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## **Monument protection based on criminal law**

### **Introduction**

Monuments are mostly endangered by the following crimes: devastation, theft, burglary, armed robbery, receiving stolen goods, illegal transfer goods out of the country. Threats posed by crimes are very serious. In the police statistical data crimes against monuments account to 0,16 % all crimes against property<sup>1</sup>. Exact number of crimes against monuments remains unknown. Best documented crimes are thefts, but statistical data show only these cases, where police officers stated, that main purpose of the criminals was seizure of subjects which were monuments. Nevertheless scale crimes against monuments is very high – according to International Criminal Police Organization (INTERPOL) Poland is in the sixth position in Europe, as far as number of thefts of pieces of art is concerned.

In may 2003 the National Prosecutor's Office carried out all-Poland research on applying regulations established by the cultural property protection act, which took into account proceedings in years 2001-2002. This research also focused on those crimes included in criminal code, which affect cultural property. The most often proceedings based on article 74 of the act, that is taking cultural property out of the country without permission or not bringing it back after the time state in permission. There were also proceedings in cases of destroying monuments; the offence was committed during building works conducted near or inside monuments. In the whole country in this period of time there were 139 proceedings in progress, 124 of which were completed (60 were dismissed, in 64 cases indictments were brought before court)<sup>2</sup>.

Protection of cultural property and other things of special importance for the culture is contained in both international regulations and regulations in Polish criminal code and the monument protection and care act.

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<sup>1</sup> Działania podejmowane przez Ministerstwo Kultury dla zmniejszenia zagrożenia zabytków przestępczością, Opracowanie Ośrodka Zbiorów Publicznych, 2005

<sup>2</sup> Kaczmarek J. Zeidler K., Karnoprawna ochrona zabytków, Prokuratura i Prawo 2/2004, str. 83-85

## **Monument protection on the basis of the monument protection and care act**

Like in all cases, to apply criminal law regulations properly, it is essential to define precisely the subject being protected. Criminal regulations in the monument protection and care act<sup>3</sup> are included in chapter 11, which describes criminal responsibility for offences against monuments. According to definition in art. 3 p. 1 of the act, a monument is a fixed property or movables, their parts or complexes, created by a human or connected with his activity and making a testimony of former period or event, which should be preserved for society due to their historic, artistic or scientific value. In the monument protection and care act the legislator departed from the term cultural property. According to former act from 15th February 1962 about cultural property protection<sup>4</sup>, under protection were cultural property defined as any movables or fixed property, from the past or present, having significance for cultural heritage and development due to its historic, scientific or artistic value. Definition of cultural property was in accordance with the Convention on international cultural heritage, passed in 1972 in Paris, with the Hague Convention of 1954 and with other international agreements ratified by Poland. Analysis of criminal regulations contained in the monument protection and care act allows to claim, that their special objects under protection belong to one, general set, that is national heritage<sup>5</sup>. It is a broad term that is more precisely defined in regulations of the act. This term should be understood in a comprehensively, perceiving it as a whole, as a cultural heritage left by former generations but also as any element that creates it and that can be threatened by illegal actions, in result of which the national heritage is negatively affected<sup>6</sup>. The monument protection and care act in chapter 11 regulates issues of crimes and offences against monuments. In comparison with chapter XIII of the cultural property protection act, there is more acts socially dangerous, especially treated as offences (new punishment is compensatory damages), the regulations have also been rearranged through creating new separate articles containing new socially dangerous acts<sup>7</sup>.

The act describes 2 crimes and 10 offences. According to art. 108, crime is described as destroying or damaging a monument intentionally or unintentionally (if it is unintentionally, punishment is more lenient). As the legislator describing committing a crime in unintentional way used the term the offender's "action", this crime can't be committed through negligence. When it comes to the situation when appropriate actions are not taken, that is negligence, it is described in article 110. In comparison with previous version, now it is possible to award compensatory damages to specific social aim connected with monuments protection. It is worth to add that article 108 had its

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<sup>3</sup> Ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami, Dz. U. z dnia 17 września 2003 r.

<sup>4</sup> Ustawa z dnia 15 lutego 1962 roku o ochronie dóbr kultury (Dz.U. 1962 nr 10 poz. 48)

<sup>5</sup> W. Hilla, Karnoprawna ochrona zabytków w polskim prawie karnym, Ochrona zabytków militarnych Helu – materiały konferencyjne, Hel 2005, str. 2

<sup>6</sup> J. Kaczmarek. K. Zeidler, Karnoprawna ochrona ..., s. 74 i n..

<sup>7</sup> R Golat., Ustawa o ochronie zabytków i opiece nad zabytkami, Komentarz, Kraków 2004, str. 192

equivalent in article 73 in the cultural property protection act. Rescinding art. 73 was widely criticized, as then it was not possible to prosecute monuments' owners when they damage them.

According to article 109 of the act it is also forbidden to take monuments abroad or not bring it back in the time stated in the permission. This ban is a general rule with two exceptions – a permission given by the minister of culture and national heritage protection to take a monument abroad permanently, if this won't affect negatively national heritage and temporal permission given by voivodeship conservation officer.

The acts mentioned above are crimes, whereas the acts described below belong to offences.

According to art. 110 not securing a monument against damage, destruction, going missing or theft by the owner or possessor is punishable; art. 111 describes a responsibility for searching for hidden or abandoned monuments, also with use of all kinds of electronic and technical devices as well as diving equipment, without permission or against its regulations, which is punishable in the same way. This regulation corresponds to relevant regulations from civil law<sup>8</sup>, i.e. art. 189 of civil code<sup>9</sup> which says that in the event of finding a thing of high price or scientific or cultural value, if looking for the owner is obviously pointless, the finder is obliged to give this thing to the appropriate authorities. This thing becomes property of Treasury, and the finder receives special remuneration.

Art. 112 provides for penalization of breaching prohibitions or restrictions being in force in cultural parks or their parts. In this event, just like on the basis of art. 111 it is possible to sentence to confiscation of tools or subjects used or which were intended to use during committing an offence, even if they don't belong to the perpetrator, as well as confiscation of subjects coming directly or indirectly from the offence, and possibility to order the perpetrator to restore the previous state or pay the equivalent of damage. Article 113 provides for a fine for the owner or possessor of the registered monument or another monument present in the voivodeship monument registry, who won't report to the voivodeship conservation officer on damage, destruction, going missing or theft of the monument, or that the monument is endangered by what mentioned, immediately after having learned about that or within a month, about change of place the movable monument is stored or changes in legal status of the monument.

A person, who makes the monument protection authority's access to monuments impossible or difficult, is also punishable (art 114 of the act).

It is also penalized when a person don't report immediately to the voivodeship conservation officer or borough leader (mayor or a city's president) on discovering during building works a subject, that can be expected to be a monument, and don't stop all works that can damage or destroy this monument and don't secure this subject and the place where it is found, using all available means and don't report on discovering a subject, that is expected to be an archaeological relic and don't secure

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<sup>8</sup> W. Hilla, *Karnoprawna ochrona ...*, str. 5

<sup>9</sup> Ustawa z dnia 23 kwietnia 1964 r. - Kodeks cywilny, Dz.U. 1964 nr 16 poz. 93

this subject and the place where it is found (art. 115-116). It is also punishable, when somebody without permission or against its regulations carries out conservation, restoration or building works, conservation or architectonic examinations on a monument or building works in its surrounding or archaeological examinations (art. 117), as well as without permission puts on a registered monument technical devices, tables, advertisements or inscriptions (art.118). The last offence is described in art. 119, which provides for a fine for those, who don't adhere to after-control orders. The aim of this solution was to increase efficiency of supervisory actions in relation to those who are controlled<sup>10</sup>.

In the doctrine there is a discussion over legitimacy of transferring crimes against monuments from the act to the penal code<sup>11</sup>. However, there are opinions that it could weaken complex regulation of monument protection. It would also cause unnecessary and excessive increase in the code regulations<sup>12</sup>.

### **Protection of cultural property provided for the penal code**

Regulations referring to protection of cultural property is also contained in the penal code<sup>13</sup>, in chapter XVI "Crimes against peace, humanity and war crimes" and in chapter XXXV "Crimes against property".

Art. 125 states, that anyone, who in the occupied or captured area or in the area where military operations are performed, breaching international law destroys, damages or takes away an cultural property, is subject to penalty from a year to 10 year's imprisonment. If this act concerns an achievement of special cultural importance, the perpetrator is subject to imprisonment not shorter than 3 years. The subject that is protected is against crime from art. 125 § 1 and 2 is legal order established by international law and property that is cultural achievement. The act described in art. 125 of penal code, as a war crime, is characterized by double illegality due to referring directly to international law, can be committed only intentionally, with direct or conceivable intent<sup>14</sup>. This action from article 125 consists in destroying, damaging, taking away a subject that is a cultural achievement, it is to committed in the occupied or captured area or in the area where war activities are performed, at the same time the occupied territory is this one, that is really in the enemy's control. The act must be performed against international law. One should refer to art. 27 of Hague Regulations from 1907 and Hague Convention from 1954 on protection of cultural property in the event of armed conflict together with Additional Protocol from 1977.

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<sup>10</sup> Golat R., Ustawa ..., str. 206

<sup>11</sup> Zeidler K., Dziedzictwo kultury w kodeksie karnym, Rzeczpospolita, 7 lipca 2005

<sup>12</sup> J. Kaczmarek. K. Zeidler, Karnoprawna ochrona ..., s. 83

<sup>13</sup> Ustawa z dnia 6 czerwca 1997 r. Kodeks karny, Dz.U.97.88.553

<sup>14</sup> Wąsek A.(red), Kodeks karny cz. szczególna, T. II, Warszawa 2004, str. 48

The subject of protection from art. 125 penal code is a subject that is a cultural achievement. According to article 1 of Hague Convention of 1954<sup>15</sup> on protection of cultural property, the term "cultural property" shall cover:

(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;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

(c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as "centres containing monuments".

Art. 125§2 defines qualified type, which is based on "special significance" of affected property. Special significance doesn't need to mean only large financial value, but also contains cult and historical significance. The criterion of giving special significance to property is based on International Registry of Cultural Property, run by the director general of United Nations Educational, Scientific and Cultural Organization (UNESCO)<sup>16</sup>.

In addition art. 126§2 of penal code states, that this, who during military activities uses, against international law, a protection sign for cultural property, which according to Hague Convention is a shield with blade pointing down, divided along diagonals into four fields, two light blue and two white (the emblem shield with light blue rectangular, one angle of which forms a blade of the shield and a light blue triangle above it, divided with a white triangle). This sign is used either individually, or triply in triangular pattern (with one shield at the bottom), in conditions described in the Convention. The crime described in art. 126§2 is a sign of perfidiousness that aims at starting hostile actions under the pretext or using undue protection on the basis of international law<sup>17</sup>.

Next regulation protecting cultural property is contained in art. 294 of penal code. Article 294 of penal code describes generally qualified type of ten types of crimes contained in chapter XXXV. These are: theft, theft of computer software, misappropriation, peculation, switching into telecommunication device, fraud, computer fraud, destroying property and intentional receiving of stolen property.

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<sup>15</sup> Konwencja o ochronie dóbr kulturalnych w razie konfliktu zbrojnego wraz z Regulaminem wykonawczym do tej Konwencji oraz Protokół o ochronie dóbr kulturalnych w razie konfliktu zbrojnego, podpisane w Hadze dnia 14 maja 1954 r. (Dz.U.57.46.212)

<sup>16</sup> Zoll A. (red.), Kodeks karny. Część szczególna. Komentarz do art. 117-277. Tom II, Kraków 1999 str. 45

<sup>17</sup> Marek A., Kodeks karny. Komentarz, Warszawa 2005, wyd. II, str. 16.

Article 294 § 2 describes the qualified type, in which qualifying feature is specific characteristic of the subject. The legislator assumed, that stricter responsibility depends on committing a crime on the property of special cultural significance. It is worth to note, that the term “property of special cultural significance” has subjective character and is connected with cultural meaning of meaning of protected subject<sup>18</sup>.

Article 294 modifies features of crimes listed in it, changing either because of value or special cultural values, contained in features of individual types of forbidden act characteristic of subject of the action. Description of the qualified type, due to legislative technique accepted by the legislator, is contained in two regulations, that should be taken into account making interpretation of its features. In the event of taking a qualified type, complex legal qualification is necessary, basing on the regulation describing basic type of the crime in question and art. 294.

### **Recapitulation and conclusions**

Summing up, it is worth to note that regulation of monument protection basing on criminal law seems to be sufficient. After introducing the monument protection and care act, the catalogue of prohibited acts was extended. The act contains in chapter 11 penal regulations, describing both crimes and minor offences.

Thanks to passing the act the problem of criminal responsibility of an owner who destroys cultural property doesn't exist any more (analysis of regulations introducing the penal code led to conclusion, that from among regulations on crimes from the protection of cultural property act, art. 73 about destroying or damaging monuments became invalid).

In order to prevent crimes against monuments effectively, close cooperation between the following institutions dealing with monuments protection (Police, prosecutor's office, Ministry of Culture) is needed. The aim of those activities should be working out a similar position and rules in acting in favour of monument's protection. Only inter-institutional cooperation may contribute to reducing number of crimes against monuments

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<sup>18</sup> Wąsek A. (red), Kodeks ..., str. 970-976

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### **Abstract**

Monuments are mostly endangered by the following crimes: devastation, theft, burglary, armed robbery, receiving stolen goods, illegal transfer goods out of the country Exact number of crimes against monuments remains unknown Nevertheless scale crimes against monuments is very high – according to International Criminal Police Organization (INTERPOL) Poland is in the sixth position in Europe, as far as number of thefts of pieces of art is concerned.

Protection of cultural property and other things of special importance for the culture is contained in both international regulations and regulations in Polish criminal code and the monument protection and care act.

The monument protection and care act in chapter 11 regulates issues of crimes and offences against monuments. In comparison with chapter XIII of the cultural property protection act, there is more acts socially dangerous, especially treated as offences, the regulations have also been rearranged through creating new separate articles containing new socially dangerous acts Regulations referring to protection of cultural property is also contained in the penal code, in chapter XVI “Crimes against peace, humanity and war crimes” and in chapter XXXV “Crimes against property”.

Summing up, it is worth to note that regulation of monument protection basing on criminal law seems to be sufficient. After introducing the monument protection and care act, the catalogue of prohibited acts was extended. The act contains in chapter 11 penal regulations, describing both crimes and minor offences. In order to prevent crimes against monuments effectively, close cooperation between the following institutions dealing with monuments protection (Police, prosecutor’s office, Ministry of Culture) is needed. The aim of those activities should be working out a similar position and rules in acting in favour of monument’s protection.

## **Karnoprawna ochrona zabytków w Polsce**

### **Streszczenie**

Zabytki narażone są na różnorodne zagrożenia, bardzo poważnymi są zagrożenia związane z przestępczością. Każde przestępstwo skutkujące bezprawnym zaborem dzieła sztuki, wiąże się z ogromną stratą nie tylko materialną, ale przede wszystkim kulturową, ponieważ są to niekiedy przedmioty unikatowe, niepowtarzalne, świadczące o naszej tożsamości narodowej. Skala przestępczości przeciwko zabytkom jest bardzo wysoka o czym świadczą zestawienia Międzynarodowej Organizacji Policji Kryminalnej (INTERPOL), zgodnie z którymi Polska znajduje

się na szóstym miejscu w Europie, jeśli chodzi o ilość kradzieży dzieł sztuki. Celem pracy jest analiza sposobu regulacji prawnokarnej ochrony zabytków.

Zabytki chronione są na podstawie konwencji międzynarodowych, przepisów ustawy o ochronie zabytków i opiece nad zabytkami, a także na podstawie przepisów kodeksu karnego. W rozdziale 11 ustawy o ochronie zabytków opiece nad zabytkami uregulowane zostało zagadnienie przestępstw i wykroczeń skierowanych przeciwko zabytkom. W zestawieniu z rozdziałem XIII ustawy o ochronie dóbr kultury, rozbudowaniu uległ katalog czynów społecznie niebezpiecznych, w szczególności traktowanych jako wykroczenia, nastąpiło także uporządkowanie regulacji poprzez wydzielenie poszczególnych rodzajów czynów społecznie niebezpiecznych w ramy odrębnych artykułów.

Regulacja odnosząca się do karnoprawnej ochrony dóbr kultury znajduje się także w ustawie kodeks karny w rozdziale XVI „Przestępstwa przeciwko pokojowi, ludzkości oraz przestępstwa wojenne” oraz rozdziale XXXV „Przestępstwa przeciwko mieniu”.

Podsumowując warto zauważyć, iż karnoprawna regulacja ochrony zabytków wydaje się być wystarczająca. Po wprowadzeniu ustawy o ochronie zabytków i opiece nad zabytkami katalog czynów zabronionych został rozszerzony. Należy jednak podkreślić, że dla skutecznego przeciwdziałania przestępczości skierowanej przeciwko zabytkom konieczna jest ścisła współpraca między instytucjami zainteresowanymi ochroną zabytków: w szczególności Policją, prokuraturą i Ministerstwem Kultury. Konieczne jest także powszechne kształtowanie świadomości wagi przestępstw skierowanych przeciwko dobrom kultury, ich społecznej szkodliwości oraz zagrożenia które za sobą niosą.