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## Who Owns Art? - The Problem of Trade in Cultural Objects

### 1. Definition of the term 'cultural property'

The term 'cultural property' was stated in two sources of international law – the Hague Convention of 1954<sup>1</sup> and the UNESCO Convention of 1970<sup>2</sup>. The legal definition of cultural property was established in the Hague Convention. It states that the term 'cultural property' shall cover, irrespective of origin or ownership, three categories of objects. The first one is movable or immovable property of great importance to the cultural heritage of all people (for example – monuments of architecture, groups of buildings, books, works of art etc.). The second group consists of buildings, the main and effective purpose of which is to preserve or exhibit movable cultural property belonging to the first group (museums, large libraries, depositories of archives, and refuges intended to shelter, in the event of armed conflict, movable cultural property). The last category are centers containing a large amount of cultural property from the first or the second group.

On the other hand, the UNESCO Convention contains eleven categories of cultural property. It should be property which, on religious or secular grounds, is specifically designated by each State as being of importance to archaeology, prehistory, history, literature, art or science. The eleven categories of cultural objects mentioned in the Convention are, for example: rare collections and specimens of flora and fauna, products of archeological excavations, property of artistic interest, archives, including sound, photographic and cinematographic archives, articles of furniture which are more than one hundred years old and old musical instruments etc.

These two definitions highlight a few attributes that a cultural property should have. The first one is that a cultural object should have historical, artistic or scientific importance. Cultural objects can be movable or immovable and have secular or religious im-

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1 Dz. U. 1957, No. 46, item 212.

2 Dz. U. 1974, No. 20, item 106.

portance. These documents try to harmonize the definition of cultural property, but the UNESCO Convention provides that each state can designate such property. Individual definitions of cultural objects were adopted, for example, by Austria, Croatia, Cyprus, Estonia, France, Germany, Greece, Hungary, Italy, Lithuania, Luxemburg, the Netherlands, Romania, Slovakia, Spain, Sweden, Switzerland and the United Kingdom.

The subject of my work is the property of movable cultural objects. I will present the changes in instruments for protecting cultural goods in international and Polish law. These instruments often restrict the ownership of private collectors because of the meaning of a cultural object to a nation. The risk of transporting cultural goods abroad was the cause of the creation of regulations which protect cultural property from leaving the territory of a country. The second cause of development of international and national regulations connected with the transfer of cultural objects was the problem of crimes committed in connection with them (for example offering objects of undefined origin, the illegal trade in art). The development of international trade led to the necessity for international preservation of cultural goods. The greatest problem is caused by movable cultural property, which can be transferred from one country to another. The problem arose at the end of the 1960s, when private collectors were often offered objects of undefined origin. It was the beginning of international cooperation to fight the illegal trade in art.

There are two great problems connected with cultural property. One of the most important questions is who can rightfully own a cultural object and what conditions should a person meet to become an owner of cultural property. This is connected with the significance of cultural goods for communities and the necessity of protecting cultural property from destruction. Cultural objects are not only tourist attractions, but are also an important element of national identity, which should be preserved for future generations.

## **2. International instruments for protecting cultural goods**

The first document which aimed to deal with the protection of cultural goods was the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. It was signed in 1954 and by 2013 had been ratified by 126 states. The Hague Convention was the first international document created to protect cultural goods during military conflict and, for the first time, it established the term 'cultural property'.

The next international document was the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. It was adopted by the General Conference of UNESCO in 1970. The Convention has been ratified by 120 countries. The first article of this document also provides a definition of cultural property, which is very wide and consists of any property

mentioned in one of eleven categories. Cultural property is also, on religious or secular grounds, specifically designated by each state as being of importance to archaeology, prehistory, history, literature, art or science. Countries which have ratified this Convention are obligated to adopt protection measures on their territories, control the movement of cultural property and return stolen cultural property. Article 7 of the UNESCO Convention states the duties of parties to the Convention. There are three duties: to take necessary measures to prevent museums and similar institutions from acquiring cultural property which has been illegally exported; to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution; to take appropriate steps to recover and return any such cultural property at the request of another party to the Convention.

Another extremely important agreement was the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which was signed in 1995. This Convention was prepared by the International Institute for the Unification of Private Law. It is a complementary instrument to the Convention of 1970. To be precise, the UNIDROIT Convention was signed to revise the UNESCO Convention. It laid down the legal rules for the restitution and return of cultural objects. 'Restitution' concerns stolen cultural objects and 'return' is a term applied to goods which have been illegally exported. It was necessary to lay down those rules, because the procedures for the return of cultural property in the UNESCO Convention had encountered some difficulties. Although the UNIDROIT Convention can only be applied in cases of international claims, which was stated in the first article, some authors claim that it was a significant document<sup>3</sup>. It was the first time that a possessor in good faith was obligated to return a cultural object which had been stolen. The possessor in good faith has the right to get fair and reasonable compensation. Nevertheless, the right of private collectors to possess a cultural object, even if they did not know that it had been stolen, was restricted in order to protect national heritage.

The next important international agreement was the European Convention on Offences relating to Cultural Property, known as the Delphi Convention. The aim of this document was to prevent the destruction and devastation of cultural objects. This convention has never come into force, because states wanted to preserve their own powers connected with criminal law. The appendix to the Convention provides a list of offences such as theft, destruction, damage, concealment etc. For the coming into force of this convention only three ratifications are needed, but no state has yet ratified the agreement.

In 2001, UNESCO drafted the Convention on the Protection of Underwater Cultural Heritage. Underwater cultural heritage was defined as all traces of human existence having a cultural, historical or archeological importance, which have been partially or totally submerged under water, periodically or continuously, for at least 100 years (art. 1

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3 W. Kowalski, *Problematyka prawna obrotu dobrami kultury*, [in:] *Rynek sztuki. Aspekty prawne*, ed. W. Kowalski, K. Zalaszińska, Warszawa 2011, p. 34.

paragraph 1). The same article gives a list of examples of underwater cultural heritage. It was necessary to draft such a document, not only because of treasure hunters, but also because of the fishing industry and the laying of pipelines. Parties to the Convention are obliged to preserve underwater heritage, train underwater archaeologists and share information with other countries. The Convention stipulates that underwater cultural heritage should not be commercially exploited.

International agreements provide just instruments for the protection of cultural property. According to the UNESCO Convention, every state has the freedom to set its own regulations connected with cultural objects.

### 3. Regulations of Polish law

Preservation of cultural property is regulated in Polish law by the act on the protection of monuments and the guardianship of monuments enacted on 23 July 2003<sup>4</sup>. The act does not use the term 'cultural object'. Instead, it uses the term 'monument'. The most significant restrictions on the right to ownership can be found in the fifth section, which regulates the export of monuments from Poland. Polish law provides some restrictions on exporting cultural goods. It is motivated by the will to preserve the most significant movable objects because of their importance to the nation. Article 51 stated that the export of cultural property is permitted under conditions that it does not cause damage to the national heritage. In 2010, the act was revised and this provision was removed. Nowadays, there is a list of cultural objects that require permission for export from Poland. The list consists of 15 categories, such as original graphics or posters which are more than 50 years old and with a value higher than 16 000 PLN, single films or photographs which are more than 50 years old and with a value higher than 6 000 PLN, a single book that is more than 100 years old and with a value higher than 6 000 PLN and so forth. Permission is issued by the Ministry of Culture and National Heritage. The Ministry can refuse to grant permission if the cultural object has special importance for the national heritage. However, the power of the organ is restricted by article 59, which enumerates categories of cultural objects which do not need permission for export. A person who wants to export a cultural object should submit a motion through a Voivodeship An Inspector of Monuments has to issue a permit for the permanent export of a monument. Permission is valid up to 12 months and after this time a person or organization cannot export the cultural object. Permission for the temporary export of monuments for utilitarian or exhibition purposes, or to carry out conservation works, can be issued by a Voivodeship Inspector of Monuments. The permit is valid for a maximum of 3

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4 Dz. U. 2003, No. 162, item 1568.

years. A Voivodeship Inspector of Monuments can also issue a general open permit for the temporary export of monuments at the request of a museum or other institution of culture which, in connection with its activity, intends to repeatedly export its collections, in whole or in part, for exhibition purposes. Permission can be cancelled if the state of the monument has deteriorated, or new facts and circumstances have been revealed. After its return to Poland, the person or organization which was allowed to export the monument shall inform the Voivodeship Inspector of Monuments about the return of the object within 14 days. In the case of library materials, the permit is issued by the National Library Director. The procedure for issuing permits is specified by the Minister of Culture and National Heritage.

If a person does not need a permit for the export of an object and it has some qualities that turn out to require a permit, border guards can demand a document which legitimizes the fact that it can be exported without a permit. If a person does not present such a document, border guards can withhold the cultural good for the time which is necessary to check whether it is legal to export it without a permit. Documents which can be presented to border guards in order to export a cultural good are mentioned in article 59 of the act on the protection of monuments and the guardianship of monuments. According to legal doctrine, this regulation is not proper. Border guards have to assume whether the document is credible, for example, they must assume whether the article's valuation is proper or its declaration of age is credible. This can cause some problems, because border guards usually do not have professional knowledge about art<sup>5</sup>.

The aim of all of these regulations is to protect a significant cultural object from devastation and destruction or the export from the country of the most important objects. Restrictions are imposed on owners of cultural property in order to protect national heritage. The right of ownership, which is one of the most important rights in international and Polish law, in this case is not absolute. Although ownership is a basic value, lawmakers sacrifice this right in some cases to protect more important values. In fact, we can see a conflict of interests in this case. Cultural objects not only have economic value, but are also part of our heritage and their value cannot be measured only in an economic way and this fact justifies restrictions on the right of ownership.

#### 4. Conclusion

To conclude, I would like to present some examples which show how serious the problem of the illegal trade in cultural objects is. In 1992, The Times published an article *Art*

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5 W. Kowalski, K. Zalasinska, *Prawo ochrony dziedzictwa kulturowego w Polsce – próba oceny i wnioski*, [in:] *System ochrony zabytków w Polsce – analiza, diagnoza, propozycje*, ed. B. Szmygin, Lublin – Warszawa 2011, p. 31.

*Raiders Jeopardize European Heritage*<sup>6</sup>. According to this article, in 1991, more than 2000 cultural objects valued at US\$ 3 billion were removed from eastern European countries. One of the countries that suffered most was Bulgaria. It is estimated that in 1991, more than 500 icons, hundreds of crosses and ancient Cyrillic manuscripts were taken from churches and monasteries.

On the other hand, in Supraśl in Poland, there is a museum which collects icons. Icons have been bought or donated by private collectors to the museum<sup>7</sup>. An interesting fact is that, in recent years, the main source of icons has become the Customs Office, which donates icons withheld on the border. In 1992, the National Library in Warsaw was offered a medieval manuscript for purchase, stolen from the library at Mount Athos. Fortunately, the manuscript was recognized and returned to the owner<sup>8</sup>.

It is also necessary to mention the *Winkworth v. Christie, Manson & Woods Ltd.* case. It was a case concerning the collection of ivory carvings, stolen in England and transported and sold in Italy. They were sold to the purchaser, who did not know that the works of art had been obtained in an illegal way, in good faith. The collection was put up for auction and the robbed owner became aware of it. He managed to stop the auction, but did not manage to regain the property. It was before the UNIDROIT Convention and Italian law protected the possessor in good faith<sup>9</sup>.

These examples show how important the problem of trade in art is nowadays, when people travel a lot. International cooperation is necessary to fight against crimes committed to obtain cultural objects. The provisions of a single country are insufficient if we want to preserve world heritage from destruction. On the other hand, lawmakers should consider private collectors and their right to possess works of art. The development of international trade in cultural property has created many problems. Movable works of art are often easy to transport, which causes problems for border guards. *It is easy to say that illegally exported art may not be imported. But effectuating such a policy, in a society within which millions of people cross the borders every year, and into which art objects numbering hundreds of thousands are brought, would be a nightmare [...] – says P. Bator*<sup>10</sup>.

### **Biographical reference:**

Martyna Piaskowska – a student of the Adam Mickiewicz University in Poznań (Law Faculty and Interfaculty Individual Studies in the Humanities). She is interested in comparative law, art and Balkan literature.

6 S.J. Checkland, *Art Raiders Jeopardise European Heritage*, The Times, 1992-06-13.

7 <<http://www.muzeum.bialystok.pl/s,zbiory,40.html>>.

8 W. Kowalski, *Nabycie własności dzieła sztuki od nieuprawnionego*, Zakamycze 2004, p. 245–246.

9 *Winkworth – vs. – Christie, Manson & Woods Ltd*, ChD 1980.

10 V. W. Kowalski, *Nabycie własności...*, p. 196.

SUMMARY

**Who owns art? - the problem of trade in cultural objects**

The aim of the study is to evaluate the issue of trade in the scope of cultural objects. Presenting the selected topic the author focuses on the notion of cultural property, international instruments for protecting cultural goods and the Polish law system.

KEYWORDS: cultural property, trade, international law system, Polish law system

