the law does not distinguish between negative and positive decisions. In this context, the abolition of the consultative commission is regrettable; the commission provided a useful viewpoint, independent of the direct judicial issues at stake in the case. It brought together lawyers and cultural heritage professionals, but also members of parliament and journalists. Its opinion, albeit non-binding, informed the judge in his or her decision-making. The commission was abolished in 2013 in order to simplify administration but without considering the harmful consequences of the decision. In terms of judicial history, the law anticipates the judgement … of history!

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[64] J.-B. Thierry, "Filmer pour l'histoire…", § 1.2.

[65] M. Cornu, "La constitution légale…", p. 64.

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Summary

The French legal system for the *patrimonialisation* of historical trials (*Archives audiovisuelles de la justice*)

Since 1985 France has introduced special legal provisions for the recording and communication of major trials called *Archives audiovisuelles de la justice* (Audiovisual Archives of Justice). These archives, which are subject to the Heritage Code, are an exception to the principle of prohibition of recording of trials. This measure was adopted in the context of the major trials for war crimes and crimes against humanity following the Second World War in order to preserve the memory of these judiciary process. These measures, originally exceptional, were then extended to a few trials relating to major national disasters. These archives are intended to constitute documentary material for historians. Recording is allowed as soon as there is "historical interest". This notion raises questions whether historicity is about the recording, the trial itself or the subject matter of the case. These problems are key to the concept of *patrimonialization*, together with its uncertainties and a dose of arbitrariness in application.

Keywords: judiciary, trial, archives, historical interest, *patrimonialisation*, war crimes, terrorism, historical research

Streszczenie

Francuski system utrwalania procesów sądowych o znaczeniu historycznym (*Archives audiovisuelles de la justice*)

W roku 1985 we Francji uchwalono prawo o utrwalaniu i upublicznieniu przebiegu procesów sądowych o znaczeniu historycznym i o utworzeniu Audiowizualnego Archiwum Wymiaru Sprawiedliwości (*Archives audiovisuelles de la justice*). Archiwum, podlegające ustawie o ochronie dziedzictwa kultury, jest odstępstwem od zakazu nagrywania przebiegu procesu. Prawo to wprowadzono na użytek procesów w sprawach zbrodni wojennych i zbrodni przeciwko ludzkości z czasów II wojny światowej. Regulację tę następnie rozciągnięto na sprawy katastrof o skali krajowej. Archiwum z założenia ma stanowić materiał źródłowy dla przyszłych badań historycznych. Pojęcie interesu historycznego, będącego prawnym warunkiem utrwalania, budzi wątpliwości co do istoty owej historyczności – czy leży ona w samym nagrywaniu, w doniosłości procesu czy też w doniosłości roztrząsanych zdarzeń. Kwestie te są kluczowe dla regulacji, w tym dla uchwycenia niejasności i arbitralności sądowego postanowienia o utrwaleniu procesu.

Słowa kluczowe: wymiar sprawiedliwości, proces, archiwa, interes historyczny, patrymonializacja, zbrodnie wojenne, terroryzm, badania historyczne

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Protection of cultural heritage in Azerbaijan

1. Introduction

Azerbaijan is home to three World Heritage Sites, namely – Walled City of Baku with the Shirvanshah's Palace and Maiden Tower,[1] Gobustan Rock Art Cultural Landscape, and Historic Center of Sheki with the Khan's Palace.[2] Besides, Azerbaijan has a universally valuable intangible cultural heritage – Mugham, one of the Masterpieces of Oral and Intangible Heritage of Humanity, not to forget Ashug Art and Novruz holiday in the Representative List of Intangible Cultural Heritage of Humanity.[3] Even though concerns about commodification of cultural property in tourism[4] or culinary[5] after the nomination to world heritage lists, Azerbaijan seemingly favours cooperation with United

[1] N. Abbasov, *Mədəniyyət Siyasəti və Mənəvi Dəyərlər* [Cultural Policy and Moral Values], Baku 2009, p. 116.

[2] More information on Azerbaijan, United Nations Educational, Scientific and Cultural Organization, Key Facts and Figures on Azerbaijan, last updated in November 2019, available at https://bit.ly/3saXPea (accessed: 12.10.2020).

[3] United Nations Educational, Scientific and Cultural Organization, UNESCO Country Programming Document for the Republic of Azerbaijan, 2011 2013, pp. 9–10, https://bit.ly/2PVB8NV (accessed: 12.10.2020).

[4] J. Caust, M. Vecco, "Is UNESCO World Heritage Recognition a Blessing or Burden? Evidence from Developing Asian Countries", *Journal of Cultural Heritage* 2017, no. 27, p. 8; F. Lenzerini, "Illicit Trafficking in Cultural Objects and the Protection of the World Cultural Heritage" [in:] *The Illicit Traffic of Cultural Objects in the Mediterranean*, eds. A.F. Vrdoljak, F. Francioni, Fiesole 2009, p. 111 (illustrating the positive impact of the List of World Heritage in Danger on the rehabilitation of the archaeological site of Angkor in Cambodia which was subject to looting and bad conservation until 1992).

[5] C. Bortolotto, B. Ubertazzi, "Editorial: Foodways as Intangible Cultural Heritage", *International Journal of Cultural Property* 2018, vol. 25, p. 412.

Nations Educational, Scientific and Cultural Organization (UNESCO) to increase the number of the listed world heritage sites.

Cultural-historical heritage has always been on the agenda of governments, insomuch that the National Security Conception of the Republic of Azerbaijan specifies it as a national interest. Cultural-historical heritage is understood as "historical and cultural objects that reflect the stages of development of the society and are perceived as national-moral heritage by the society".[6] Not all objects are cultural heritage; the nature and significance of an object are decisive to define cultural heritage.[7] Cultural heritage is the sum of traditional cultural expressions and traditional knowledge in Azerbaijan.[8]

Several problems of cultural heritage protection still exist at the national level that literature hardly discussed, except specific studies on a particular group of cultural heritage.[9] This article, however, does not aim to address them. Instead, as one of the pioneer studies on Azerbaijan, it tries to situate cultural heritage protection in the domestic laws of Azerbaijan, spot terminological discrepancies with international agreements and find out the recent approach to cultural heritage and the current cultural policy. It argues that even the perfect compliance with international agreements does not sufficiently safeguard cultural heritage in reality unless alternative dispute resolution mechanisms are employed.

Part 1 describes the sources of cultural heritage law in Azerbaijan and explores the rationale of protection. This part aims to discover the current cultural policy that draws the borders of cultural heritage protection.

Part 2 describes objects of protection and discusses discrepancies between cultural treasure, cultural property, and cultural heritage in a historical overview.

Part 3 divides the protection mechanisms into legal, technical, social, and financial, but focuses on legal (consensual) and technical ones. This part highlights the state dominance in the ownership, use, or further control of the cultural property in Azerbaijan.

Conclusion pronounces critique of *de lege lata* and proposes changes for better protection of cultural heritage.

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[6] Ş. Nuruzade, "Arxeoloji İrs Milli-mənəvi Dəyərlər Sistemində" [Archaeological Heritage in the System of National-Moral Values], *Azərbaycan Arxeologiyası* 2018, vol. 21, no. 2, p. 117.

[7] L.V. Prott, P.J. O'Keefe, "'Cultural Heritage' or 'Cultural Property'", *International Journal of Cultural Property* 1992, vol. 1, p. 309.

[8] K. Imanov, *Mədəni Müxtəlifliyin Qorunması və Təşviqinin Aktual Problemləri* [Actual Problems of the Protection and Promotion of Cultural Diversity], Baku 2018, p. 7.

[9] See, e.g., A. Cəfərova, "Səsli Mədəni İrsimiz" [Our Vocal Cultural Heritage], *Scientific Work* 2020, no. 12/61, p. 146.

2. Rationale and Sources of Cultural Heritage Law

2.1. Utilitarian and Non-utilitarian Grounds for Protection

It is necessary to protect cultural heritage for utilitarian and non-utilitarian grounds.[10] While utilitarian grounds focus on the market[11] and information value of cultural objects, non-utilitarian grounds emphasise the spiritual feelings created by cultural heritage[12] to justify the protection. The information value is about the potential of cultural heritage to pass through generations and contribute to development, to the studies on the history of culture, art, and museums.[13] Thus, ideally, every individual should have an interest in the protection of cultural heritage.

Compared to individuals, states' interests are generally utilitarian, such as the promotion of cultural property as touristic sites. However, excessive utilitarianism may commercialise cultural heritage without any public-interest restrictions and eventually impede access to cultural heritage.[14] On the other hand, if cultural heritage remains unused, it may gradually erode, or restricted access can delay scientific progress. In this ongoing debate, science has traditionally justified the appropriation of cultural or natural objects with their benefits to human knowledge.[15] In response, some countries, including Azerbaijan, have preferred to keep their cultural treasures within the borders by all means and introduced strict measures like consent, reporting, and registration for acquisition for research purposes. In fact, some Western museums still restrict a large part of collections for scientific studies as well.[16]

Naturally, states devise protection mechanisms based on their interests partly influenced by the leading political ideology. Research shows that some countries, such as Laos, protect cultural heritage to restore self-knowledge while others, like Vietnam, care

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[10] N. Abbasov, *Mədəniyyət Siyasəti*…

[11] See also: C. Chippindale, "Cultural Property", *The Classical Review* 2011, vol. 61, no. 1, p. 258.

[12] L. Guruswamy, J.C. Roberts, C. Drywater, "Protecting the Cultural and Natural Heritage: Finding Common Ground", *Tulsa Law Journal* 1999, vol. 34, no. 4, pp. 715, 717.

[13] E. Məmmədzadə, "Mədəni İrsin İtirilməsi Səbəbləri" [Reasons for the Loss of Cultural Heritage], *Mədəniyyət.AZ* 2017, no. 2, p. 69.

[14] See, e.g., B. Ivey, *Arts, Inc.: How Greed and Neglect Have Destroyed Our Cultural Rights*, Los Angeles 2008, pp. 224–225 (discussing the case of the United States of America and criticizing the failure of the government to stand behind the public interests in intellectual property, trade of commercial goods, and access to heritage).

[15] G. Scarre, "The Repatriation of Human Remains" [in:] *The Ethics of Cultural Appropriation*, eds. J.O. Young, C.G. Brunk, Oxford 2009, p. 73.

[16] R. Peters, "Beyond Restitution: An Interest-oriented Approach to International Cultural Heritage Law" [in:] *The Illicit Traffic*…, p. 174.

about their cultural heritage to promote tourism.[17] Similarly, Azerbaijan's current policy heavily depends on the government's attempts to diversify the oil-dependent industry to tourism and agriculture. In that regard, regulations to utilise cultural property are not surprising. However, such utilisation must accompany rules to preserve the integrity of cultural heritage where the law takes action.

2.2. Sources of Cultural Heritage Protection in Azerbaijan

The legal basis of cultural heritage protection is comprehensive, especially regarding compliance with international agreements.[18] Article 40 of the Constitution[19] recognises everyone's right to participate in cultural life (albeit in the narrow sense) and obliges everyone to show respect and care for historical, cultural, and moral[20] heritage and preserve historical and cultural monuments. However, the state is also under the duty to protect historical, tangible, and intangible heritage under Article 16.

Azerbaijan is a party to several international agreements on cultural heritage, including the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, signed in Hague on 15 May 1954 (hereinafter: the 1954 Hague Convention), the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, signed in Paris on 14 November 1970 (hereinafter: the 1970 UNESCO Convention), the Convention concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on 16 November 1972 (hereinafter: the 1972 UNESCO Convention), and the Convention for the Safeguarding of the Intangible Cultural Heritage, signed in Paris on 17 October 2003 (hereinafter: the 2003 UNESCO Convention). Other sources include the Law on Culture (2012),[21] the Law

[17] L. Lixinski, *Intangible Cultural Heritage in International Law*, Oxford 2013, p. 141.

[18] N. Abbasov, *Müasir Şəraitdə Azərbaycan Dövlətinin Mədəniyyət Siyasəti və Mənəvi Dəyərlərin İnkişaf Amilləri* [Cultural Policy of the State of Azerbaijan and Development Factors of Moral Values in Modern Conditions], Baku 2008, p. 54; E. Məmmədzadə, "Mədəni İrsin İtirilməsi…", p. 70.

[19] The Constitution of the Republic of Azerbaijan (1995), as amended on 24 August 2002, 18 March 2009, and 26 September 2016, available at https://bit.ly/3mfK3FJ (accessed: 2.04.2020); see the unofficial translation of the Constitution of the Republic of Azerbaijan, available at https://bit.ly/3sLgyOw (accessed: 2.04.2020).

[20] Despite this article refers to the literal translation of '*mənəvi irs*' into English as 'moral heritage', the legislator presumably aimed to refer to 'intangible heritage' mentioned in Article 40. The wording of Article 77 where the same term is used but after 'tangible heritage' supports this translation. In Azerbaijani Turkish, '*mənəvi*' means both 'moral' and 'intangible' (or non-material). Article 40 of the Constitution may need revision to avoid this translation discrepancy.

[21] Law of the Republic of Azerbaijan on Culture, 506-IVQ, Gazette of Azerbaijan (2012).

on the Protection of Historical and Cultural Monuments (1998),[22] the Law on Library Work (1998),[23] and the Law on Museums (2000).[24] Among these laws, the Law on Culture is the most comprehensive legislation incorporating the 1970 and 1972 UNESCO Conventions.

3. Objects of cultural heritage protection

3.1. Terminological discrepancies: Cultural sample and cultural treasure?

The Law on Culture classifies cultural heritage based on tangibility (tangible and intangible), mobility (moveable and immoveable), nationality (national cultural heritage), or location (underwater and natural). It is no coincidence that Law on Culture defines "cultural heritage" as an umbrella term. Legal scholars have also avoided introducing constituents of cultural heritage but only referred to its sub-categories, namely, world heritage, cultural diversity, intangible, underwater, and indigenous cultural heritage.[25]

According to Article 1 of the Law on Culture, "national cultural heritage" is "cultural samples belonging to the Azerbaijani nation and having a universal value", including the cultural heritage of national minorities. The same article defines intangible cultural heritage as "practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage". Further, under Article 36 of the Law on Culture, intangible cultural heritage comprises ethnography (custom and traditions, holiday and rituals, historical symbols), folklore (performance, music, and dance, plays, and games), and art (applied art, traditional decorative art) and national cuisine under Article 37.

Legal terminology however does not always follow international agreements. Occasionally, the Law on Culture uses cultural treasures and cultural samples to refer to cultural objects. Article 30 defines cultural treasure as "manuscripts, ancient, rare collections, folklore, and the things with a museum value before 1960, movies and highly important television and radio materials, and natural objects and parks". Legal scholars

[22] Law of the Republic of Azerbaijan on the Protection of Historical and Cultural Moments, 407-IQ, Gazette of Azerbaijan (1998).

[23] Law of the Republic of Azerbaijan on Library Work, 611-IQ, Gazette of Azerbaijan (1998).

[24] Law of the Republic of Azerbaijan on Museums, 839-IQ, Gazette of Azerbaijan (2000).

[25] V. Vadi, *Cultural Heritage in International Investment Law and Arbitration*, Cambridge 2014, p. 18.

have explained cultural treasure as an equivalent of cultural property,[26] and this article uses both interchangeably. Although cultural property as a concept, similarly to cultural heritage, is vague and hard to define,[27] the definition of cultural treasure in Article 30 is detailed, if not exhaustive.

One can infer from Article 30 that cultural treasure is tangible, except folklore. The language of the Regulations by the Cabinet of Ministers on the Protection, Restoration and Use of Cultural Heritage Samples (Regulations) supports this inference; in Article 4 and 6 of the Regulations, intangible goods are accompanied by cultural heritage, whereas in Article 5, tangible things are followed by cultural property. Other definitions of cultural property have divided it into moveable and immovable property.[28] Nonetheless, the phrase "intangible cultural property" is not unfamiliar to legal scholars[29] as it is associated with intellectual property.[30] Unlike cultural property, cultural heritage usually refers to tangible and intangible heritage as a whole.[31] This article discusses the issues only within meaning laid down in domestic law, leaving definitions set in international agreements out as the latter are shaped by their scope.[32] Of note, the term "cultural sample" is used to illustrate the things not approved as a cultural treasure by an expert. Even if a cultural sample looks unique, old, and culturally significant, protection is subject to recognition as cultural property by the state body.[33] Put simply, although a cultural sample is a legal term in the Law on Culture, in practice experts classify objects as cultural property.[34]

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[26] S. Süleymanlı, *Mədəni İrsin Qorunmasının Beynəlxalq-Hüquqi Tənzimlənməsi Problemləri və Azərbaycan Respublikasının Qanunvericiliyi* [International and Legal Regulation Problems of Cultural Heritage Protection and the Laws of the Republic of Azerbaijan], Baku 2018, pp. 28–29.

[27] K. Zeidler, *Restitution of Cultural Property. A Hard Case – Theory of Argumentation – Philosophy of Law,* Gdańsk – Warsaw 2016, p. 63.

[28] S.A.H. Rashid, A.B. Omer, A.K. Ali, "Protection of Cultural Property in the Light of International Humanitarian Law", *Journal of Critical Reviews* 2020, vol. 7, no. 6, p. 1022.

[29] E. Kakiuchi, "Cultural Heritage Protection System in Japan: Current Issues and Prospects for the Future", *GRIPS Discussion Paper* 2014, no. 14-10, p. 4; A.N. Walsh, D.M. Lopes, "Objects of Appropriation" [in:] *The Ethics of Cultural Appropriation*, eds. J.O. Young, C.G. Brunk, Oxford 2009, p. 225.

[30] V. Vadi, *Cultural Heritage*…, p. 25.

[31] See e.g., P.G. Stone, "A Four-tier Approach to the Protection of Cultural Property in the Event of Armed Conflict", *Antiquity* 2013, no. 87, p. 167.

[32] E. Cunliffe, N. Muhesen, M. Lostal, "The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations", *International Journal of Cultural Property* 2016, vol. 23, p. 4.

[33] S. Süleymanlı, *Mədəni İrsin Qorunmasının*…, p. 51.

[34] L.V. Prott, P.J. O'Keefe, "'Cultural Heritage'…", p. 309.

3.2. Cultural property versus cultural heritage: Historical development

To ensure clarity in legal terminology, it is worth visiting the history of cultural property and cultural heritage in international law. The protection of cultural property came after the attempts to enforce international humanitarian law after the Second World War[35] to shield cultural property against further destruction.[36] Back then, defining the object of protection as cultural property was a conscious decision to invoke absolute property rights to impede destruction. The 1954 Hague Convention served this purpose. However, in time, the right to culture started to clash with and gradually prevail over the concept of property assigned to cultural objects because absolute property rights were enforceable against everyone, be it perpetrators of cultural barbarism or someone else.[37] Moreover, property rights recognised ownership rights of *bona fide* purchasers of cultural property and caused trouble in restitution cases[38] because a third-party *bona fide* owner of the cultural property could benefit from the property right and impede restitution. Finally, the commodification of cultural objects and exploitation in commerce served as a defence against the property concept.[39]

That is where "cultural heritage" was born to give cultural objects back to society. The shift from "cultural property" to "cultural heritage" elevated cultural objects from an individual to a societal level, and even further – to the universal level, as it is the case for some parts of cultural heritage in the 1972 UNESCO Convention making up the world heritage.[40] Arguably, a piece of cultural heritage became a cultural object that deserves protection when society is informed about its significance.[41] However, cultural heritage was not immune from commodification concerns either.[42] Interestingly, both proponents and opponents of the inscription of cultural heritage to world heritage lists highlight increased visibility of endangered heritage,[43] the detailed analysis of which is outside of the scope of this article.

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[35] L. Lixinski, *Intangible Cultural Heritage*…, p. 5.

[36] A.F. Vrdoljak, F. Francioni, "Legal Protection of Cultural Objects in the Mediterranean Region: An Overview" [in:] *The Illicit Traffic*…, p. 4.

[37] L.V. Prott, P.J. O'Keefe, "'Cultural Heritage'…", p. 309.

[38] K. Siehr, "The Protection of Cultural Heritage and International Commerce", *International Journal of Cultural Property* 1997, vol. 6, no. 2, p. 304; see generally: K. Zeidler, *Restitution of Cultural Property*…, pp. 136–202 (introducing a non-exhaustive list of the arguments often raised in restitution cases of cultural property).

[39] L. Lixinski, *Intangible Cultural Heritage*…, p. 6.

[40] F. Lenzerini, "Illicit Trafficking…", p. 106.

[41] L.V. Prott, P.J. O'Keefe, "'Cultural Heritage'…", p. 311.

[42] Ibid., pp. 14–15.

[43] See e.g. J. Reguant-Aleix, M.R. Arbore, A. Bach-Faig, L. Serra-Majem, "Mediterranean Heritage: An Intangible Cultural Heritage", *Public Health Nutrition* 2009, vol. 12, no. 9A, p. 1592.

An alternative concept to "cultural heritage" is "community property", where society as a whole is recognised as an owner. Since culture has an element of collectiveness and the property is often an individual right concept,[44] the term "community property" fits its subject matter, albeit the idea not widely recognised.[45]

Apparently, the Law on Culture corresponds to the rise of the right to culture under Article 27 of the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948,[46] by using the term "cultural heritage" more often than "cultural treasure". However, it is not a result of debates but the incorporation of international agreements. Still, the strong position of executive bodies, especially the leading role of the Ministry of Culture[47] in ownership, use, or further control of cultural treasure – an organising principle of society inherited from Soviet Azerbaijan – has not been undermined. Although it may sound proper to call something a "cultural treasure", it is just words on paper. State dominance in cultural heritage protection causes the risk of appropriation, just as it did in the other communist regimes of that time, particularly in Poland.[48] Thus, the state control with little or no accountability was and is not entirely safe. Admittedly, cultural property can still be owned and used by individuals with certain restrictions on the exercise of rights. In reality, however, the state is usually in charge of cultural property, either *de jure* as state property or *de facto* by strict requirements for consent.

4. Protection mechanisms of cultural heritage

Law is the most significant tool to protect cultural heritage, but it is not the only tool. Technical, financial, and social mechanisms (operating, of course, within legal boundaries) are equally useful. A legal rule can be prohibitive or consensual. This article describes the latter only, leaving criminal laws out of its scope. Technical mechanisms include registries, protection ranks, consent, and reporting. Of course, in practice, these mechanisms are applied cumulatively.

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[44] V. Vadi, *Cultural Heritage*…, p. 26.

[45] A.N. Walsh, D.M. Lopes, "Objects of Appropriation…", p. 225.

[46] K.L. Alderman, "The Human Right to Cultural Property", *Michigan State University Law Review* 2011, vol. 20, no. 1, p. 73.

[47] See also: *Tvinning Layihəsi: Mədəniyyət Sektorunun Siyasəti və İdarə Olunması Sistemində İslahatlar* [Twinning Project: The Reforms in the Policy and Management of the Cultural Sector; hereinafter: Twinning Project], p. 9, https://bit.ly/3u3xQXO (accessed: 29.11.2020).

[48] J. Stepnowska, K. Zeidler, "The Case of Polish Museums Holding Cultural Objects "In Trust" after WWII" [in:] *Treuhänderische Übernahme und Verwahrung: International und Interdisziplinär Betrachtet [Fiduciary Takeover and Custody: International and Interdisciplinary View]*, eds. O. Kaiser, C. Köstner-Pemsel, M. Stumpf, Vienna 2018, p. 298.

4.1. Legal mechanisms

The Law on Culture harmonises imperative and dispositive approaches to cultural property and assigns duties to the owner or user. Under Article 39, the relationship between the executive body and an owner or user of cultural property with a protection rank is subject to a compulsory preservation contract. Contractual obligations complement legal duties; even without a preservation contract, the owner must manage the cultural property properly under Article 203 of the Civil Code. Mismanagement of cultural property results in the confiscation via compulsory purchase under Article 203(3) of the Civil Code. Still, this mechanism applies only to the especially valuable cultural property listed by the state and occurs only when there is a threat of devaluation of the cultural property due to the mismanagement.

4.2. Technical mechanisms

4.2.1. Registration

Under Article 26 of the Law on Culture, the state maintains registries, catalogues, accounting systems, lists, and databases of cultural property. Two registries identified in the Law on Culture are the Public List of National Cultural Property and the Preservation List of Cultural Property. The lists are published on the website and renewed regularly. The registry classifies cultural property based on its world, national and local significance. The key subject in charge of the content of the lists is the Cabinet of Ministers, not the Ministry of Culture.[49] Under Article 36 of the Law on Culture, the registry aims to restore intangible cultural heritage via identification, systemisation, maintenance, preservation, improvement, and transfer through generations.

Inscription in the world heritage or public lists has legal effects on the legal regime of cultural property. Article 6(2) of the Law on Privatisation of State Property prohibits the privatisation of the state property included in the world natural and cultural heritage list. Also, under the same article, the state property that belongs to national cultural and natural heritage, including historical and cultural monuments of the Azerbaijani nation (except the historical and cultural monuments with local significance), cannot be privatised. However, it is unclear whether the state property that belongs to national cultural and natural heritage is limited to those included in the public lists or covers all.

[49] Twinning Project, p. 26.

4.2.2. Ranking

The Law on Culture introduces several protection ranks – preventive, conservation, restoration, and special protection. Protection ranks determine the legal regime of cultural property, and they are given for the status of cultural property and its historical or cultural value. The cultural property with a preventive rank cannot be destructed, destroyed, dismantled, restructured, moved, or aesthetically changed without the consent of the executive body. In other words, the law does not prohibit the ownership or use of the cultural property with a preventive rank, unless it is destroyed or otherwise changed without the consent of the Ministry of Culture. The cultural property with a conservation rank is not used at all or used under the control of the executive body. The cultural property with a restoration rank needs work to restore its primary cultural function so that the restoration of such property is prioritised. Finally, the cultural property included in the Public List of the National Cultural Property receives a special protection rank.

4.3. Critique of protection mechanisms

The existing protection mechanisms amount to cultural nationalism.[50] The circulation of cultural property is restricted; any cultural property of Azerbaijan shall be returned to Azerbaijan regardless of their location or time, or conditions of the export. Article 35 of the Law on Culture strictly prohibits the appropriation of national cultural heritage objects by other states. Although the extraterritorial application to the illicit appropriation of cultural property abroad is disputed,[51] it probably reflects Azerbaijan's firm response to the loss of cultural property in the past and continuing threats to cultural heritage. Colonialism has been one of the reasons for the loss of cultural property[52] and Azerbaijan experienced partial or total invasion by neighbouring countries throughout its history, most recently, the invasion of 20% of its internationally recognised territories in 1992 and 1993 by Armenia. In the rise of nationalist movements and ongoing threats by neighbouring countries against Azerbaijan's cultural heritage, it is likely to remain as part of national identity and pride for a long time. There is no plurality of cultural nationalism and internationalism in Azerbaijan;[53] however, the use of cultural property to promote diversified industries is not only an option but a reality.

[50] S. Süleymanlı, *Mədəni İrsin Qorunmasının*…, p. 62.

[51] See also: A. Chechi, "Facilitating the Restitution of Cultural Objects through Cooperation: The Case of the 2001 US-Italy Agreement" [in:] *The Illicit Traffic*…, p. 151.

[52] E. Məmmədzadə, "Mədəni İrsin…", p. 71.

[53] See: *Enforcing International Cultural Heritage Law*, eds. F. Francioni, J. Gordley, Oxford 2013, p. 11.

Relying heavily on international agreements, restitution is a part of Azerbaijan's cultural policy. It is followed by preservation of restituted objects. Among international agreements, the 1994 Convention of Commonwealth of Independent States (CIS) on the Cooperation Between Customs Service for the Preservation and Restitution of Illicitly Exported and Imported Cultural Property, and 2001 Agreement of the CIS on Export and Import of Cultural Values could be the effective tools that Azerbaijan uses in diplomatic cooperation for restitution of illicitly exported cultural property.

One might argue about the adequacy of the existing mechanisms in restitution cases. Admittedly, it is hard to impose international law on cultural heritage protection against property rights.[54] Besides, the rules of the private international law to return illicitly exported cultural objects can be complex.[55] However, international cooperation must not exclude other mechanisms.[56] The operation of international agreements, in reality, is not always advantageous. One example can be the applicability of the 1954 Hague Convention to the Nagorno-Karabagh armed conflict. With the exception of minimum requirements outlined in Article 19, Article 18 of the 1954 Hague Convention limits the scope to the event of a declared war or to any other armed conflict which may arise between two or more of the High Contracting Parties. In consequence, the applicability of the 1954 Hague Convention to internal conflicts is not clear.[57] The Nagorno-Karabagh armed conflict has an inter-state character but it has occurred in the internationally recognised territories of Azerbaijan. Such factors may complicate the issue and question the applicability of the 1954 Hague Convention. This article does not seek to solve this issue here, though. Instead, without prejudice to the importance of cooperation in cultural heritage protection,[58] it raises this issue as an example of how international agreements may be limited in scope in certain cases which necessitate devising alternative mechanisms. The effectiveness of any mechanism to protect cultural heritage, however, will depend on the institutional accountability and independence of the judiciary that urgently need thorough reforms.

[54] R. Peters, "Beyond Restitution…", p. 175.

[55] A. Jakubowski, "Return of Illicitly Trafficked Cultural Objects Pursuant to Private International Law: Current Developments" [in:] *The Illicit Traffic*…, p. 138.

[56] See e.g. L. Khalidi, "The Destruction of Yemen and Its Cultural Heritage", *International Journal of Middle East Studies* 2017, no. 49, p. 738. Highlighting the need for international advocacy by archaeologists and world community, as well as media to stop the destruction of cultural heritage sites in Yemen.

[57] A.F. Vrdoljak, F. Francioni, "Legal Protection…", p. 7.

[58] F. Lenzerini, "Illicit Trafficking…", p. 112.

5. Conclusions

Cultural heritage protection in Azerbaijan can be characterised by strong position of state entities. Cultural heritage protection does not pursue utilitarian interests only; however, there are legal and consensual mechanisms allowing the use of cultural property. The state control over the ownership and use of cultural property may prevent excessive commercial exploitation of cultural property only if state agencies are more accountable. Further, the Law on Culture needs revision to omit terminological discrepancies, such as "cultural sample" and "cultural treasure", in order to comply with the 1970 and 1972 UNESCO Conventions.

As an exemplary Contracting State of the UNESCO Conventions, Azerbaijan still needs to strengthen the protection of cultural property at the national level. This reform may include specific provisions to ensure greater access to cultural property owned by private parties and claims against the destructed or lost cultural property since the Nagorno-Karabakh armed conflict, especially beyond the 1954 Hague Convention. Further research is needed to discuss the applicability issues in the example of Nagorno-Karabakh armed conflict. There is also need to develop possible alternative dispute-resolution mechanisms,[59] not necessarily by way of revision of the existing rules.[60]

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[59] See also: M. Shehade, K. Fouseki, K.W. Tubb, "Editorial: Alternative Dispute Resolution in Cultural Property Disputes: Merging Theory and Practice", *International Journal of Cultural Property* 2016, vol. 23, p. 352.

[60] M. Lostal, *International Cultural Heritage Law in Armed Conflict*, Cambridge 2017, p. 19.

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Tvinning Layihəsi: Mədəniyyət Sektorunun Siyasəti və İdarə Olunması Sistemində İslahatlar [Twinning Project: The Reforms in the Policy and Management of the Cultural Sector].

Summary

Protection of cultural heritage in Azerbaijan

This article discusses the protection of cultural heritage in Azerbaijan. After defining cultural heritage, analysing the concept of cultural treasure and sample, and describing the protection mechanisms, such as registration, ranking, and contracts, it aims to situate cultural heritage protection in the domestic laws and find out the latest approach to cultural heritage as an identifier of the government's policy. It argues that even the perfect compliance with international agreements does not sufficiently safeguard cultural heritage in Azerbaijan unless alternative dispute resolution mechanisms are employed. To support this argument, it studies the recent research on the rationale of cultural heritage protection in Azerbaijan and abroad to compare the findings with international agreements in a historical overview.

Keywords: Azerbaijan, cultural heritage, cultural property

Streszczenie

Ochrona dziedzictwa kultury w Azerbejdżanie

W artykule omówiono stan ochrony dziedzictwa kultury w Azerbejdżanie. Autor, analizując pojęcia skarbu kultury (*cultural treasure*) oraz warunkowego dobra kultury (*cultural sample*), poprzez przybliżenie mechanizmów ochrony, takich jak rejestr, system klasyfikacji oraz umowa o opiekę nad dobrem kultury, opisuje miejsce, jakie zajmuje ochrona dziedzictwa w prawie i polityce Azerbejdżanu. Stawia tezę, że nawet najściślejsze przestrzeganie umów międzynarodowych nie gwarantuje właściwego poziomu ochrony, jeżeli nie towarzyszą mu wypracowane i wdrożone alternatywne metody rozwiązywania sporów. Teza ta wsparta jest analizą aktualnego stanu dyskursu naukowego na temat racji ochrony dziedzictwa w Azerbejdżanie i na świecie, z uwzględnieniem kontekstu historycznego.

Słowa kluczowe: Azerbejdżan, dziedzictwo kultury, dobro kultury

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Review of the key legal acts concerning the protection of historical monuments in Poland from 1918 onwards

1. Introduction

In this article I would like to discuss the development of legal acts concerning historical monument protection in Poland. The presented issue is particularly important, especially when it comes to historical monuments of Poland, since they were exposed to harm. All the events taking place in this country, from the Partitions to the communist regime, had a significant impact on the condition of Polish cultural assets. Presenting these issues in the form of a cross-section of various normative acts issued at the turn of the years will help to better understand and provide a broader view of the current legislation on the protection of monuments. I will consider the most important normative acts on the grounds of the discussed branch of law. These shall be: the Decree of the Regency Council of 31 October 1918 on the care of cultural and artistic monuments (*Journal of Laws* of 1918 no. 16, item 36), the Legislative decree of the President of the Republic of Poland of 6 March 1928 on the care of monuments (*Journal of Laws* of 1928, no. 29, item 265, as amended), the Decree of 1 March 1946 on the registration and prohibition of export of works of art and objects of artistic, historical or cultural value (*Journal of Laws* of 1946, no. 14, item 99), the Act of 15 February 1962 on the protection of cultural assets and museums (*Journal of Laws* of 1962, no. 10, item 48, as amended) and the Act of 23 July 2003 on the protection and preservation of monuments (consolidated text: *Journal of Laws* of 2020, item 282, as amended), currently in force.

2. Definitions of cultural heritage and historical monument

In order to start reflection on different legal acts concerning historical monuments protection it is particularly important to explain what a monument is and place it in the context of a more general concept, namely – cultural heritage.

Cultural heritage can be defined as a collection of movable and immovable objects with related spiritual values as well as historical and cultural occurrences, etc. which are important in particular society and as such require legal protection.[1] Cultural heritage includes both material and non-material goods, in the form of concepts, feelings, reactions passed on by predecessors to future generations.[2]

Furthermore, we can distinguish three aspects of cultural heritage. First of all, there is national cultural heritage, and for the purposes of this article we are talking about Polish national heritage. Secondly, we differentiate the European cultural heritage, and thirdly, the world cultural heritage, with each previous one including the next.[3] Each of the aforementioned areas is subject to legal protection in a slightly different way. When speaking about the Polish national heritage, it is primarily the Polish legislation, and when it comes to the next two, it is European legislation and international law, respectively.

Given this definition of cultural heritage, its importance for society is self-evident. Cultural heritage is what constitutes the identity of a particular society. It reveals its traditions and customs as well as indicates its development. It can be said that cultural heritage is the essence of a society, thus it determines the values on which that society is driven and on which it was created. Therefore, it is necessary for it to be protected by law.

When it comes to historical monument its dictionary definition is "an object or item of particular value because of its age or aesthetic features".[4] The concept of a monument is also defined in most legal systems in a separate, specific way. Polish law also defines this notion, beginning with the Decree of 1918 and including the current Act on protection and preservation of monuments of 2003.

Monuments form an important part of the above mentioned group of objects called cultural heritage. As testimonies of times that have passed, they provide us with a great amount of information concerning the lives of our ancestors, thus they play an extremely important role as sources of knowledge, as well as indicating the traditions

[1] J. Pruszyński, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, vol. 1, Kraków 2001, p. 50.

[2] K. Zeidler, "Pojęcie 'dziedzictwa narodowego' w Konstytucji RP i jego prawna ochrona" [in:] K. Zeidler, *Zabytki. Prawo i praktyka,* Gdańsk – Warszawa 2017, p. 18.

[3] Ibid., p. 18.

[4] Definition from Dictionary of Polish Language (SJP) https://sjp.pl/zabytek (accessed: 10.10.2020).

and values of particular societies. Therefore, as in the case of cultural heritage, the legal protection of the monuments, as its part, is extremely important and worth paying attention to.

3. The Decree of the Regency Council of 1918 on the care of cultural and artistic monuments

The year 1918 marks the beginnings of the monument protection law in Poland. On 31 October 1918 the Regency Council of the Kingdom of Poland issued a Decree on the care of cultural and artistic monuments (hereinafter: the Decree of 1918). It therefore plays an extremely important role in the development of monument protection law in Poland, since it basically originated the entire branch of law and will be described as such in this article.

Leaning closer to the date of the decree we can notice that it was issued even before the date now commonly regarded as the date of Poland's regaining independence. The question that arises is why the need to protect national monuments was born even before the independence was regained. The answer to this question is simple: the Polish cultural heritage was destroyed during the years of the Partitions and the First World War, therefore it required immediate protection. National legacy also played an important role as a factor keeping Poles in the belief that their country will be reborn again.[5] Consequently the need for protecting cultural heritage in Poland was necessitous at that time.

Moreover, it is worth noting that Poland, which was forming its statehood at that time, had to face cultural, national, religious, linguistic and also legal divisions. It was the different legal systems in the individual partitions that made the introduction of uniform legislative solutions on the merged territories of the reborn Poland one of the most urgent issues.[6]

The Decree, apart from being the first act of this kind in the history of Poland, is remarkable for being an illustration of exceptionally high quality legislation. As an example of a modern and forward-looking solution in it, we can point out the ban on exporting historical objects abroad without the conservator's permission on the account of the "national cultural good". The restriction of the owner's property rights for the national interest is in itself a progressive regulation, as is the possibility to initiate *ex officio* expropriation proceedings for a public museum.[7]

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[5] *Dekret Rady Regencyjnej z 1918 r. o opiece nad zabytkami sztuki i kultury z komentarzem czyli eseje o prawie ochrony dziedzictwa kultury*, eds. K. Zeidler, M. Marcinkowska, Gdańsk 2017, pp. 8–9.

[6] K. Zalasińska, *Prawna ochrona zabytków nieruchomych w Polsce*, Warszawa 2010, p. 28.

[7] J. Pruszyński, "Organizacja ochrony zabytków w dwudziestoleciu międzywojennym", *Ochrona Zabytków* 1988, no. 1/2(161), p. 76.

As far as the scope of regulation is concerned, the decree used the enumeration method. The monuments were divided into three groups: 1) immovable (Article 12), e.g., caves, fortified settlements, buildings, both brick and wooden, monuments, gravestones; 2) movable (Article 18), e.g., works of art, paintings, sculptures, coins, medals, armour; 3) excavations and finds (Article 23).

The Decree also extended legal protection to landscapes and this was the first such regulation in Polish law.[8]

In accordance with Article 1 of the Decree, legal protection was granted to monuments located within the borders of the Republic of Poland, provided that they were inscribed in the register of art and cultural monuments (the register was established by this Decree). However, it follows from the subsequent regulations that items not entered into the register were also subject to protection of the Decree – under certain conditions. The Decree differentiated the legal protection of immovable, movable and archaeological monuments, which is a result of their different properties.[9] According to Article 2 of the Decree, the care of the monuments belonged to the Ministry of Religious Denominations and Public Enlightenment (it can be said that it is the equivalent of today's Ministry of Culture and National Heritage).[10]

As far as the technical side of monument protection is concerned, the Decree created an administrative structure for the protection of monuments, which can be called conservation services. These services were related to the idea of conservation districts and conservators linked to voivodes, as specialised organs of the executive branch of government, while being severed from "ordinary" local government. This is most probably due to the fact that, referring to the political thought of that time, the protection of historic monuments should be the responsibility of the state as a whole and not of the self-governmental, regional structures.[11] According to Article 3 of the Decree, the activities related to the care of monuments of art and culture were the responsibility of the conservators of monuments of art and culture, appointed by the Minister of Religious Denominations and Public Enlightenment.[12]

As I mentioned earlier, the creation of such legislation was necessary for the reborn Poland. The need to protect historical monuments resulted not only from the need to

[8] Ibid., p. 77.

[9] *Dekret Rady Regencyjnej z 1918 r.* …, pp. 15–16.

[10] Ibid., p. 20.

[11] P. Dobosz, "Perspektywy prawa i organizacji administracji konserwatorskiej w 100-lecie powstania niepodległych służb ochrony zabytków w Polsce", *Wiadomości Konserwatorskie* 2018, no. 56, p. 53.

[12] P. Szymaniec, "Polska myśl konserwatorska przełomu XIX i XX w. a rozwiązania Dekretu Rady Regencyjnej z dnia 31 października 1918 r. o opiece nad zabytkami sztuki i kultury" [in:] *Ochrona dóbr kultury w rozwoju historycznym*, ed. M. Różański, Olsztyn 2017, p. 43.

manifest one's Polishness, but also from the considerable damage done to the Polish cultural heritage by the partitioners. This situation was further aggravated by the lack of unified legal regulations in the areas previously governed by partitioning powers. The Decree of 1918, as a normative act, met those needs by introducing modern methods of monument preservation into Polish legal system.

Unfortunately, the damage caused by many years of warfare in Poland, as well as the disproportion of necessities and resources, were the reason why many of the intended objectives related to the protection of cultural heritage, introduced by the Decree, were not achieved.[13] That is why the need for changes arose. The respond to that need came in 1928.

4. The Legislative decree of the President of the Republic of Poland of 6 March 1928 on the care of monuments

The second decade of the twentieth century in the Republic of Poland began with legislative work. It became clear that the previous regulations did not consider all the issues related to the organisation and operation of monuments conservationists.[14] The works ended with the issue of the Legislative decree of the President of the Republic of Poland of 6 March 1928 on the care of monuments (hereinafter: the Legislative Decree). It is worth pointing out that the invoked regulation constitutes the first source of universally binding law in the field of protection, care and conservation of historical monuments, which was established by the constitutional authorities of a fully independent and internationally recognised Poland.[15]

In terms of the subject matter, the Legislative Decree did not differ significantly from the Decree of 1918. However, the definition of monument was modified. From that moment on, every object (both immovable and movable), characteristic of a certain epoch, having artistic, cultural, historical, archaeological or paleontological value, became a monument. This value had to be established by administrative action. Any object having these three features – representativeness, value and official recognition – was to be preserved.[16]

The Legislative Decree, in addition to defining a historic monument, contained several other regulations different from those in the aforementioned Decree of 1918. For example, the register was abandoned as a basis for taking a monument under state protection, and it was replaced by an administrative decision of a competent authority

[13] J. Pruszyński, "Organizacja ochrony zabytków…", p. 78.
[14] Ibid., p. 79.
[15] P. Dobosz, "Perspektywy prawa…", p. 56.
[16] J. Pruszyński, "Organizacja ochrony zabytków…", p. 79.

declaring the object to be a monument. The time criterion for recognising an object as a monument was also discarded, which was a very progressive thought at that time.[17]

In Article 2 of the Legislative Decree, there is an enumerative list of objects, which in particular are monuments. Among them we can point out as examples caves and tombs with antechamber, traces of land and surface sediments, pottery and metal smelting furnaces, prehistoric stone figures, both wooden and brick buildings with all the details of architecture and wall decoration and the surroundings, loose monuments, tombstones, ruins of buildings, monuments and statues, ornamental gardens, works of art: paintings, sculptures, engravings, coins, medals. From the further part of Article 2 we learn that the Legislative Decree excludes documents which are secret under canonical law, as well as objects of special religious cult, such as miraculous paintings – their protection was considered sufficient.[18]

According to Article 5 of the regulation, the monuments shall be looked after by the conservation authorities. The article contains further clarification, according to which the conservation authority in the first instance is the provincial general administration, while the conservation authority in the second instance is the Minister of Religious Denominations and Public Enlightenment. The Decree has placed a significant amount of duties on conservation services, a burden which unfortunately proved excessive. Conservation services were not fully operational at the time. As in the case of the first Decree, the Legislative Decree has not achieved its intended purpose: the inadequacies appeared due to excessive duties, insufficient resources and understaffing of conservation offices.[19]

5. The Decree of 1 March 1946 on the registration and prohibition of export of works of art and objects of artistic, historical or cultural value

Another element of the evolution of the Polish system of protection of cultural assets was the Decree of 1 March 1946 on the registration and prohibition of export of works of art and objects of artistic, historical or cultural value (hereinafter: the Decree of 1946). The decree of 1946 amended the 1928 Legislative Decree that had been in force so far.

[17] K. Zimna-Kawecka, "Monument protection and organisation of conservation offices during the interwar period in Poland (on the example of Pomeranian Voivodeship) and the norms in the Act from 23 July 2003 concerning monument protection and care for monuments", *Wiadomości Konserwatorskie* 2010, no. 27, p. 125.

[18] J. Pruszyński, "Organizacja ochrony zabytków…", p. 79.

[19] Ibid., p. 88.

The new regulation imposed an obligation to register a work of art or an object of artistic, historical or cultural value by anyone who was in possession of such an object. The application for registration had to take place within 3 months from the entry into force of the decree under penalty of fine and forfeiture of the object to the state. Both private persons and persons acting as intermediaries were obliged to register, while museums were excluded from the regulation (theoretically, the register of monuments should have been kept in them).

Owners, holders or managers of objects that were subject to registration were obliged to report the object to the local conservation authority of the first instance, which declared the registration or exemption from registering. In cases of doubt, these authorities were obliged to consult the National Museum in Warsaw, the National Museum in Cracow or the Wielkopolska Museum in Poznań, and in relation to prehistoric and early-historic monuments – the State Archaeological Museum in Warsaw, the Archaeological Museum of the Polish Academy of Arts and Sciences in Cracow or the Prehistoric Museum in Poznań.[20] The necessity of introducing such regulation is highly doubtful, since the previous provisions seemed to be sufficient – registration only with the consent of a private person, and obligatory only if the object threatened to be deteriorated.

The decree also introduced a ban on export of works of art and objects of artistic value outside the country without permission. Is was specified that all dated movable works of art and objects made up to 1830 of artistic or historical value, as well as non-dated movable objects made from prehistoric times up to and including the period of the empire and objects of historical or cultural value related to national uprisings or post-industrial emigration, are considered to be the items which are subject to the export ban. The permit could only be issued by the Minister of Culture and Art and its absence resulted in a fine, imprisonment of up to three years or obligatory forfeiture of property in accordance with the Regulation of the Minister of Culture and Art of 14 January 1947. It should be noted that the Decree of 1946 almost literally copied the solution of the Decree of 1918, which, however, was created under completely different political conditions.[21]

The registration requirement imposed by a decree of 1946 was an expression of the dominant tendency of the state to interfere in matters previously free of its interference. In addition, it was not calculated that the registration of all monuments located on Polish territory would significantly exceed the capabilities of the conservation service.

[20] K. Burski, "Normatywne podstawy ochrony dóbr kultury w PRL. Studium historyczno-prawne" [in:] *Prawo a ochrona dóbr kultury*, eds. P. Dobosz, M. Adamus, D. Sokołowska, Kraków 2014, p. 82.

[21] J. Pruszyński, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, vol. 2, Kraków 2001, p. 284.

Furthermore, the ban on the export of monuments was illusory in that the majority of citizens of the People's Republic of Poland were denied not only the opportunity to leave, but also any foreign contacts, while the export of works of art by government shareholders was not subject to any control.

The decree significantly violated property rights.[22] The obligatory character of the registration, its complicated procedure and high criminal penalty threat caused the assumption that the state authorities are to confiscate monuments in private hands, and thus to hide and even destroy the objects of art, especially those made of precious materials. The effectiveness of the Decree of 1946 is also evidenced by the lack of any documents concerning registration and permits granted during its sixteen-year validity.[23]

6. The Act of 15 February 1962 on the protection of cultural assets and museums

The Act of 15 February 1962 on the protection of cultural assets and museums (hereinafter: the Act of 1962) was the legal successor of the Decree of 1946. This regulation was also largely an echo of the communist power prevailing at that time in Poland. This was indicated by many expressions used in the law, such as "development of socialist society" or "manifestations of clericalism". After the law was issued, it was called the most modern act of its kind in all Europe. It should be stated, after Jan Pruszyński, that this compliment was definitely exaggerated,[24] as it is difficult to point it out as an example of good legislation at all.

The Act of 1962 introduced a new notion of "cultural assets" – any movable or immovable object, old or contemporary, relevant to heritage and cultural development because of its historical, scientific or artistic value. This definition appears to be imprecise, giving rise to a rather discretionary granting of monument status to objects, which in turn may lead to a restriction of property rights. A legislative procedure of this kind corresponds to the communist socio-political doctrine of that time.

Furthermore, the Act of 1962 states that monuments should serve the "development of socialist society". Any objects were excluded from legal protection as a cultural asset if they were considered as relics of "clericalism" or "nobility", serving the "exploitation of man by man" or otherwise not conforming to the principles of socialist ideology.

[22] A. Mazur, "Ograniczenia wywozu zabytków ruchomych w prawie polskim i czeskim", *Zeszyty Naukowe Towarzystwa Doktorantów UJ. Nauki Społeczne* 2017, no. 17(2), p. 164.

[23] J. Pruszyński, *Dziedzictwo kultury Polski*…, p. 286.

[24] Ibid., p. 293.

In spite of this, a significant part of such monuments were already registered and thus subject to legal protection.[25]

The term "monument" was also introduced into the law, alternating with the term "cultural asset", which caused conceptual confusion and indicated the lack of consistency of the lawmakers.[26] Following the example of its predecessors, the 1962 Act also contained an enumerative catalogue of objects subject to legal protection as historical monuments.[27] Article 5 of the Act indicated that from the subject matter point of view the objects to be protected were in particular:

1) works of construction, urban planning and architecture, regardless of their state of preservation, such as historical urban assumptions of cities and settlements, parks and decorative gardens, cemeteries, buildings and their interiors together with their surroundings and building complexes of architectural value, as well as buildings of importance for the history of construction;
2) ethnographic objects such as typical rural housing estates and particularly characteristic rural buildings as well as all devices, tools and objects that are the evidence of economy, artistic creation, ideas, customs and other fields of folk culture;
3) works of plastic arts – sculpture, painting, decoration, graphics and illumination, handicrafts, weapons, costumes, numismatics and sphragistics;
4) historical monuments, such as weaponry, battlefields, places commemorating the struggles for independence and social justice, extermination camps and other sites, buildings and objects related to important historical events or to the activities of institutions and prominent historical personalities;
5) archaeological and paleontological sites, such as field traces of primary settlement and human activity, caves, prehistoric mines, mounds, cemeteries, barrows and all the products of past cultures;
6) objects of technology and material culture, such as old mines, steelworks, workshops, buildings, constructions, devices, means of transport, machines, tools, scientific instruments and products which are particularly characteristic of ancient and modern forms of economy, technology and science, when they are unique or connected with important stages of technical progress;
7) rare specimens of living or inanimate nature, if they are not subject to nature conservation regulations;

[25] Ibid., p. 295.

[26] Ibid., p. 298.

[27] J. Artemiuk, "Geneza pojęcia zabytku archeologicznego w prawie polskim", *Folia Iuridica Universitatis Wratislaviensis* 2015, vol. 4(2), p. 113.

8) library materials, such as manuscripts, autographs, illuminations, old prints, first editions, prints-uniques and other cimelia, maps, plans, notes, engravings, other recordings of image or sound, instrumentaria, bindings;
9) collections which have artistic or historical value as a whole, regardless of the type and value of their components, if they are not part of the national archival resource as a whole, regardless of the type and value of the individual components, if they are not part of the national archival collection
10) studios and workshops of prominent artists and activists, as well as documents and objects related to their life and work;
11) other immovable and movable objects that deserve permanent preservation due to their scientific, artistic or cultural value;
12) cultural landscape in the form of established conservation protection zones, reserves and cultural parks.

The 1962 Act also introduced significant changes with regard to the export abroad of movable monuments. Article 41(1) of the Act introduced a general ban on the export of historical monuments. However, Article 42(1) listed the assets which were not subject to the export ban – they could be exported, but only after obtaining a certificate from the Voivodeship Historic Preservation Officer or the National Library in Warsaw. According to the regulation of the Minister of Culture and Art of 30 June 1965 on the procedure for submitting applications and issuing certificates and permits for the export of cultural assets abroad, the competent authorities for issuing permits were: the National Library in Warsaw, the Head Office of the State Archives and the conservator of monuments. An exception was the application for permanent export of a musical instrument of high artistic or historical value, which had to be submitted to the Minister of Culture and Art.[28]

The Act of 1962 also stipulated the keeping of a register of monuments, however, as in the previous regulations of 1918 and 1928, the register was not complete or exhaustive and was only indicative. Cultural goods were not monuments until they were entered into the register. In the catalogue of goods which were subject to registration, we can find works of construction, urban planning and architecture, regardless of their state of preservation. Sacred objects were completely ignored in this catalogue, thus neglecting the specific nature of temples and the works of art contained therein. Potential protection could also be given to "battlefields, places commemorated by fights for independence and social justice, extermination camps and other sites and buildings connected with important historical events or with the activities of institutions and prominent historical personalities". However, Polish authorities of that time did not recognise the wars of 1914–1918 as an independence struggle, and treated the war of 1920

[28] A. Mazur, "Ograniczenia wywozu zabytków…", pp. 164–165.

as an aggression of Poland against the young Soviet republic. Therefore, the protection of the above mentioned objects in the Polish People's Republic was doubtful and, in fact, it was only real on paper.[29]

We can summarise this law as too general and too imprecise, as well as hermetic. Following J. Pruszyński, one can say that the biggest accusation that can be made against this Act is its inconsistency with other branches of public law. Many monuments have been destroyed and neglected on its grounds, and its regulations have unfortunately shaped the attitude of the whole generation of conservators to the resource under its protection. It was a false and harmful approach in its effects.[30]

7. The Act of 2003 on protection and preservation of monuments

The functioning of the 1962 law left a lot to be desired, so it became necessary to re-regulate the protection of cultural heritage law in a way that would correspond to the changing reality – primarily the political transformation that had taken place in Poland since 1989. As a result of the transformation, many normative acts required modernisation and adaptation to new conditions, including issues concerning legal protection of monuments. The answer to these problems was supposed to be the Act of 2003 on protection and preservation of monuments (hereinafter: the Act of 2003).

Article 1 of the Act of 2003 defines the subject matter of the law. According to this article, the Act regulates the subject, scope and forms of monuments care and protection as well as principles of creating a national program of monuments care and protection and financing conservation, restoration and construction works on monuments, as well as organisation of monument protection bodies. The article concretises the provisions of Articles 5, 6 and 73 of the Polish Constitution: the existence of an obligation on the part of the Polish nation (i.e. all citizens of the Republic of Poland) to pass on to future generations everything that is valuable from more than a thousand years of achievements is emphasised in the text of the Basic Law at the very outset – in the preamble.[31]

The current Act on the on the protection and preservation of monuments keeps the term "monument". However, in addition to the classic division of monuments into movable and immovable, the Act distinguishes the category of archaeological monuments. Admittedly, the Act of 1962 also distinguished such a group of objects, but did not formulate any definition in this respect, only indicating them as examples. On the

[29] J. Pruszyński, *Dziedzictwo kultury Polski*…, p. 301.
[30] Ibid., p. 306.
[31] *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*, ed. M. Cherka, LEX.

other hand, the regulations concerning archaeological monuments contained in the Act on protection and preservation of monuments clearly refer to the provisions of the European Convention for the protection of archaeological heritage, drafted by the Council of Europe – the first convention regulating the issues related to legal protection of archaeological monuments, although the attempts to adopt an act in this respect were made already in the interwar period.[32]

The new law on the protection of monuments already in its very name introduces the division of the whole sphere of protection into two areas: 1) protection of monuments and 2) their preservation. Protection of monuments is carried out by public authorities – governmental and self-governmental administration, acting in the public interest, according to the competences assigned to them by law. On the other hand, the preservation of monuments is individualised, and the responsibility for carrying it out is vested on the current owner of the monument.[33] The preservation of the monument by its owner or possessor consists of, in particular, ensuring the following conditions: scientific research and documentation of the monument; carrying out conservation, restoration and construction works on the monument; securing and maintaining the monument and its surroundings in the best possible condition; using the monument in a way that ensures permanent preservation of its value, as well as popularising and disseminating knowledge about the monument and its importance for history and culture.[34]

The Act of 2003 specifies what the protection of monuments consists of, particularly with regard to taking actions by public authorities to ensure legal, organisational and financial conditions enabling permanent preservation of monuments as well as their development and maintenance, preventing threats that may cause damage to the value of monuments, stopping the destruction and misuse of monuments, counteracting theft, disappearance or illegal export of monuments abroad and controlling the state of preservation and destination of monuments, as well as taking into account protective tasks in spatial planning and development and in forming the environment.[35]

The Act also typifies the following offences where the object of the criminal behaviour is a monument:

1) intentional and unintentional destruction or damage of a historical monument (Articles 108(1) and 180(2));

[32] A. Gerecka-Żołyńska, "Realizacja międzynarodowych standardów ochrony dziedzictwa kulturalnego w polskiej ustawie o ochronie zabytków i opiece nad zabytkami", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2007, no. 4, p. 53.

[33] R. Golat, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz,* LEX.

[34] J. Sługocki, *Opieka nad zabytkiem nieruchomym. Problemy administracyjnoprawne*, Warszawa 2017.

[35] Ibid.

2) intentional and unintentional export of the monument without permission or failure to bring it back into the territory of the Republic of Poland after exporting it abroad within the period of validity of the permission or, in the case referred to in Article 56a(8) of the Act, within 60 days from the date when the decision on the refusal of issuing another permission to temporarily export the monument abroad has become final or from the date of receiving information that the application for issuing another permission to temporarily export the monument abroad has been left without consideration (Articles 109(1) and 109(2));
3) counterfeiting or altering of the historic monument in order to use it in trading in antiques (Article 109a);
4) selling a movable item as a movable monument or selling a monument as another monument, in a situation when the perpetrator knows that they are counterfeited or forged (Article 109b);
5) search, without permission or against the conditions specified in the permission, for hidden or abandoned antiques, including with the use of all kinds of electronic and technical devices and diving equipment (Article 109c).

The Act of 2003, like any other law, has its drawbacks and advantages. What it can be primarily accused of is the excessive workload on the conservation services. The 2003 law imposes so many obligations on provincial conservators that in the current legal framework they are not able to cope with it. It is also said that the act imposes more obligations than rights on private owners of historical monuments, thus constituting an excessive restriction of the right of ownership.[36] The undue burden raises questions as to the practicalities: as a matter of fact, most of the owners do not perform their duties under the Act, and thus reduce the number of duties of the conservation services. Consequently, the conservation services are able to cope with all their duties, however, this has not particularly beneficial consequences for the monuments.[37] In spite of numerous flaws and deficiencies, the 2003 law is currently in force and there is room for postulations *de lege ferenda* – changes that will allow for more complete protection of historical monuments.

It is worth emphasising that nowadays the Polish cultural heritage is also protected by other special laws, such as the Act of 3 February 2001 on the protection of Fryderyk Chopin's heritage (consolidated text: *Journal of Laws* of 2020, item 115). What is more, Poland is a party to international agreements concerning the protection of various types of cultural heritage, such as the Convention for the Protection of the

[36] K. Zeidler, "O dobre prawo dla zabytków – rozważania na gruncie ustawy z 2003 r. o ochronie zabytków i opiece nad zabytkami" [in:] K. Zeidler, *Zabytki. Prawo*…, p. 58.

[37] Ibid., p. 59.

Architectural Heritage of Europe adopted on 3 October 1985 in Granada or the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, signed in Hague on 15 May 1954.

8. Conclusions

The development of monument protection law in Poland has come a long way, beginning with the Decree of 1918 and ending within the Act of 2003. Polish monuments have been exposed to waves of destruction for years. Partitions, the First World War, the Second World War, communist regime, period of transformation – all these events had a significant impact on the cultural heritage of Poland. Many monuments were destroyed or lost, hence the greater importance of protecting what remains. These regulations, what should be said, fulfilled their task only partially. Despite the efforts to protect Polish monuments as fully as possible, many of them were destroyed. Most of the regulations imposed too many obligations on the monuments' conservators and did not provide for an efficient system of their registration and thus preservation and protection.

There was also a noticeable tendency for polish lawmakers to adapt monument protection law to the current political thought dominating in the state. This tendency had a somewhat positive impact on the protection of historic monuments, as exemplified by the Decree of 1918, which expressed the need to protect historic monuments and cultural heritage in general as a manifestation of Polishness and independence of our country. On the other hand, when looking at the regulation of the 1962 Act, one can see the evident detriment in linking the need to protect monuments with political thought. The act gave strong expression to the communist ideology, which resulted in confiscation of many monuments in private hands for the benefit of the state, only to see them disappear. Also, the fact that certain events of major importance for Poland and Poles were rather inconvenient for the communist authorities (for example, the war of 1920 was represented as the Polish aggression against the young Soviet Russia) affected the protection of a significant part of the Polish cultural heritage, or to be more precise, certain objects simply fell out of legal protection in order to accommodate the political narrative.

However, after looking into different regulations on monument protection in Poland, one can also notice that each successive regulation has drawn on the previous one, often disregarding the fact that new needs for historic preservation have emerged as a result of the passage of time and changes in the factual situation. In this context the relation between the current Act of 2003 and the Act of 1962 is strongly visible. As Katarzyna Zalasińska writes, in adopting the Act of 23 July 2003 on the protection

and preservation of historical monuments, the required axiological reflection was not performed in the era of political transformation, resulting in the change of ownership structure of the historical resources, consequently adopting the normative bases built on the axiological assumptions adopted under the Act of 15 February 1962 on the protection of cultural heritage, which negatively influences the effectiveness of the system of protection of immovable monuments in Poland. Thus we have a situation in which the old system of values has become "unstable" in the face of socio-economic changes of the beginning of the 90s, which resulted, among others, in a change of ownership status of the majority of historic monuments, while the new one still has not crystallised.[38]

Of course, on a similar basis, the 1962 law also drew on its legal predecessors. Unfortunately, transferring similar regulations from one act to another without any reflection on changes in their axiological basis creates a situation in which the regulations cannot fully fulfil their functions, and the monuments suffer. Although new legal acts concerning the discussed issues should certainly draw from their predecessors, it is necessary to remember about the need to reflect and adjust the old institutions to the new circumstances.

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Act of 23 July 2003 on the protection and preservation of monuments (consolidated text: *Journal of Laws* of 2020, item 282, as amended).

Summary

Review of the key legal acts concerning the protection of historical monuments in Poland from 1918 onwards

The protection of historical monuments in Poland is an important issue. Polish cultural heritage has undergone many challenging events, therefore its protection is crucial. This article will discuss the most fundamental normative acts concerning protection of historical monuments as

parts of cultural heritage, which have been issued since Poland regained its independence, by the communist regime, until today. Presenting this issues in the form of a review will allow for better understanding of current regulations and the current state of Polish historical monuments.

Keywords: cultural heritage, Poland, cultural heritage protection

Streszczenie

Przegląd kluczowych aktów prawa ochrony zabytków w Polsce (od 1918 r. do prawa aktualnie obowiązującego)

Ochrona zabytków w Polsce stanowi niezwykle istotne zagadnienie, przede wszystkim ze względu na fakt, że polskie dziedzictwo kultury na przełomie lat doświadczyło wielu różnorodnych wyzwań. W niniejszym artykule omówiono najistotniejsze akty normatywne dotyczące ochrony zabytków, które były wydawane od momentu odzyskania przez Polskę niepodległości, poprzez okres obowiązującego na jej obszarze ustroju komunistycznego, do dnia dzisiejszego. Przedstawienie tej problematyki w formie przeglądu pozwoli na lepsze zrozumienie obecnie obowiązujących przepisów oraz aktualnego stanu polskich zabytków.

Słowa kluczowe: dziedzictwo kultury, Polska, ochrona zabytków

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Legal and ethical aspects of pornography in comparison with nude art in the context of dignity of human body

1. Introduction

Human sexuality and human body have always been subject of art. The perception of body and sexuality was changing throughout the centuries, and so was the meaning of the word "pornography". The term itself originates from Greek and literally means "writing about prostitutes". The earliest legal regulations concerning pornography came into existence in the 18th century, and from then on the phenomenon was associated with moral disapproval.[1] Since the codification of human rights in the 20th century lawyers have been compelled to interpret the law with regard to human dignity. This notion is also linked to the interpretation and moral judgement of pornography and nude art. As the society evolves and the perception of human sexuality changes, the questions about difference between pornography and nude art and their relation to human dignity remain ever relevant. The aim of this article is to study this subject in the context of applicable law and ethics.

2. Definitions

Any examination of the notion of pornography in the context of dignity of human body requires, at the outset, linguistic clarification. For the purposes of this article we shall propose the following definitions.

[1] M.M. Bieczyński, "Definicja pornografii w prawie karnym w świetle celu artystycznego jako przesłanki różnicującej ocenę sądową" [in:] *Prawo wobec erotyki w sztuce oraz pornografii*, eds. M.M. Bieczyński, A. Jakubowski, Wydawnictwo Silva Rerum – Wydawnictwo Uniwersytetu Artystycznego w Poznaniu, Poznań 2016, pp. 127–129.

1) Pornography consists of images, films and shows depicting sexual intercourse, whose aim is sexual agitation of the viewers. This pragmatic (teleological) element is crucial to the concept: pornography is any content which aims is to sexually agitate the viewer.[2]
2) Art is product or process made by man in order to influence the observers and provoke all kind of emotions, both negative and positive ones.[3]
3) Dignity of human body is firmly related to the dignity of person. Dignity arises from natural law and is confirmed in the various legal acts concerning human rights such as the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948 or the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, pp. 391–407).

These definitions will be expanded and discussed further in the article.

3. The ubiquity of pornography

Pornography today is so common that it resembles a bulk product. The variety of forms in which that content appears – films, photographs, animated images (gifs) – targets wide range of audiences. Universal access to the Internet made pornography equally accessible, in fact more easily than ever before. Arguably, availability of pornographic content online is greater than public access to the results of scientific research. There is no significant financial barrier either: most of pornographic content can be accessed free of charge.

4. Penalisation of pornography

4.1. European Union regulations concerning pornography

If it is true that criminal law reflects commonly accepted moral standards, an analysis of criminal regulations will allow us to distill those features of pornography that make it morally objectionable. Although criminal law is part of public law, any meaningful examination of criminal law applicable to our subject requires mentioning the regional context – the European Union's primary legislation and secondary law. This

[2] *Słownik Języka Polskiego PWN*, https://sjp.pwn.pl/szukaj/pornografia.html (accessed: 7.03.2020).

[3] W. Tatarkiewicz, *Dzieje sześciu pojęć,* Państwowe Wydawnictwo Naukowe PWN, Warszawa 1976, pp. 44–46.

statement is justified on two grounds. Firstly, the founding Treaties are joint endeavour of all the Member States and, due to legal nature of European directives – including their direct and indirect effects – have impact on all Member States of the EU. Secondly and more importantly, both primary and secondary law of the EU is applicable throughout the Union in a uniform fashion. In other words, the fundamental freedoms arising from the Treaties allow creation and distribution of legally accepted pornography – which is to say, neither production nor distribution of pornography is in itself contrary to the EU law. Jurisprudence of The Court of Justice of the EU states that the freedoms mentioned above can only be limited on the basis of the Article 52 in conjunction with Article 62 of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390) in order to protect public policy or general interest.[4] And if so, these limiting measures have to be taken with regard to the principle of proportionality. The EU law on the issue of pornography and the protection of minors has features of a framework law: clarification of this regulation is at the discretion of the Member States.

The EU's secondary law consists of three directives on the subject. Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, pp. 1–14) defines child pornography in Article 2 as "any material that visually depicts a child engaged in real or simulated sexually explicit conduct; any depiction of the sexual organs of a child for primarily sexual purposes; any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes". Furthermore, in Article 4 the Directive obliges Member States to take all the necessary measures to guarantee that any intentional action whose aim is to prepare, make or attempt to make child pornography, is punishable.

In light of the Article 14 of Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.07.2000, p. 1–16), service providers cannot be liable for the information stored at the request of a recipient of the service, on the condition that "the provider does not have actual knowledge of

[4] Judgment of the Court (First Chamber) of 14 October 2004 in case C-36/02: *Omega Spielhallen- und Automatenaufstellungs-GmbH vs. Oberbürgermeisterin der Bundesstadt Bonn*, ECLI:EU:C:2004:614.

illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent". If the provider obtains such knowledge, he is obliged to act expeditiously to remove or to disable access to the information (notice and takedown procedure).[5] At the same time, Article 15 declares that the service providers have no general obligation to monitor the information they transmit.

Finally, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provisions of audiovisual media services (hereinafter: Audiovisual Media Service Directive; OJ L 95, 15.04.2010, p. 1–24) regulates, *inter alia*, the protection of minors in use of the on-demand audiovisual services. Article 12 creates an obligation that the Member States take appropriate measures to ensure that minors do not see or hear content which may seriously impair their physical, mental or moral development.

4.2. Polish regulations concerning pornography

Polish law in principle does not prohibit pornography, but there are caveats and exceptions. The concept which is key to all Polish criminal provisions on the subject is autonomy of will. Article 191a of the Act of 6 June 1997 – Penal Code (consolidated text: *Journal of Laws* of 2020, item 1444) of states that it is a crime to record either an image of a naked person or an image of a person during sexual activities through use of force, threat or deceit. In addition to unlawful recording, it is also forbidden to distribute an image of a naked person or an image of a person during sexual activities without that person's consent. As to the pornographic content itself, according to Article 202 of the Penal Code it is a crime to publicly display such content in a manner that may impose it on another person against this person's will. Paragraph 3 of that Article stipulates that pornography which includes minors, violence or the use of animals is altogether unlawful, and paragraphs 4 and 5 state that distribution of every kind of activity with a minor with the aim of sexual agitation is considered a crime and punishable with severe penalty of up to 12 years of imprisonment and carries, at the court's discretion, forfeiture of the items which served or were designed for committing the offence, even if these were not owned by the perpetrator. Protection of minors goes further. Article 200 para. 5 of the Code prohibits running advertisements of pornography in a way that allows access to it to a minor under the age of 15. Paragraph 4a of Article 202 criminalises possession

[5] K. Groszkowska, "Prawne możliwości ograniczenia dostępu do pornografii w internecie w Unii Europejskiej", *Analizy BAS* 2019, no. 1(149).

of or accessing pornographic content which includes minors; para. 4b criminalises production, distribution and possession of a depiction – whether created or altered – of a minor engaged in a sexual activity; para. 4c criminalises anyone who, in order to achieve sexual gratification, takes part in a presentation of pornographic content that includes a minor. Of note, Poland implemented the Audiovisual Media Service Directive in the Act of 18 July 2002 on Electronically Supplied Services (consolidated text: *Journal of Laws* of 2020, item 344).

4.3. French regulations concerning pornography

Under French Penal Code only child pornography is considered as crime. Article 227(23) of Penal Code state that production, distribution, possession and web usability of child pornography is forbidden and punishable by imprisonment and a fine. France, like Poland, criminalises accessing and viewing child pornography, as well as production and distribution of pornographic content including violence or child pornography, if there is a possibility that a minor may gain access to it (Article 227(24) of Penal Code).[6]

4.4. British regulations concerning pornography

United Kingdom's laws related to pornography rely on the notion of obscenity. Chapter 66 of the Obscene Publications Act 1959 and the Obscene Publications Legal Guidance define the term as follows: "an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it". An article means any "matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures".[7] In practice, examples of obscenities include sexual activities involving animals, children, deceased people and with the use of violence. Furthermore, under chapter 44 of the Criminal Justice Act 2003, chapter 14 of the Protection of Children Act 1999 and chapter 4 of the Criminal Justice and Immigration Act 2008, child pornography is expressly forbidden. Although the United Kingdom is no longer a Member of the European Union, the influence of EU regulations on British law before Brexit was unquestionable: after all, pornographic materials are commodities (for the most part they are "goods" within the

[6] Ibid.

[7] The Obscene Publications Legal Guidance, https://www.cps.gov.uk/legal-guidance/obscene-publications (accessed: 7.12.2020).

meaning of the founding Treaties) and so the concepts of internal market and common market require stable and, to a certain extent, uniform criminal law context throughout all Europe.

4.5. Common themes

It appears that the main difference between Polish, French and the British law is the amount of emphasis on the effect on the person, whether a participant or a consumer. Despite the fact that the continental law systems (civil law systems) prefer rigid definitions and the system of common law allows for functioning of more flexible terms, criminal law operates like a universal presumption of lawfulness: pornography is legal to produce and to consume unless it is of the forbidden kind. Again, if we subscribe to the idea that criminal law incorporates a minimum standard for morality, we might provisionally conclude that pornography is immoral only if it runs against the law, either by being decreed a crime due to its subject (e.g., the presence of a child, use of violence, sexual activities with an animal) or due to its undesired effect on a person (e.g., unwanted consumption, obscenity). This provisional observation requires further analysis.

5. Moral aspects of pornography

Any meaningful deliberation on moral aspects of pornography should distinguish between matters concerning creators of pornography on one hand (both actors and persons responsible for the technical aspect of creation) and the audience on the other. The following analysis is made in reference to the legally accepted pornography.

Wojciech Załuski remarked that there are two approaches to that problem. The first one is called the restrictive ethics, according to which all sexual content and actions deprived of any higher value than mere sexual gratification – such as mutual trust, tenderness and intimacy – shall be considered as morally wrong. The second one, the permissive ethics, is based on the assumption that the moral judgement of pornography should be centred on the notion of voluntariness of concerned parties.[8] I tend to subscribe to the latter approach as it embodies the universal principle of freedom of the individual and embraces its underlying concept of free will, which, in turn, extends to rights over one's own body, freedom of private and sexual life and freedom of expression. These

[8] W. Załuski, "Aspekty seksualności" [in:] J. Stelmach, B. Brożek, M. Soniewicka, W. Załuski, *Paradoksy bioetyki prawniczej,* Wolters Kluwer, Warszawa 2010, p. 187.

principles arise from the natural law and find affirmation in both international and domestic regulations concerning human rights, such as the Universal Declaration of Human Rights or the Constitution of the Republic of Poland (*Journal of Laws* of 1997, No. 78, item 483, as amended).

5.1. Morality of actors and creators

In the spirit of the permissive ethics, pornography shall be considered as morally accepted on the condition that the creation and distribution of the content are based on free and informed consent of all parties: every person taking part in the production, whether it is an actor or a director, has to be fully aware of the essence, aim of the content and possible future distribution. This condition necessarily excludes the participation of incapacitated persons, either due to their mental illnesses and mental disorders or due to an illegal action of the third party. Needles to say, the involvement of an incapacitated person in sexual activity as well as causing such incapacitation by a third person would imply criminal liability. The principle of consent is enshrined in penal codifications of many countries, including Poland: the use of deception in order to engage person in sexual activity is forbidden and punishable (Articles 197 and 198 of the Polish Penal Code). Polish legal scholars indicate that the term "deception" should be understood broadly and include cases of either misleading the victim directly or exploiting an existing error so that the decision-making process of the victim is impaired (deception *sensu stricto*) and cases where the victim is unable to make free decisions due to deactivation of their volitional control of movement (deception *sensu largo*).[9]

In other words, moral acceptance of pornography requires voluntariness. The participation of persons engaged in the production of pornographic content has to be based on their decision, free from any external pressure, and this voluntariness must cover both the process of production and distribution. Moreover, the person in question must be granted a possibility to withdraw the consent at every stage and this decision must be respected by other participants. That strict attitude is dictated by the fact that the freedom in question is bi-directional, i.e. includes positive and negative aspect ("freedom to" and "freedom from"). Of note, Articles 197 and 198 of the Penal Code criminalise forcing or using unlawful threat in order to engage a person in sexual activity. While "force" is to be understood as using physical measures against the victim, their relative or even an animal in order to overcome the resistance of a victim and

[9] M. Mozgawa [in:] M. Budyn-Kulik, P. Kozłowska-Kalisz, M. Kulik, M. Mozgawa, *Kodeks karny. Komentarz aktualizowany*, LEX/el.

engage it in sexual activity,[10] Article 115 para. 12 of the Penal Code expressly defines "unlawful threat" as a threat to commit a crime or a threat to cause the institution of criminal proceedings, or to disseminate derogatory information concerning the person threatened or his next of kin.

When the condition of voluntariness is met, pornography should not be considered disrespectful to the dignity of human body since that standard of dignity cannot be examined *in abstracto*, as a standalone concept, fully disconnected from the subject's own individual judgment as to self-perception and self-expression. This judgment is highly subjective. People are free to form that judgment and to act on it in any way they might choose and their own judgment cannot be overridden by someone else's. Needless to say, this liberty is an organising principle of social co-existence and remains fundamentally connected to the freedoms mentioned above in 4.1.

5.2. The morality of audience

As it is the case with content creators, moral assessment of attitudes of the audience must also revolve around the idea of voluntariness. As it was already stated, according to Article 202 of the Penal Code it is a crime to publicly display pornography in a manner that may impose such contents on another person against this person's will. However, the problem appears to be more complicated. Wojciech Załuski correctly observes that voluntariness of the audience as a point of moral reference should be examined in relation to voluntariness of creators of the content: if the content was not created and/or published voluntarily and the viewer is aware of that, it should be considered morally objectionable to watch it.[11] This extends to the situation in which the observer is not fully confident as to the voluntariness of the content but decides to consume it regardless. In either case this amounts to a violation of the dignity of human body of the creators. If the condition of voluntariness on the part of the creator is not established in the viewer's mind positively, one has to assume that an infringement of the dignity of human body had occurred at some point, whether during production or distribution of the content. In either of these scenarios – the viewer knows the content lacks voluntariness or the viewer suspects so and yet chooses to view anyway – such behaviour should be considered morally wrong on two levels, in relation to legality of the content (criminal law as a minimal moral standard) and dignity of its creators.

[10] Ibid.

[11] W. Załuski, "Aspekty seksualności"…

5.3. Dignity of human body and objectification

The issue of possible violation of the dignity of human body is closely related to the issue of objectification. Barbara L. Fredrickson and Tomi-Ann Roberts explain that "sexual objectification occurs whenever a woman's body, body parts, or sexual functions are separated out from her person, reduced to the status of mere instruments, or regarded as if they were capable of representing her. In other words, when objectified, women are treated as bodies – and in particular, as bodies that exist for the use and pleasure of others".[12] It seems that these two issues are inseparable when it comes to moral assessment of pornography. Although in the current state of cultural discourse objectification of human body concerns mostly women, men might also be its victims. Sarah R. Heimerdinger-Edwards, David L. Vogel and Joseph H. Hammer observed that not only the objectification of women has a malicious impact on men, but also that this social phenomenon affects women as well as men.[13] Without doubt, the essence of objectification is a negation of the dignity of human being and its body and, in consequence, our moral attitude towards it is, to say the least, unfavourable. However, and perhaps paradoxically, free will, acknowledgement of rights over one's own body and freedoms related to private and sexual life seem to fuel the phenomenon. It is likely that objectification, a byproduct of these liberties, is unavoidable: if a given person does not feel that their participation in a specific enterprise is contrary to their inner sense of morality and, as a corollary, does undertake certain activities consciously and voluntarily, then the outside observer would be correct to assume that he or she had agreed to objectify his- or herself.

5.4. Nude art

What is the difference, in the above context, between pornography and nude art? To answer this question, one must first understand the essence of the nude and place it takes in broadly defined art. The linguistic approach offers little in terms of insight: nude is a "painting, sculpture or photography presenting naked person".[14] Mateusz M. Bieczyński indicates three possible points of view on the relation between art and eroticism:

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[12] B.L. Fredrickson, T.A. Roberts, "Objectification Theory. Toward Understanding Women's Lived Experiences and Mental Health Risks", *Psychology of Women Quarterly* 1997, vol. 21, issue 2, pp. 173–206.

[13] S.R. Heimerdinger-Edwards, D.L. Vogel, J.H. Hammer, "Extending Sexual Objectification Theory and Research to Minority Populations, Couples, and Men", *The Counseling Psychologist* 2011, vol. 39, issue 1, pp. 140–152.

[14] *Słownik Języka Polskiego PWN,* https://sjp.pwn.pl/szukaj/akty%20.html (accessed: 7.11.2020).

1) Theory of separation of art and eroticism assumes that contact with erotic content provokes intellectual experience rather than biological response as it is the case with pornography.
2) Theory of cross-referencing assumes that these two concepts stay in the close relation; it is possible for content to have both pornographic aspect (i.e. provoking biological reaction) and higher not-just-sexual emotional value.
3) Theory of inclusion assumes that pornography should be considered as subtype of eroticism.[15]

In the light of all three of those theories, the difference of eroticism and pornography lies in the occurrence of an intellectual experience. However, it is also possible to achieve an emotional rapture in contact with content intended as merely pornographic. If one was to understand art as a product or process made by man in order to influence the observers and provoke all kind of emotions, both negative and positive ones, the boundary between pornography and art fades away. What is more, time and large-scale cultural shifts appear to factor in this assessment: the idea of eroticism evolved and these changes have lead to widening of this term.[16]

Despite the fact that nude art is not criminalised, it should also be examined in terms of law-related concept of voluntary and conscious consent of the model who is being captured. The permissive approach (applied *mutatis mutandis* to nude art) indicates that a person whose body is a subject of nude art has to be fully aware of the essence and aim of the enterprise. It is crucial that the model makes the decision about making their body available for the artist willingly and fully consciously. Should the situation lack any of these two necessary conditions – in the circumstances analogous to the ones mentioned previously in context of pornography, such as deception, unlawful threat or use of force – it would be morally wrong for the artist to capture the model's body against his or her will. The same applies also to distribution. Moreover, that consent cannot be irrevocable and the model must be granted a possibility to withdraw it at every stage, not only in the process of production (painting, photographing etc.) but also after the display of the final product. The strict approach to the issue of consent is necessary for many reasons, one of them being the subtle and nuanced differences between pornography and nude art.

The problem of morality of the audience of nude art is far more difficult to assess when contrasted with moral questions surrounding consumption of pornography because art benefits from express presumption of lawfulness. The audience of art assumes

[15] M.M. Bieczyński, "Definicja pornografii…", pp. 136–141.

[16] M. Gołda-Sobczak, J. Sobczak, "Sztuka czy przekaz pornograficzny?" [in:] *Prawo wobec erotyki*…, pp. 271–272.

that it was made with the observance of the law and respect to the value of human dignity. Andrzej Jakubowski argues for a notion of art as a legal defence in a criminal case.[17] There are crimes known to Polish law that are about inflicting undue emotional discomfort on the victim, but an artist, under certain conditions, would be exempt from such criminal liability with respect to the work of art. This idea, when applied to eroticism and nude art, would confirm that art indeed benefits from presumption of lawfulness. Art as criminal defence might be pleaded in cases where certain works of art may offend audience's religious feelings or cause public indecency. Furthermore, in the case *Muller and others v. Switzerland* the European Commission of Human Rights suggested that art should enjoy special protection (*une protection specific*) because of its role in the democratic society. The freedom of art is necessary for public opinion to form and spark discussion on current problems of the society. Although the European Court of Human Rights, by a majority vote, upheld the verdict of the Swiss court, judge Alphonse Spielmann issued a dissenting opinion in which he drew attention to the possible danger of censorship of art dictated by protection of public morality. He pointed out that in 1857 Gustave Flaubert's "Madame Bovary" was considered as indecent and recalled the conviction of Charles Baudelaire for "Les Fleurs du Mal".[18] Evolution of society mirrors changes in the way we perceive art, eroticism and pornography. Behaviour or content once considered obscene in future might be regarded as masterpieces. Bearing this in mind, the European Court of Human Rights should adopt a strict interpretation of State's entitlement to interfere with the scope of artistic expression.[19] Furthermore, as Andrzej Jakubowski noted, in cases *Hoare v. The United Kingdom* and *Perrin v. The United Kingdom* – both concerned the right to distribute pornography – the European Court of Human Rights refused to protect the freedom of artistic expression and declared that the measures taken by the United Kingdom in name of protection of public morality were justified. However, it was suggested that these judgments would be different if the subject of the deliberation was art and not pornography.[20] This conclusion appears to support the thesis that art benefits from the presumption of lawfulness.

The difference between pornography and art – the occurrence of intellectual experience – is connected with intention behind both. According to the above-mentioned definition of art proposed by Władysław Tatarkiewicz, the aim of nude art is to influence the audience and provoke an emotional response. This response might be as

[17] A. Jakubowski, "Swoboda wypowiedzi artystycznej a 'prawo do pornografii' w orzecznictwie Europejskiego Trybunału Praw Człowieka" [in:] *Prawo wobec erotyki*…, pp. 215–216.

[18] Ibid.; Judgment of the Court of 24 May 1988 in case 10737/84: *Muller and others v. Switzerland,* [section A] no. 133.

[19] A. Jakubowski, "Swoboda wypowiedzi artystycznej…", p. 218.

[20] Ibid., pp. 214–215.

varied, nuanced and complex as human emotions can be, and the critical factor in this response is emergence of an intellectual connection – a dialogue of sorts – between the artist and the audience. Art makes us pause and reflect. In contrast, the aim of pornography is merely to sexually agitate and to provoke a biological response. This difference in aim corresponds to the very issue of dignity of human body: as Barbara L. Fredrickson and Tomi-Ann Roberts remarked, objectification occurs when people are treated "as bodies that exist for the use and pleasure of others".[21]

6. Conclusions

The difference between pornography and nude art is based mostly on the aim of creators and reaction of the audience. Aside from difficulties as to moral assessment of pornography, the baseline is that the content involving presence of a child, use of violence or animals is commonly perceived as wrong, and this universal belief has its reflection in the EU law and in criminal regulations of various European countries, such as Poland, France or the United Kingdom. At the same time, pornography itself, which is a result of conscious and voluntary cooperation, should be considered as morally acceptable. This proposition is based on the assumption that rights over one's own body, freedom of private and sexual life and freedom of artistic expression should be interpreted as ability to decide about participation in that kind of enterprises without any external pressure or judgement. Moreover – again, with the exception of instances of criminality – the judgment on the possible infringement of the dignity of human body should be vested in the person whose body it concerns. Finally, nude art benefits from the assumption that it is made in the name of art and therefore embraces higher values due to the presence of intellectual experience; this intellectual experience is a standalone factor in assessment whether it violates the dignity of human body.

That said, it is important to differentiate between what is "morally accepted" and "morally good". The complexities and subjective nature of deliberations on moral status of pornography, nude art and their influence on the dignity of human body make it extremely difficult, if not entirely impossible, to propose overarching and universally applicable statements as to the latter. The last word here is everyone's own.

[21] B.L. Fredrickson, T.A. Roberts, "Objectification Theory…"

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Summary

Legal and ethical aspects of pornography in comparison with nude art in the context of dignity of human body

The aim of the article is to examine the differences between pornography and nude art. The issue has been analysed on the ground of applicable law of the European Union and legal regulations functioning in Poland, France and the United Kingdom. This comparative approach is supplemented with discussion about the moral aspects of the creation and consumption of pornography and of nude art, with particular emphasis on freedom of artistic expression, rights over one's body and human dignity. The author discusses these phenomena and concepts with an attempt to find boundaries between them.

Keywords: human dignity, dignity of human body, rights over one's own body, nude art, pornography

Streszczenie

Prawne i etyczne aspekty pornografii oraz aktów w kontekście godności ludzkiego ciała

Celem niniejszego artykułu jest porównanie sytuacji prawnej pornografii i aktów w sztuce w kontekście regulacji prawnych obowiązujących w Unii Europejskiej, zwłaszcza w prawie polskim i francuskim. W odniesieniu do analizowanego zagadnienia uwzględniono również przepisy prawa brytyjskiego. Przedstawione tu rozważania odnoszą się do moralnych aspektów produkcji oraz wykorzystywania treści pornograficznych i aktów w sztuce. Artykuł dotyczy problematyki wolności sztuki, godności ludzkiego ciała i prawa do rozporządzania własnym ciałem. Autorka podejmuje próbę wytyczenia granic pomiędzy powyższymi pojęciami.

Słowa kluczowe: godność człowieka, godność ludzkiego ciała, prawo do rozporządzania własnym ciałem, akty, pornografia

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