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**PUNISHMENT IN CASES OF OFFENCES  
AGAINST CULTURAL HERITAGE.  
MODEL REMARKS AGAINST THE BACKGROUND  
OF UNESCO AND THE COUNCIL OF EUROPE  
CONVENTIONS**

**Abstract**

Among the issues raised internationally that relate to the protection of cultural heritage, increasing attention is being paid to the individual responsibility of perpetrators of crimes against cultural property. The aim to harmonise the level of criminal law protection of cultural property in national legal systems is seen as one of the most important factors that could reduce crime in this area. Legislative initiatives undertaken by countries in order to strengthen the criminal law protection of cultural property focus primarily on two groups of problems: the development of a catalogue of offences against cultural property and the determination of the type and amount of sanctions with which these offences should be threatened.

In the search for an optimal pattern of penalisation, the article identifies the norms of international law influencing the scope of penalisation of behaviours violating the principles of protection of cultural property in the national legal orders and analyses the legislative achievements so far obtained within the framework of international cooperation at the universal and regional (European) level. The considerations were concentrated around three key issues, which were considered to be: the notion of just punishment, the analysis of the scope of criminal law protection of cultural property set

out in the documents of UNESCO and the Council of Europe, and the type and amount of sanctions that should be applied to behaviour directed against cultural property under legal protection. The last part of the article consists of the final conclusions formulated after an autonomous assessment of the regulations adopted in the two systems of international cooperation on the criminal law protection of cultural heritage indicated above.

### KEYWORDS

international protection of cultural heritage, individual criminal responsibility, UNESCO, Council of Europe, European Union, cultural property, criminal sanctions, administrative sanctions, imprisonment, confiscation of property

### SŁOWA KLUCZOWE

międzynarodowa ochrona dziedzictwa kulturowego, indywidualna odpowiedzialność karna, UNESCO, Rada Europy, Unia Europejska, dobra kultury, sankcje karne, sankcje administracyjne, pozbawienie wolności, konfiskata mienia

## 1. HIGHLIGHTING THE PROBLEM

In the field of international law, the question of undertaking formalised cooperation for the protection of cultural property became particularly important in the second half of the 20th century with the establishment of international organisations that included the protection of cultural heritage among their basic statutory objectives.<sup>1</sup> In this context, from a global perspective, it is worth mentioning the establishment of UNESCO in 1946, and from a regional (e.g., European) perspective, the establishment of the Council of Europe in 1949.<sup>2</sup>

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<sup>1</sup> Bart Zwegers, *Cultural Heritage in Transition A Multi-Level Perspective on World Heritage in Germany and the United Kingdom, 1970–202*, Springer 2022, 3 <<https://doi.org/10.1007/978-3-030-93772-0>>; see more Alberto Martorell, *The role of cultural heritage in the global society* in Bogusław Szmygin (ed), *Heritage in transformation: cultural heritage protection in XXI century – problems, challenges, predictions*, Lublin 2016, 151–152.

<sup>2</sup> Attempts to regulate the few issues of protection of cultural property related to humanitarian law were made as early as the beginning of the 20th century. The peace conferences organised at that time in The Hague resulted in the adoption of several conventions regulating the conduct of armed conflicts. Of particular importance, from the point of view of the protection of cultural property, were those adopted in 1907: Convention IV on the Laws and Customs of War and Convention IX on Bombardment by Naval Armed Forces in Time of War. Another example of the beginnings of international cooperation for the protection of cultural property is the Treaty

*De lege lata*, attention is drawn to the disproportion between the adopted rules of cooperation based on civil law instruments and those based on criminal law elements. The former have a comprehensive character, and among them, the remedies in the form of return or restitution of cultural property occupy a key position, while criminal law protection is regulated in a marginal and fragmentary way.<sup>3</sup> The low level of recommendations for criminal law protection is the result of the use of the concept of minimum intervention in international treaties for the protection of cultural property.<sup>4</sup> This concept leaves States Parties free to choose the acts challenged and the sanctions threatened, which may be criminal or administrative. The freedom of choice of sanctions indicates that it is of primary importance to achieve the stated objective of ensuring effective protection of cultural heritage. Determining the means by which this objective is achieved holds lesser importance. The advantage of using the concept of minimum intervention is the flexibility to implement the solutions adopted in the international agreement into the national order.

The arguments in favour of strengthening criminal law protection include, on the one hand, the increase in the level of threat and variety of attacks on cultural property and, on the other hand, the increase in the real possibility of apprehending the perpetrator of a criminal offence using measures provided for in the criminal procedure. Against this background, the inclusion of the perpetrators of this type of crime committed in the context of an armed conflict under the jurisdiction of the International Criminal Court<sup>5</sup> is also of particular importance.

A mode of responsibility based on the norms of criminal law is linked to the need for national criminal law systems to develop a catalogue of offences against cultural objects, which may include specific behaviour not yet criminalised. The constituent elements of the offences in these cases are co-determined, inter alia,

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for the Protection of Artistic and Scientific Institutions and Historical Monuments, adopted on 15 April 1935 by the majority of American states (Brazil, Chile, Dominican Republic, Guatemala, Colombia, Cuba, Mexico, El Salvador, USA, Venezuela), referred to as the Roerich Treaty after its creator. For a more extensive discussion, see Roger O' Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge 2006, 22–27; Anna Przyborowska-Klimczak, *Rozwój ochrony dziedzictwa kulturalnego w prawie międzynarodowym na przełomie XX i XXI wieku*, Lublin 2011, 43–71.

<sup>3</sup> See also Wojciech Kowalski, *Restytucja dzieł sztuki w prawie międzynarodowym*, Katowice 1989, 22–24; Kamil Zeidler, *Restitution of cultural property, Hard Case. Theory of Argumentation. Philosophy of Law*, Gdańsk-Warszawa 2016, 26–29.

<sup>4</sup> Stefano Manacorda, 'Criminal Law Protection of Cultural Heritage: An International Perspective' in Stefano Manacorda, Duncan Chappell (eds), *Crime in the Art and Antiquities World Illegal Trafficking in Cultural Property*, Springer 2011, 18.

<sup>5</sup> Rome Statute of the International Criminal Court done at Rome on 17 July 1998 <<https://www.icc-cpi.int>>.

by the rules of legal protection of cultural property adopted in the national legal order, insofar as they prescribe the manner of dealing with these exceptional objects. As a result, violations of these rules lead to criminal liability.

This solution is peculiar in the sense that if the questioned behaviour concerned objects other than cultural assets, it could remain unpunished. Under the Polish Act on the protection and care of monuments,<sup>6</sup> for example, we may point to the act of destroying a monument, which is classified as a criminal offence (Article 108(1–2)). Criminal liability in this case is incurred by anyone who destroys a monument, even if the destruction is carried out by the owner of the monument. Criminal liability in the case of destruction of things that are not monuments is enforced on the basis of Article 288 (1) of the Polish Criminal Code<sup>7</sup> and applies only to behaviour involving destruction of another person's property. An important element in shaping effective criminal law protection is also the selection of appropriate penalties and criminal measures to be imposed for offences against cultural property, taking into account the relevant rules of individual and general prevention. The purpose is not only to prevent impunity for acts that threaten cultural heritage, but it is also fundamental that they are in accordance with the standards of due process and the norms guaranteed by international human rights law.

## 2. RESEARCH METHODOLOGY

The article analyses the key treaties for the protection of cultural heritage developed by UNESCO and the Council of Europe in order to indicate the norms of international law influencing the level of penalisation of behaviour violating the principles of protection of cultural property in the national legal orders.<sup>8</sup> The considerations carried out focus on three issues: the notion of just punishment, the analysis of the scope of criminal law protection of cultural property set out in the documents of UNESCO and the Council of Europe, and the type and amount of sanctions that should be applied to behaviour directed against legally protected cultural property.

The final conclusions are drawn after an autonomous assessment of the regulations adopted in the two systems of international cooperation on the criminal law

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<sup>6</sup> Act of 23 July 2003 on the protection and care of historical monuments (Consolidated text, Official Journal 2022, 840).

<sup>7</sup> Act of 6 June 1997 Criminal Code (Consolidated text, Official Journal 2023, 17).

<sup>8</sup> Scott Veitch, *Moral Conflict and Legal Reasoning*, Oxford, Portland Oregon 2002, 205–206.

protection of cultural heritage indicated above. The considerations are carried out primarily using the dogmatic legal method.

### 3. THE CONCEPT OF JUST PUNISHMENT IN CRIMINAL LAW DOCTRINE

Punitive repression, which corresponds to the moral principle that wrong deeds should be punished, has for centuries acted as a regulator of human relations.<sup>9</sup> In social terms, a punishment that arouses universal approval, resulting from the need for revenge, which is one of the elements of the social sense of justice, is considered just.<sup>10</sup>

In the science of criminal law, the discussion on just punishment has been held for years, both on the grounds of its adjudication in the *civil law* system, as well as in the *common law* system.<sup>11</sup> It is nowadays unanimously accepted that punishment should take into account both retributive and preventive objectives. The essence of punishment should not be reduced to a mere problem of retribution.<sup>12</sup> In the process of imposing a particular punishment, its severity is of paramount importance, which depends on the gravity of the act, the degree of guilt and the consideration of the various circumstances of the offence, classified as mitigating or aggravating. In this context, it is worth recalling the Italian Constitutional Court's ruling No 313 of 4 July 1990, from which it follows that punishment has an obligatory repressive character and is deeply linked to the need for social defence and the general prevention of crime. The retributive and repressive functions of punishment should set the minimum conditions without which punishment would lose its meaning. However, the Court has stipulated that, while reintegration, deterrence and social defence are values with a constitutional basis, the impairment of civil rights on their basis can only occur for a corrective purpose, explicitly defined in the Italian Constitution in the context of punishment.<sup>13</sup>

<sup>9</sup> Kazimierz Buchała, Andrzej Zoll, *Polskie prawo karne*, Warszawa 1995, 13.

<sup>10</sup> Bogusław Janiszewski, 1999, 'Sprawiedliwość kary. Rozważania w świetle prawnych podstaw jej wymiaru' in Andrzej J Szwarc (ed), *Rozważania o prawie karnym. Księga jubileuszowa z okazji 70. urodzin Profesora Aleksandra Ratajczaka*, Poznań 1999, 152–153; Paweł Petasz, *Sens, istota i cele kary kryminalnej*, Gdańskie Studia Prawnicze, 2005, Vol XIV, 1129.

<sup>11</sup> The discussion covers not only the notion of fair punishment but also the principles of due process, without which it is objectively impossible to achieve fair punishment. Kevin J Heller, Markus D Dubber, 'Introduction' in Kevin J Heller, Markus D Dubber (eds) *The handbook of comparative criminal law*, Stanford University Press 2011, 2–3.

<sup>12</sup> Jarosław Warylewski, *Kara. Podstawy filozoficzne i historyczne*, Gdańsk 2007, 22.

<sup>13</sup> M. C. Carta, *Detention conditions and treatment of prisoners in the case-law of the Court of Justice of the European Union and of the European Court of Human Rights* in Anna Gerecka-