HISTORICAL PERSPECTIVE OF HERITAGE LEGISLATION.
BALANCE BETWEEN LAWS AND VALUES

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International conference October 12-13, 2016
Niguliste Museum Tallinn, Estonia
Conference proceedings

Conference team: ICOMOS Estonia NC; ICLAFI; Estonian Academy of Arts;
Tallinn Urban Planning Department Division of Heritage Protection; Estonian National Heritage Board

Publication: ICOMOS Estonia NC; ICLAFI; Estonian Academy of Arts
Editors: Riin Alatalu, Anneli Randla, Laura Ingerpuu, Diana Haapsal
Design and layout: Elle Lepik
Photos: authors, Tõnu Noorits
Tallinn 2017

ISBN 978-9949-88-197-0 (pdf)

The conference and meetings of ICLAFI and Nordic-Baltic ICOMOS National Committees
were supported by:
Estonian Academy of Arts, Tallinn Urban Planning Department Division of Heritage Protection, National Heritage Board,
Ministry of Culture, Nordic Council of Ministers

Published with the financial support from Estonian Cultural Foundation

ICOMOS EESTI RAHVUSKOMITEE

ICOMOS international council on monuments and sites

ESTONIAN ACADEMY OF ARTS Architecture Design Art Research

HISTORICAL ASPECTS OF THE LEGAL PROTECTION OF CULTURAL HERITAGE IN POLAND

WOJCIECH KOWALSKI, Prof. Dr.

The article concentrates on the historical evolution of the legal instruments of the protection of monuments in Poland including the following: legal protection of monuments in 19th century under Austrian, Prussian and Russian laws at that time in force on the Polish lands; law after restitution of Poland in 1918; legal solutions 1945-1991; and the current situation.

Wojciech Kowalski is the Professor in Cultural Property Law since 1995 and head of the Department of Intellectual and Cultural Property Laws at the University of Silesia, Katowice. Visiting professor at University of Edinburgh, 1998-2000; guest lecturer in London, Edinburgh, Minsk (Belarus), Heidelberg and Athens (Georgia, USA).

Representative of Poland to the Council of Europe's Cultural Heritage Committee 1992-1994. Elected Deputy Chairman of Committee 1993-1994. One of the founders of ICLAFI, deputy chairman 1998-2000. Member of State Council for the Protection of Monuments 1997-2000. Legal adviser in the Ministry of Foreign Affairs.

Presentation of the evolution of legal framework for the protection of cultural heritage in Poland should start by mentioning an important postulate in this area from as early as the 16th century. In *Leges seu Statuta ac privilegia Regni Poloniae omnia…*, published in 1553 in Krakow, the author of this lecture of law, Jakub Przyłuski, wrote that not only religious objects should be excluded from the right to be destroyed in war, which was already a customary law, but also outstanding works of literature and art. He added further that soldiers, when fighting, should also "spare the lives of men famous for their virtues and knowledge".[1] At that time, this statement was revolutionary because the contemporary classics of the Law of Nations, such as Alberico Gentili or Hugo Grotius, considered the war looting of works of art legal for a long time, although less and less willingly.[2] Regulations in the spirit of Przyłuski's demands were included both in earlier and later peace treaties concluded by Poland, for example, with Moldova in Krzemieniec in 1510, and with Sweden in Oliwa in 1660.[3]

They were related solely to international relations, but the demand of protection of historical heritage contained in them also fought its way to the widely understood national law and was soon reflected in the recommendations of the king and the municipal and church authorities. We know from archival sources, for instance, that the Krakow synod of bishops, by resolution of 1621, ordered parish priests to take care of paintings and other monuments in churches,[4] and on the Wawel Royal Castle in Krakow painter Jan Tretko was commissioned to "repair paintings" in 1684[5].

This was not yet even a modest legal regulation of wider importance, and so we can hardly call it the formation of a conservation service in our modern understanding. It began to develop in Europe only in the mid-nineteenth century, when Poland officially no longer existed after the partition between Prussia, Russia and Austria in 1792. For this reason, both the law of the protection of monuments, and the formation of public service responsible for their care, began to be created on the Polish territories, which belonged to these countries, according to the principles adopted at this time for the whole states.

The office of the state conservator was created at first among these three countries in Prussia, and thus also the parts of former Poland were included in it. This took place in 1843, when Ferdinand von Quast, who earlier developed a project of organisation of the system of this administration, was appointed to this position.

Protection of monuments was based on the provisions of §§ 33, 35, 38 and 71-72 of *Preussisches Allgemeines Landrecht* of 1794, supplemented with further provisions, and since 1907 on a special act.[6] Since 1891, provincial *landesconservatoren* for individual provinces were appointed.[7] In 1892 Johann Heise was appointed for Pomerania, in 1893 Adolph Boetticher for East Prussia, and Julius Kohte for Wielkopolska, Hugo Lemcke for Western Pomerania and Hans Lutsch for Silesia.[8] It should also be emphasised that these officials implemented the policy of the Prussian State, *inter alia*, resulting from the needs of the ongoing process of unification of Germany. In the case of Polish monuments, this policy meant in practice Germanisation.[9] Therefore, Polish organisations, such as the Society of Friends of Learning, established in 1800 in Poznan, and the Society of Friends of

1 W. W. Kowalski, *Art treasures and war* (Leicester: Institute of Art and Law, 2014), 19.

2 *Ibid.*, 19.

3 *Ibid.*, 20.

4 J. Pasierb, *Ochrona zabytków sztuki kościelnej* (Warszawa: 1968), 17.

Fine Arts, which focused on preserving the Polish legacy, were trying to function simultaneously to state administration and limit the effects of its activity. Situation was even more complicated in towns where there were German minorities. For example in towns such as Toruń, there were two societies functioning in one city, the Polish Torun Learned Society and the German *Copernicus Verein*.[10]

Unlike in Prussian State, Russia had no state system of protection of monuments until 1918. Only archaeological monuments attracted some interest which was reflected in the creation of the Imperial Archaeological Commission in 1859.[11] However, it was not interested in the Polish monuments, with the exception of studies of the Orthodox mural paintings in the Castle Chapel in Lublin in 1903 and in 1914.[12] Only the local authorities with a limited independence initiated an action of taking inventory of the monuments on Polish territory in 1827 which, between 1844 and 1855, bore fruit in the form of visits to 386 places where, among others, 250 churches and 80 castles were inventoried.[13] Social organisations, fuelled by patriotic motives, were trying to fill in the lack of an institutionalised conservation service, for example, the Society of Friends of Learning, which was interested in protection of the historical heritage, formed in 1800 in Warsaw. However, after the Polish November Insurrection in 1832, it was liquidated by the occupation authorities and revived only in 1907.[14] It was also then, when the Society for the Protection of Monuments of the Past, operating to this day, was established.

On the Polish territories belonging to Austria the situation in terms of protection of the Polish cultural heritage was relatively the most favourable, as in 1850 the Imperial Royal Central Commission for the Research and Preservation of Architectural Monuments was established in Vienna by the emperor's decree. Three years later, its responsibilities and the statute were determined, under which teams dealing with individual countries of the Habsburg Empire were created within its framework. In 1856, the first two official conservators were appointed for the Polish territories – Paweł Popiel in Krakow and Franciszek Stroński in Lvov. The social activity existing there only assisted them in protection of Polish heritage. One of the most active was, *inter alia*, the Department of Art and Archaeology of the Krakow Scientific Society, created already in 1848. In 1888, the conservation congress took place in Krakow, and the result was the division of the above-mentioned official team into two: one based in Lvov and the other in Krakow. Between 1888 and 1890, this demand was executed. At the beginning of World War I in 1914, the state National Conservation Office, managed by Tadeusz Szydłowski, was created in Krakow.[15] Taking into account the essential role played in this service by Polish specialists and a large degree of autonomy in their operation, it is generally acknowledged that it was the service that became the prototype of the Polish administration on the protection of monuments.[16]

With the restitution of Poland in 1918 after World War I, this service was considered as loyally performing its duties to the reconstituted state and carried them out until a new conservation administration was formed for the whole country.[17] It was established on the basis of a rapidly issued Decree of the Regency Council of 31 October 1918 on the care of art and culture monuments.[18] It had a uniform and centralised nature, and the authority competent for the protection of monuments was the Minister of Religious Affairs and Public Enlightenment. All activities related to this protection were performed by provincial conservators of art and culture monuments appointed by the Minister, who worked in their assigned districts. Under the instruction of the Minister, they kept an inventory of monuments, open for those interested. In order to be able to prepare it, all owners of monuments were required to make them available for the purpose of investigation of possible historic value. Pending the entry into the register, all real property and personal property "demonstrating art and culture of past eras," older than 50 years were subject *ipso jure* to "legal protection" (Article 11). It was not allowed to destroy, alter, reconstruct, etc., the monuments without permission of a provincial conservator who also had the right to control the course of work carried out on the basis of his authorisation. This also included "archaeological research" (Article 25).

Similar restrictions and prohibitions, to "destroy, remove, sell, replace," etc., were related to movable monuments and their collections owned by the "country, cities, administrative or religious communities, parishes and social institutions" (Article 20). Also "sale, exchange, pledge or donation of monuments... owned by communes, cities, parishes and public institutions" was controlled and to ensure it all such legal actions were declared as *ipso jure* as null and void (Article 33). Finally, the discussed decree introduced a general prohibition of the export of movable monuments abroad and provided for the possibility of expropriation of movable and immovable monuments in the event of specific threats. For example, "the danger of destruction, damage or export abroad" of a privately owned monument could lead to its expropriation, if it had "outstanding national importance" (Article 22). The decree also provided for the possibility to confiscate a movable monument "in the case of a secret export or attempt to export from the state borders" (Article 34). Failure to comply with the decree was punishable by imprisonment and fines.

As can be judged from this brief analysis, issuing the decree in 1918 was the attempt of the authorities to try to stop the process of destruction of Polish cultural heritage, which took place during 125 years, when Poland was not independent country, and also during World War I. Massive destruction of monuments during World War I, including, for example, destruction of entire cities, as in the case of the bombing of Kalisz, justified the adoption of often strict rules in the decree. All generally defined monuments older than 50 years were covered by legal protection even before their examination and entry into the register. A far-reaching limitation referred not only on the property right, but also the right to dispose the monuments, especially the movable ones. Another question is whether they could be applied effectively in the phase of organisation of the state and its administration.

5 A. Franaszek, *Działalność wielkorządców krakowskich w XVII w.* quoted after B. Rymaszewski, *Polska ochrona zabytków* (Warszawa: 2005), 10 *et seq*.

6 P. Dobosz, *Systemy prawne ochrony zabytków z perspektywy teorii prawa administra-cyjnego* (Kraków: 2015), 119.

7 P. Dobosz, *op. cit.*, 118.

8 J. Frycz, *Restauracja i konserwacja zabytków architektury w Polsce w latach 1795-1918 (*Warszawa: 1975), 11.

9 B. Rymaszewski, *op. cit.*, 13.

10 *Ibid.*, 12.

11 *Ibid.*, p8.

12 J. Frycz, *op. cit.*, 11.

13 B. Rymaszewski, *op. cit.*, 14-15.

14 *Ibid.*, 12-13.

15 See in detail, P. Dobosz, „Jubileusz 1000 lecia," in P. Dobosz, K. Szperlak, W. Górny (eds.), *Dziedzictwo, dobra kultury, zabytki, ochrona i opieka w prawie (*Kraków: 2015), 119 *et seq.*

16 P. Dobosz, *Systemy,* 70.

17 *Ibid.*, 125.

18 *Dziennik Praw Państwa Polskiego 1918,* No. 16, item 36.

The provisions of the second act related to the protection of monuments of 1928[19] introduced some changes to the existing system of legal protection of monuments, and supplemented and specified it at the same time. One of more important changes was the introduction of a synthetic definition of monument which was "every object, either immovable or movable, characteristic for a certain era, having artistic, cultural, historical, archaeological or paleontological value, confirmed with a certificate issued by provincial conservator and in result deserving preservation" (Article 1). As follows from this provision, and what is additionally confirmed further, only an official confirmation of the historic value of an object qualified it as a monument which, from the moment of delivery of the relevant certificate, was subject to legal protection (Article 3). What is worth noting, the conservation authorities were required to specify in this decision the borders of the immovable monument and the borders of its surrounding area which were also subject to protection (Article 2(2)). Moreover, the certificate determining an immovable monument was to be entered not only to state inventory of monuments but also to proper real-property register (Article 3 *in fine*) run for all real properties in the whole country (Article 4).

Another important change was the establishment of the principle that the protection of monuments was at first provided by the conservation authorities, who were provincial authorities of general administration (Article 5). However, at the same time, "the expert organs" of these authorities were "conservators appointed by the Minister of Religious Affairs and Public Enlightenment." They were part of the "personnel composition of the provincial conservator office," whereas their rights and obligations were defined by the abovementioned Minister in consultation with the Minister of the Interior (Article 6). Conservation authority of the second instance was the Minister of Religious Affairs and Public Enlightenment (Article 5).

Evaluating the importance of these provisions, it can be said that after ten years of the decree of 1918 discussed above being in force the situation changed, and it was possible to adopt a rule that legal protection of "immovable or movable object" begins from presenting an interested party with a certificate formally recognising this object as a monument. However, there was also an exception to this rule, namely in the case of a threat to an object which could be recognised as a monument, but has not been recognised yet, the conservation authority had the right to stop activities posing such a threat and, for example, impose a ban on the sale of this object (Article 12). In addition, the regulation included extended provisions on the expropriation of monuments and introduced a right of pre-emption of the Treasury (Article 20). Penal provisions have also been extended.

At the end of the discussion of the state of law before the outbreak of World War II, I should also mention the Act of 1 March 1933 on the protection of public museums (DU 1933, item 279). It was a short act whose Article 1 defined the concept of public museums as "any collection in the field of art, culture and nature, with the exception of libraries, organised to protect the scientific, artistic or commemorative value, owned by: a) the State, b) local authorities and other public-legal institutions and corporations, c) associations and private persons, provided that these collections are available to the public." Article 2 provided that "care of and supervision over" museums understood like this "in scientific, artistic, technical and organisational terms" will be provided and exercised by the Minister of Religious Affairs and Public Enlightenment. The Minister also gave an authorisation for the establishment of public museums and approved their statutes.

The outlined provisions were only formally in force after the outbreak of World War II and during the German and Russian occupation of 1939-1945 since the occupation administrations did not show any respect for the Polish cultural heritage. That is not all; special occupation provisions were introduced in order to legally justify the organised looting of cultural goods. Just to mention one of such acts, although there were more of them, namely the Regulation of the General-Governor for the occupied Polish areas of 16 December 1939 on the "protection" of works of art in the General Government. The title of this document suggests implementation of the "protection" of works of art, but in practical terms it was a legal basis for their confiscation. And so, on the basis of section 3 of this document, each holder of a private or church work of art was obliged to report it to a special representative of occupational administration who decided on its confiscation at his own discretion. Failure to comply with this order was punishable by imprisonment. There was separate legislation with a similar objective in relation to the assets of the Polish State and Jewish property. Even though these provisions were certainly *ipso jure* invalid as contrary to the principles of International Law of War, they were applied in the occupied Poland and in practice opened way to irreparable damage.

The pre-war provisions discussed earlier "regained" their power after the end of war and were in force for almost 20 years, when a new uniform act on the protection of cultural property and on museums was adopted in 1962.[20]

19 *Regulation of the President of the Republic of Poland of 6 March 1928 on the guardianship of monuments,* DU 1928, No. 29, item 265.

20 *The Act of 15 February 1962 on the protection of cultural property and on museums,* DU 192, No. 10, item 48, hereinafter referred to as: "*Act of 1962.*"

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