Teka Komisji Prawniczej PAN Oddział w Lublinie, vol. XVII, 2024, no. 1, pp. 233-255
https://doi.org/10.32084/tkp.8605

THE NEED FOR COMPARATIVE STUDIES OF PRINCIPLES RELATED TO THE PERMISSION FOR TEMPORARY TRANSFER OF HISTORICAL ARTEFACTS TO THE TERRITORY OF ANOTHER EUROPEAN UNION MEMBER STATE, ISSUED BY THE PROVINCIAL CONSERVATOR OF MONUMENTS*

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Abstract. This article discusses the rules of temporary export of historical artefacts abroad in relation to the regulations on the permits for the temporary transfer of historical artefacts abroad to the territory of another European Union Member State, issued by the provincial conservator of monuments. Polish law distinguishes between three basic approaches to the transport of historical artefacts across the border. Some artefacts can be removed without the need to obtain an export license, some can be exported with an export license, while some cannot be exported from Poland at all. The problem of historical artefacts is related to determining the limits of the owner's disposal of this particular item. Within the limits specified by the laws and rules of social coexistence, the owners, with the exclusion of other persons, may use things in accordance with the socio-economic purpose of their right, in particular, they may receive benefits and other income from these objects. Within the same limits, they may dispose of the thing, as provided for in Article 140 of the Civil Code. The administrative

* Quotations in the article, translated by the author into English, come from sources published in Polish. The term "provincial monument conservator" can also be translated into English as "voivodeship inspector of monuments", „Provincial Heritage Conservation Officer". A Polish word "zabytek" has a wider context than the English word "a monument". In Polish the word "zabytek" does not only mean immovable monument. The law on protection and guardianship of monuments [hereinafter: APM] provides a definition of a monument in Article 3(1-4). The expressions used in this Act shall have the following meaning: 1) monument – real estate or a movable, their parts or complexes, being the work of human being, or connected with their activity, and constituting a testimony of the past epoch or event, the preservation of which is in the social interest because of historical, artistic, or scientific value; 2) immovable monument – real estate, its part, or a complex of the real estate referred to in Point 1; 3) movable monument – a movable, its part, or a complex of the movables referred to in Point 1; 4) archaeological monument – an immovable monument constituting onground, underground, or underwater remains of the existence and activity of human being consisting of cultural strata, and products, or their traces contained in them, or the movable monument being such product. Cf. about the temporary moving of historical artefacts abroad: Sienkiewicz 2014.

ISSN 1899-7694
e-ISSN 2719-7379

situation of the owner of historical property results in restrictions in this respect. This also applies to the transfer of such an object across the border. The transfer of historical artefacts abroad is a de facto act subject to administrative regulation. The analysis of legal norms in the context of norms related to extra-legal knowledge will give a full picture of the state's will to protect national heritage, as well as reveal the theory of public administration activity in this area, which can be called the theory of state intervention in the export of historical artefacts abroad.

Keywords: monument; administrative regulation; provincial monument conservator.

1. THE COMPARATIVE STUDY OF LEGAL ACTS

The comparison can be made in a various dimension. Despite the fact that the administration applying the law can not rely directly on non-binding normative acts, their analysis may indicate the directions of interpretation that were well-established way of determining the scope of a given concept or a method of action.[1] The correct application of the law cannot be deprived of comparisons, for example, when an interpreted norm requires an evaluation of the occurrence of the conditions for its application, especially when those conditions contain a reference to non-legal knowledge. Subsumption alone requires a comparison. The legal norm should be therefore first compared with the factual state to determine whether the fact can subsumed under the legal norm. Therefore it can be assumed that the use of terms "comparative law", "comparative study of the law" is fully justified in examining the law, because the law as other phenomena of human life is subject to comparisons in many respects, legal and extra-legal ones. The subject of the comparative study of the law, by its nature, will impose a multi-faceted quality of the study. All of the following can be compared: legal cultures of the world, legal education in different countries, different lawyer occupations, legal systems, branches of law, individual national and international norms, constitutional norms, substantive procedural norms, institutions of the law.[2] This is not, of course, a closed list, but rather an example of research areas within the framework of comparative law. "Traditionally,comparative law appears to be a comparison of legal history (comparative history of law), comparison of laws (comparative legislation) and comparison of legal systems (descriptive comparative law)" [Brodecki,

[1] "To what extent is the study of the past is required? In many works scholars point out that discovering the past makes sense primarily in the law, where the traditions shape the mindset of lawyers and common traditions are the foundation of the general principles of a transnational or international nature" [Brodecki, Konopacka, and Brodecka-Chamera 2010, 17].

[2] About multi-faceted quality of comparative study of the law see Tokarczyk 2002; about comparison of legal cultures see Idem 2003.

Konopacka, and Brodecka-Chamera 2010, 16]. Multi-faceted quality refers to a comparative term itself. Defining comparative law, comparative study of the law is not simple. Difficulties with the name and content have been the subject of a legal dispute among scholars researching comparative study of the law since the creation of this field of research. Some treat a comparative study of the law as a branch of the law, others consider comparative law a method of legal study and research [Tokarczyk 2002, 27-28]. The view that comparative law is not considered as an independent scientific discipline is present in the literature,[3] and some point out that this is a comparison of laws, which is a part of the comparative literature.[4] When monument protection law uses comparative legal method many concepts undefined by the legislator can be clarified.[5] The comparison of legal acts of monument protection shows the conditions of making positive and negative decisions in the whole system of these acts.

The comparative study may involve legal institutions[6] also compared in administrative dimension. It is an utilitarian art.[7] In this utilitarian sense, it is worth using a comparative method to determine the meaning of norms which contain general clauses when a literal interpretation does not provide a complete answer to the question about the scope of application of a norm. It is also often a necessary measure to determine the correct interpretation.[8] The usefulness of the method of comparative study was appreciated by many generations of lawyers. As indicated by M. Rybicki, "comparative method was used from ancient times, primarily for practice in the process of preparing new legislation. In ancient Greece and Rome the laws of foreign countries were studied comparing them both among themselves and with their own national law. For example, as tradition says, the codification of the law by the Solon of Athens, and the oldest codification of the Roman law – The law of twelve tables – was preceded by a study of the laws of other countries of the then-known world" [Rybicki 1978, 29]. In the history of Polish law

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[3] "There is no sufficient arguments to consider «comparative law» as an independent, autonomous discipline" [Rybicki 1978, 31].

[4] "Comparative law is essentially a comparison of rights, comparative study of the law, which belongs to the broader concept of comparative literature" [Tokarczyk 2002, 28].

[5] "The use of a comparative legal method could also foster better explanation of different points of view and different concepts underlying the different systems and legal institutions" [Rybicki 1978, 35].

[6] "Comparing legal institutions, understood as a set of legal rules governing certain types of separate social relations, it is a highly-rated and most often undertaken task by the scholars of comparative study of the law" [Tokarczyk 2002, 70].

[7] "The usefulness of comparative law is its decisive quality" [Brodecki, Konopacka, and Brodecka-Chamera 2010, 15].

[8] "Why should we be especially interested in comparative law today, is the same question as in what respect this aspect of legal knowledge is necessary" [Ancel 1979, 157].

a method of comparative study found its practical application. A comparative legal method was used since regaining independence after the World War I because of the need to unify several legal systems of the occupying powers into one Polish legal system on the territory of a reborn country. "The co-existence in one country a few legal systems required what M. Ancel called inner comparative law, needed until national unification law" [Poźniak-Niedzielska 1984]. Comparing different phenomena, including the law is a characteristic of human action. Every day, a person makes multi-faceted comparisons without being aware of it as the judgement refers to their ideal notions of reality. Comparing is a method of obtaining information about the surrounding world[9]. It is also a part of the evaluation of the law, for example its quality. Comparing is also used in public institutions during various processes related to their functioning. There are also various criteria for comparison.

2. THE ATTITUDE OF THE STATE TO TRANSPORTING HISTORICAL ARTEFACTS ACROSS THE BORDER

Polish law distinguishes between three basic approaches to historical artefacts being transported across the border. Some artefacts can be removed without the need to obtain an export license, some can be exported with an export license while some of them cannot be exported from Poland at all. The problem of historical artefacts is related to the determination of the limits of the disposal of this particular item by the owner. Within the limits specified by the laws and rules of social coexistence, the owners may, with the exclusion of other persons, use things in accordance with the socio-economic purpose of their right, in particular, they may collect benefits and other income from those things. Within the same limits, they can dispose of the thing, as provided in Article 140 of the Civil Code.[10] The situation of the owner of historical property under administrative law results in limitations in this respect. This also applies to the transfer of such an object across the border. Moving historical artefacts abroad is a factual act [Paczuski 2010, 409] subject to administrative regulation. This article concerns the rules of temporary export of historical artefacts abroad regarding regulations on permits for the temporary moving of historical artefacts abroad to the territory of another European Union Member State, issued by the provincial monument conservator.

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[9] "Comparison is a generally accepted epistemological practice, whose main objective is to obtain new knowledge – learning." "If we have accepted already fixed idea that all human knowledge is based on comparison, then any knowledge would lead to comparisons" [Tokarczyk 2002, 34].

[10] Act of 23 April 1964, the Civil Code, Journal of Laws of 2020, item 1740 [hereinafter: CC].

Historical artefacts are objects of a special kind in the Polish legal system.[11] Transporting them across the border without referring to legal regulations may lead to far-reaching legal consequences for the exporting party. Pursuant to Article 4 of the Act on the protection and guardianship of monuments,[12] their protection includes, among others, counteracting the illegal export of historical artefacts abroad. Protection in the legal sense is also implemented through penal sanctions stipulated in this Act. Safeguarding national heritage is a task and obligation imposed on public administration by the Constitution of the Republic of Poland,[13] as stipulated in Article 5. From the very definition of a monument indicated in the Act on the protection and guardianship of monuments (Article 3(1)), it follows that their preservation is in the public interest due to their historic, artistic or scientific value. The purpose of this article is to present the main principles pertaining to the above-mentioned temporary moving of historical artefacts.

3. THE PRINCIPLE OF CONSTITUTIONAL GROUNDS FOR PROTECTING NATIONAL HERITAGE

The actions of public administration in the area of regulatory measures as well as law enforcement with regard to moving historical artefacts across the border find their legal justification in the Polish Constitution. Pursuant to its Article 5, the Republic of Poland safeguards the national heritage. For this reason, the monument protection authorities have been equipped with the powers to "safeguard", expressed in their regulatory interference in the rights of the owner or holder of an artefact in a situation when they temporarily or permanently move the historical object abroad. The protective function is carried out for the common good, and for the implementation of the public interest expressed in preserving the cultural heritage for future generations [Zalasińska 2010, 141].

Regulatory actions in terms of granting permits for the export of a historical artefact abroad implement the aim of the law, i.e., the common good. In the case of Poland, they are also of particular historical importance, because during the Second World War, collections of Polish heritage were noticeably decimated. A significant number of monuments was destroyed,

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[11] About Cultural Heritage Protection Law and monument protection law see Zeidler 2014, 23, note 1: "Cultural Heritage Protection Law shall remain in such a relationship to monument protection law like the concept of cultural heritage as a wider concept compared to the concept of the monument as a narrower one." Cf. Sienkiewicz 2013; Idem 2014. About rules of monuments protection see Dobosz 2020.

[12] Journal of Laws of 2021, item 710.

[13] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended [hereinafter: Polish Constitution].

and moreover, the German and Soviet occupiers appropriated works of art that have not been found or returned to Poland to this day [Pruszyński 2001, 478; Idem 1989, 110ff]. Therefore, the care of the administration to preserve the achievements of past generations in the territory of Poland protects the legally and factually justified social interest. The legal significance of these actions is evidenced by the fact that the protection of the national heritage was raised to the constitutional level [Chmaj 2009, 27]. It is a crime to move an artefact abroad without prior permission.[14]

4. THE PRINCIPLE OF COUNTERACTING ILLEGAL EXPORT OF HISTORICAL ARTEFACTS ABROAD

For a practical assessment of the scope of protection of historical artefacts, the legal definition of monument protection is very important, which is very broad. It is included in Article 4 APM. One of the activities listed in this provision, which falls under the above definition, is the prevention of theft, loss or illegal export of historical artefacts abroad.

When analysing the normative acts regulating the sphere of export of historical artefacts abroad, a reservation should be made that it is an extensive subsystem in administrative law, covering not only national regulations, but also international legal norms. This article focuses only on a few types of permits which are issued by the provincial conservator of monuments, pursuant to the Act on the protection and guardianship of monuments, and which relate to the export of historical artefacts abroad to the territory of another European Union member state. This of course does not mean that the problem of export permits has been exhausted. The author points out that there are also other administrative decisions regarding the export of artefacts outside Poland, but they will not be discussed in this article. There are several types of permits for the export of artefacts abroad, issued under Polish law. This study discusses three types of temporary export permits: a single permit for the temporary moving of a historical artefact abroad, a multiple individual permit for the temporary moving of a historical artefact abroad, and a multiple general permit for the temporary moving of a historical artefact abroad. The authority issuing these permits is the voivodeship (provincial) conservator of monuments, or in relation to library materials – the Director of the National Library of Poland. A single permit for the temporary

[14] Article 109(1) and (2) APM: "Whoever, without a permit, exports a historical artefact abroad or, after having taken it abroad, does not import it within the period of validity of the permit, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 3 years. If the perpetrator of the act referred to in Section 1 acts unintentionally, he is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years."

export of a historical artefact listed on the Heritage Treasures List is issued by the minister competent for culture and protection of national heritage at the request of a natural person or organizational unit in whose possession the artefact is and who intends to move the artefact abroad one time for practical operation, exhibition purposes, or for carrying out conservation works (Article 53(1) APM). The present discussion concerns the permits issued by the provincial conservator of monuments.

5. THE PRINCIPLE OF FORMALIZING THE CONDITIONS FOR THE EXPORT OF HISTORICAL ARTEFACTS ABROAD

When discussing the scope of formalization and administrative recognition of the above-mentioned permits, it should be noted that on 18 April 2011, the Minister of Culture and National Heritage issued a regulation on the export of historical artefacts abroad,[15] which entered into force on 29 April 2011. This regulation specifying the detailed scope of formalization and discretionary power, along with the general norms indicated in the Constitution of the Republic of Poland, together with the Act on the protection and guardianship of monuments and the Code of Administrative Procedure[16] constitute the main legal research field. The detailed framework of this reflection on the law is set out in Articles 53-55 APM.

When analysing the legal grounds for issuing permits, it should be noted that Article 4 APM, which should define the legal framework for protection, stipulates that it "consists, *in particular*, in actions by public administration bodies aimed at: 1) ensuring the legal, organizational and financial conditions enabling the permanent preservation of monuments as well as their use and maintenance; 2) *preventing threats* that may harm the value of monuments; 3) *preventing the destruction and misuse* of monuments; 4) *counteracting the theft, loss or illegal export* of monuments abroad; 5) control of the state of preservation and use of monuments; 6) inclusion of protective tasks in planning and spatial development and in environmental management" [emphasis – T.S.].

It should be noted that these norms are not directly related to the norms pertaining to the permits. As evidenced by the use of the phrase "in particular" in this provision, it is not a closed but an open catalogue. An assessment of the harmfulness of planned activities on any historic substance may also be justified by other reasons, not mentioned in this provision.

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[15] Journal of Laws No. 89, item 510.

[16] Act of 14 June 1960, the Code of Administrative Procedure, Journal of Laws of 2021, item 735 [hereinafter: CAP].

The wide scope of administrative discretion is evidenced in the use of indeterminate phrases in conjunction with the phrase "in particular", which gives an undefined catalogue of negative premises.

On top of all this, there is a problem with the interpretation of the legal definition of monuments and artefacts, which does not link the "historicity" of objects with their legal status, e.g. being listed in the register, but rather with the factual status. Pursuant to Article 3(1) APM, a historical artefact is understood as "a real estate or movable object, their parts or complexes, created by man or related to his activity and being a testimony to a bygone era or event, the preservation of which is in the public interest due to their historic, artistic or scientific value." Therefore, all activities that pose a threat to the protection of a monument or artefact should be interpreted in terms of possible threats to the values indicated in this definition, that is, first of all, possible damage to the preservation of evidence of a bygone era or event, in the light of its historic, artistic or scientific value. Moreover, it should be noted that the very definition of a monument refers to "public interest". Thus, should only this public dimension of monument protection be of interest to the provincial conservator of monuments?

6. THE PRINCIPLE OF TAKING INTO ACCOUNT THE INTEREST OF A PARTY TO THE PROCEEDINGS AND THE PUBLIC INTEREST

After all, the protection of monuments requires taking into account the interests of the owner of the monument as well as the public interest. These interests might not coincide. It should be noted that, pursuant to Article 7 CAP, an administrative body is "obliged to settle the matter while taking into account both the public interest as well as the legitimate interest of citizens." Therefore, this provision does not assume the priority of any interest or purpose. It is the duty of a public administration body to balance and establish the priority of objectives in administrative regulatory procedures or in police activities. The hierarchy of values indicated by law, and what follows – the significance of individual interests, are not only a theoretical issue, but also have a practical dimension. Public interest is not always and unconditionally more important than the interest of an individual. The legislator adopted the concept of reconciling these two interests rather than rigid setting of priorities [Adamiak and Borkowski 2004, 72-23]. Establishing the priority of these objectives cannot be made while disregarding the values on which the legal order is based. The legislator who tries to reconcile various individual or collective interests must face the problem of determining a common value [Zdyb 1991, 221] with respect to which the boundaries of regulatory practices or police activities will be defined. The balancing of these objectives must be reflected in the statement

of reasons of a given administrative decision, otherwise the party dissatisfied with the decision will try to challenge it, pointing to, for example, the lack of reconciliation of the social interest and the legitimate interest of citizens, omission of some interests in the process of balancing them, unjustified assumption of domination of any interest or unequal treatment of interests, or the violation of the principle of justice [Zdyb 1991, 240; Jaśkowska and Wróbel 2009, 136-38]. Public administrative bodies dealing with monument protection are responsible for the implementation of the values defined by law. Public administration realizes the public interest [Kocowski 2009, 155] as well as individual public subjective rights [Chaciński 2004, 16ff]. Therefore, after issuing a permit, it should pay attention to the manner of its implementation and react to any instances of breaching the limits of freedom, in particular when it concerns not only the formal violation of legal norms, but also when it results in violation of the rights of other entities.

The basic purpose of the statutory regulation is to define the subjective and objective scope of regulatory procedures and police activities in terms of protection of monuments. While discussing the issue of the statutory discretionary powers, one needs to mention the fact that this power will result not only from the provisions of the Act on the protection and guardianship of monuments, but also from the provisions of the Code of Administrative Procedure. As an example, the legal problem related to establishing the parties to the administrative procedure should be mentioned. Article 28 CAP links the concept of a "party" to proceedings with demonstrating a legal interest. Already at this stage, attention should be paid to the controversy related to the concept of party viewed in an objective or subjective way. This phenomenon may be compounded by the problem of a different understanding of the scope of legal interest in administrative regulatory procedures or in administrative police activities [Sienkiewicz 2011a]. The scope of entities with a legal interest in the permit granting procedure may be perceived differently than in the permit revocation procedure. The legal interest, and thus in practice the status of the party, is determined by the provisions of the Act on the protection and guardianship of monuments. When formulating the catalogue of applicants, the legislator refers to the legal or factual status of the matter, and sometimes to the legal status of the applicant.

7. THE PRINCIPLE OF LINKING THE SUPERVISION OF THE TRANSPORT OF ARTEFACTS ACROSS THE BORDER WITH POSSESSION

Some permits connected with the movement of artefacts across the border relates to the factual status – possession. "A single permit for the permanent export of a historical artefact abroad" is issued at the request of a natural

person or an organizational unit in whose possession the artefact is (Article 52(2) APM). "A single permit for the temporary export of a historical artefact abroad is issued by the provincial conservator of monuments at the request of a natural person or an organizational unit in whose possession the artefact is and who intends to move the artefact abroad one time for practical operation, exhibition purposes, or for carrying out conservation works" (Article 53(1) APM). A "multiple individual permit for the temporary export of a historical artefact abroad is issued by the provincial conservator of monuments at the request of a natural person or an organizational unit in whose possession the artefact is and who intends to repeatedly export this artefact abroad for practical operation or exhibition purposes" (Article 54(1) APM).

Another type of permits relates to the legal status of the applicant. "A multiple general permit for the temporary export of historical artefacts abroad is issued by the provincial conservator of monuments at the request of a museum or other cultural institution which, in connection with its activities, intends to repeatedly export its collections abroad, in whole or in part, for exhibition purposes" (Article 55(1) APM).

When assessing the regulation, it is impossible to ignore the history of application of individual provisions. Therefore, it is worth referring to the body of jurisprudence or cases illustrating the application of law in practice. In the case of exporting artefacts abroad, the question arises whether the current regulation includes a general ban on export, or the mere movement across the border is allowed, and the prohibition applies only to acting without a permit? Should permanent export be treated differently than temporary one? A pro-freedom interpretation regarding the export of artefacts abroad was provided by the Provincial (Voivodeship) Administrative Court in Warsaw in the judgement of 13 March 2006.[17] The statement of reasons of the judgement provides arguments that the general rule is consent to export, and the prohibition is the exception to the rule. This confirms the hypothesis that the action itself, resulting from subjective rights, is allowed, while it is forbidden to act without prior permission, but taking into account the provisions of administrative and criminal law related to the unauthorized transboundary movement of artefacts, one may doubt whether this freedom is real or apparent.

[17] Ref. no. I SA/Wa 1019/05, Lex no. 197565.

8. THE PRINCIPLE OF PROTECTION OF HISTORICAL ARTEFACTS *EX OFFICIO* AND THE PRINCIPLE OF PRESUMPTION OF AWARENESS OF THE HISTORIC FEATURES OF THE TRANSPORTED GOODS ON THE PART OF THE EXPORTING ENTITY

"The provincial conservator of monuments may issue an ex officio decision on the entry of a movable artefact in the register of monuments in the event of legitimate concern of its destruction, damage or illegal movement of the artefact abroad, or export of a monument of exceptional historic, artistic or scientific value" (Article 10(2) APM). Pursuant to Article 3(1) APM, a monument is understood as real estate or a movable item, their parts or assemblies, created by man or related to his activity and being a testimony to a bygone era or event, the preservation of which is in the public interest due to their historic, artistic or scientific value. It should be noted that the "historicity" of a given object is determined by the factual status, and not by the legal form of protection. A historical artefact may also be an item not listed in the register of monuments or not covered by any other form of protection indicated in Article 7 APM.[18] This may cause interpretation doubts in a situation where the Border Guard or the customs authority undertake actions against a person crossing the border while transporting an item with the features of a historical artefact but not listed in the register. In case of doubt, they may require the exporting person "to present a document confirming the fact that the exported artefact does not require a permit (Article 59(2) APM). Specific regulations related to this issue can be found in Article 59(3) APM.

Thus, the law shifts the burden of proving exportability to the exporting party. It requires a certain precaution of the person moving an item with the features of a historical artefact, who should think in advance about possible controversies on the border concerning the item in question.

If the document confirming that the artefact may be exported is not presented, or there is legitimate concern that it is not a reliable document, "the authority of the Border Guard or the customs authority may keep the monument for the time necessary to determine whether the export of the monument could have been made without a permit" (Article 59(4) APM) for permanent or temporary export.

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[18] "The forms of protection of monuments are: 1) entry into the register of monuments; 1a) entry on the List of Heritage Treasures; 2) recognition as a monument of history; 3) creation of a cultural park; 4) establishing protection in the local spatial development plan or in the decision on the location of public purpose investment, decision on conditions of development, road investment permit, decision on the location of the railway line or the building permit for public use airports."

It should be mentioned here that pursuant to Article 10 of the APM, "the provincial conservator of monuments may issue an ex officio decision on the entry of a movable artefact in the register of monuments in the event of legitimate concern of its destruction, damage or illegal movement of the artefact abroad, or export of a monument of exceptional historic, artistic or scientific value."

The Act on the protection and guardianship of monuments tries to simplify the situation somewhat in this respect by indicating a catalogue of artefacts for the moving of which a licence in the form of an export permit is required. The prerequisites for obtaining a permit are, in particular, the age of the item or its value.

The export permit is a manifestation of regulatory actions of public administration. There are several types of permits for the temporary export of artefacts abroad, issued by the provincial conservator of monuments. The Act requires prior obtaining of: "1) a single permit for the temporary export of a historical artefact abroad, or 2) a multiple individual permit for the temporary export of a historical artefact abroad, or 3) a multiple general permit for the temporary export of a historical artefact abroad" (Article 51(3) APM).

The authority issuing these permits is the provincial conservator of monuments (cf. Article 53(1), Article 54(1), Article 55(1) APM), or in relation to library materials – the Director of the National Library of Poland (Article 58 APM). They may also withdraw this permit by means of a decision (Article 56(1) APM), "if the state of preservation of the artefact has deteriorated or new facts and circumstances have come to light proving that the applicant does not give any warranty" (Article 56(2) APM), "that it will not be destroyed or damaged and will be brought back to the country before the expiry of the permit" (Article 51(2) APM). The provincial conservator of monuments (or, respectively, the Director of the National Library) notifies immediately the customs administration authority about the revocation of the permit (Article 56(3), Article 58 APM).

A single permit for the temporary export of a historical artefact abroad and a multiple individual permit for the temporary export of a historical artefact abroad is issued at the request of the holder of an artefact (a natural person or an organizational unit), intending, respectively: one time or repeatedly, "to export this monument abroad for practical operation or exhibition purposes, or for conservation works" (Article 53(1), Article 54(1) APM). The permit has a limited validity period, which "may not exceed 3 years from the date of issuing the permit" (Article 53(2), Article 54(2) APM).

The multiple general permit for the temporary moving of a historical artefact abroad has been regulated somewhat differently. The group of entities

that may apply for it has been narrowed. They are issued "at the request of a museum or other cultural institution which, in connection with its activities, intends to repeatedly export its collections abroad, in whole or in part, for exhibition purposes" (Article 55(1) APM). The validity period of this permit is extended compared to the previous two and is 5 years from the date of its issuance (Article 55(2) APM).

An entity that used a permit for the temporary export of a historical artefact abroad is required to notify the provincial conservator of monuments (or, respectively: the Director of the National Library of Poland) on bringing the object to the territory of the Republic of Poland, not later than within 14 days from the expiry of the permit, and is also obliged to make the artefact available for inspection at the request of the conservator (Director of the National Library) (Articles 57 and 58 APM).

Pursuant to Article 51(1) APM, a permit for the export of a historical artefact abroad is required for objects included in one of the categories pointed in this regulation (Article 51(2) APM).

Regardless of the age or value of the artefact, a permit will be required to export objects that are: "1) listed in the register, 2) included in public collections, which are the property of the State Treasury, local government units and other organizational units included in the public finance sector, 3) part of museum inventories or the national library resource" (Article 51(4) in conjunction with Article 51(3)).[19]

The condition for obtaining a positive review of the application for a permit for the temporary moving of a historical artefact abroad is the fact whether "the state of its preservation allows it, and the natural person or organizational unit in whose possession the artefact is gives a warranty that it will not be destroyed or damaged and will be brought back to the country before the expiry of the permit (Article 51(2) APM). A permit to export abroad is not required for the categories pointed in Article 59(1) APM.

9. THE PRINCIPLE OF PURPOSEFULNESS OF MONUMENT PROTECTION

The general constitutional order to protect the national heritage is reflected in specific negative premises in the procedure for issuing a permit for the export of a historical artefact abroad. They define the specific objectives of the conducted proceedings, which should be referred to in the justification of the refusal to grant the permit. The files of the administrative

[19] Historical artefacts included in the List of Heritage Treasures may be temporarily exported abroad, but the permit in this respect is issued by the minister competent for culture (Article 53(1) APM).

proceedings should also show that specific conditions indicated in the procedure for obtaining the permit were subject to in-depth examination, pursuant to Article 12(1) CAP.

The general objective is to "prevent threats that may harm the value of monuments, and to counteract the theft, loss or illegal export of monuments abroad" (Article 4(2) and (4) APM). Moving a historical artefact from the domestic legal area is connected with the risk of insufficient protection of the object's substance and its being retained in Poland due to the different degree of protection of monuments in the internal regulations of other countries [Drela 2006, 234]. The risk of loss or destruction of an artefact also increases as a result of the process of its physical movement, but also due to possible insufficient legal protection in a foreign territory. One of the aims of monument protection is preserving their physical substance [Bąkowski 2010, 101]. Article 4 APM indicates only an exemplary catalogue of monuments protection activities, by using the phrase "in particular", and therefore the conditions for issuing negative decisions on the export of artefacts abroad should be analysed. The objectives of the administrative procedure for the issue of an export permit are different for the application for a permanent export permit than in the case of temporary export. The legislator did not explicitly indicate the purpose of the proceedings, but indicated premises the occurrence of which causes the applicant to be refused the permit.

10. THE PRINCIPLE OF USING NON-LEGAL ASSESSMENTS AND KNOWLEDGE-BASED NORMS

In the case of proceedings for the issuance of a permit for the temporary moving of an artefact abroad, the specific purpose of the procedure will be to determine whether the state of its preservation allows its export abroad, and whether "the natural person or organizational unit in whose possession the artefact is gives a warranty that it will not be destroyed or damaged and will be brought back to the country before the expiry of the permit" (Article 51(2) APM).

Thus, the legislator assumed that in this case it is not necessary to examine the significance of the artefact for cultural heritage, but pointed out that one should ensure, from the point of view of the public interest, the probability of the item's return to the national territorial area as well as minimize the risk of its loss or damage.

The use by the legislator of the terms "special significance for cultural heritage", and "state of preservation of the monument" allowing its export abroad, or the warranty that the artefact will not be "destroyed or damaged

and will be brought back to the country before the expiry of the permit" imposes on the authority examining the export application an obligation to use in this procedure justifications also related to non-legal assessments. In the circumstances shaping the administrative matter, it is not enough to be guided only by a literal interpretation of the provision. One should also take into account the interpretation of a specific provision in the light of the axiological foundations of a given branch of law, in terms of logic, intent, and the entire system of provisions, i.e. the purpose and meaning of the application of the norm [Zdyb 1999, 21; Idem 1991, 75-76]. In this broader sense, one should look for a specific scope of the norm based on indeterminate phrases and general clauses. Phrases like: "Special significance for cultural heritage", "state of preservation of the monument" allowing its export abroad, or the warranty that the artefact will not be "destroyed or damaged and will be brought back to the country before the expiry of the permit" are indeterminate phrases, or general clauses, the application of which in practice makes the law more flexible, making it possible to adapt a decision to a specific situation in the most equitable way. In other words, they make it possible to use non-legal assessments and rules [Adamiak and Borkowski 2004, 71-72; Sienkiewicz 2011b, 16-38]. Therefore, they enable the fullest achievement of the objectives of the procedure.

It should be noted directly that an assessment made on the basis of statutory premises is not an easy task. While the special significance for cultural heritage or the state of preservation of a monument enabling its movement can be determined by visual inspection, participation of experts in the proceedings or through the report of an authorized expert, what method can be used to measure the premise of giving a warranty by a natural person or an organizational unit in whose possession the artefact is that it will not be "destroyed or damaged and will be brought back to the country before the expiry of the permit"? The legislator ordered here an assessment of the applicant's attributes, which, in the light of the necessity to provide a statement of reasons for a negative decision, will be a source of much controversy. It should be noted that the issue of examining the warranty of the return of artefacts to Poland will not only apply to natural persons, but also to universally respected public institutions.

11. THE PRINCIPLE OF FORMALIZATION OF THE APPLICATION FOR THE EXPORT OF A HISTORICAL ARTEFACT ABROAD

In order to obtain a permit to export a monument abroad, a formal application must be submitted. Its mandatory elements are specified in the regulation of the Minister of Culture and National Heritage of 18 April 2011

on the export of historical artefacts abroad,[20] the regulations of which "apply to the export of historical artefacts from the territory of the Republic of Poland: 1) to the territory of another member state of the European Union; 2)outside the customs territory of the European Union, if artefacts do not constitute cultural goods within the meaning of Article 1 of Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (Official Journal UE L 39 of 10.02.2009, p. 1)" (para. 1(2)).

Some of its provisions (para. 6(1)(2) and para. 6(2)(3) as well as para. 7 and 8) shall "also apply to applications for the export of monuments constituting cultural goods, within the meaning of Article 1 of Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods, from the territory of the Republic of Poland outside the customs territory of the European Union" (para 1(3) of the regulation of the MKiDN).

Applications: a) for a single permit for the permanent export of a historical artefact abroad, b) for a single permit for the temporary export of a historical artefact abroad, c) for a multiple individual permit for the temporary export of a historical artefact abroad, include: "1) name, surname, place of residence and address of the applicant or the name, seat and address of the organizational unit being the applicant; 2) definition of the artefact with a description enabling its identification; 3) justification" of the application (para. 2(1, 2, 3) of the regulation of the MKiDN; cf. para. 3(1, 2, 6); para. 4(1, 2, 4) of the regulation of the MKiDN).

In addition, the application for a single permit for the temporary export of a historical artefact abroad includes: "indication of the country to which the artefact is to be exported; planned date of importing the monument to the territory of the Republic of Poland; an indication of the period for which the permit is to be issued" (para. 3(3-5) of the regulation of the MKiDN), and the application for a single permit for the temporary export of the monument abroad includes an "indication of the period for which the permit is to be issued" (para. 4(3) of the regulation of the MKiDN).

The fourth type of application – for a multiple individual permit for the temporary export of a historical artefact abroad, includes: "1) name, seat and address of the museum or other cultural institution being the applicant; 2) an excerpt from the register of cultural institutions; 3) an indication of the period for which the license is to be issued; 4) an indication of at least 2 persons authorized to sign the list of exported monuments, attached to the permit; 5) justification of the application" (para. 5 of the regulation of the MKiDN).

Attachments to the applications documenting the artefact have also been formalized. They should be accompanied by "2 colour photographs

[20] Journal of Laws No. 89, item 210 [hereinafter: the regulation of the MKiDN].

of the artefact, sized no less than 9 x 13 cm" (para. 6(1)(1) of the regulation of the MKiDN).

In addition, one must attach either: "a declaration of the owner of the artefact that the registered monument is his property, it is legally unencumbered, and is not subject to seizure under the provisions on judicial enforcement or administrative enforcement" (para. 6(1)(2) of the regulation of the MKiDN; cf. para. 1(3) of the regulation of the MKiDN), or "if the applicant is not the owner of the artefact, the applications [...] shall also include the consent of the owner of the monument to its export abroad by the applicant" (para. 6(2) of the regulation of the MKiDN; cf. para. 1(3) of the regulation of the MKiDN). In the event that there are several co-owners of a historic artefact, the consent of all co-owners should be attached, because the export of the item abroad is, in the author's opinion, an activity that exceeds the scope of ordinary management of the item within the meaning of Article 199 CC,[21] it is also associated with the risk of loss, destruction, or damage, as well as the risk of reduced legal protection in a foreign territory. In the event of lack of authorisation of all the co-owners, the public administration body should not issue a permit for the export of the artefact abroad. This particularly concerns the case of the single permit for the permanent export of an artefact abroad. Such an application should "also be accompanied by the applicant's declaration that the artefact is not listed in the register of monuments, is not part of public collections, which are the property of the State Treasury, local government units and other organizational units included in the public finance sector, and that it is not in a museum inventory or the national library resource" (para. 6(3) of the regulation of the MKiDN; cf. para. 1(3) of the regulation of the MKiDN).

In the context of considerations on the ownership of an artefact, attention should be paid to the group of applicants defined in the above-cited Act on the protection and guardianship of monuments. The group has been defined very broadly. The proceedings are initiated at the request of the holder – a natural person or an organizational unit (Article 52(2), Article 53(1), Article 54(1) APM), and in the case of the multiple general permit for the temporary export of historical artefacts abroad – "at the request of a museum or other cultural institution which, in connection with its activities, intends to repeatedly export its collections abroad, in whole or in part, for exhibition purposes" (Article 55(1) APM). It is obvious that in the case of possession, i.e. the factual status, and not the legal status, there may

[21] "To dispose of joint property and to perform other activities that exceed the scope of ordinary management, the consent of all joint owners is required. In the absence thereof, co-owners whose shares amount to at least half, may request a decision by a court that will rule taking into account the purpose of the intended activity and the interests of all co-owners."

be differences of opinion about the export of the artefact abroad between the owner and the holder. In order to avoid controversy in this context, the above-mentioned regulation stipulates the need to attach the owner's consent to the application. While this is a solution that deserves approval as it eliminates the risk of acting against the owner's will, its quality is questionable in the light of the rules of legislative technique, as the legal basis of the regulation, as defined in Article 61 APM[22] does not designate delegations enabling the addition of such limitation in the regulation. The author of this work has doubts as to whether the limits of the enabling delegation were not exceeded in this case. This does not affect the fact that the provisions of the applicable regulation are mandatory. However, in the event of introducing amendments to the Act on the protection and guardianship of monuments, it is worth to consider supplementing the delegation to issue the regulation with appropriate clauses. Currently, it only specifies the issuance of regulations as to the procedure and permit templates.

12. THE PRINCIPLE OF DIRECT CONTACT WITH THE ARTEFACT OF THE MONUMENT PROTECTION ADMINISTRATION BODY WHICH ISSUES A PERMIT FOR THE TEMPORARY EXPORT OF THE ARTEFACT ABROAD

In the procedure for issuing a permit, an mandatory inspection must be carried out. It is a procedural step indicated in Article 85 CAP. This procedure ensures direct contact of a given office employee with the artefact and the most accurate assessment of the object. The administration authority may not refrain from carrying out the inspection in a situation where the law makes it mandatory.[23] Pursuant to para. 7(1) of the regulation of the MKiDN, the provincial conservator of monuments or the Director of the National Library of Poland, prior to considering the application for the issuance of: a single permit for the permanent export of an artefact abroad, a single permit for the temporary export of an artefact abroad, or a multiple individual permit for the temporary export of an artefact abroad, *shall inspect the monument*. In these cases, it is an obligatory procedure. Pursuant to para. 8(1) and (2) of the above-mentioned regulation "in the case of an application for a single permit for the permanent export of a historical artefact abroad, after the inspection of the monument the provincial

[22] "The minister competent for culture and protection of national heritage shall determine, by way of a regulation, the procedure for submitting applications and issuing single permits for the permanent export of a historical artefact abroad, single and multiple permits for the temporary export of an artefact abroad, as well as templates of these permits, in order to standardize these documents and also ensure the protection of these artefacts."

[23] See ibid.

conservator of monuments sends the application together with the artefact inspection report to the minister competent for culture and protection of national heritage." This protocol "includes a description of the artefact and an indication of its author or manufacturer, the time of its creation and the value of the item given as amount." The obligation to perform the inspection has not been stipulated in the case of submitting the application for a multiple general permit for the temporary export of artefacts abroad. The applicant in this case is a museum or other cultural institution. However, pursuant to Article 85(1) CAP "A public administration body may, if necessary, carry out an inspection."

As an optional step, the appointment of experts in the proceedings is allowed. Pursuant to para. 7(2) of the above-mentioned regulation, the "inspection may be carried out with the participation of appropriate experts and with the use of specialized equipment." According to Article 84(1) CAP, "when specialised knowledge is required in the matter, a public administration body may request an expert or experts to issue an opinion."

"The inspection is carried out in the place where the historical artefact is located", or at the seat of the provincial conservator of monuments or the Director of the National Library, respectively (para. 7(3) of the regulation of the MKiDN; cf. para. 1(3) of the regulation of the MKiDN). In the event it is necessary to temporarily detain the artefact at the seat of this authority in order to carry out the inspection, the "applicant shall be issued a receipt." para. 7(4) of the regulation of the MKiDN; cf. para. 1(3) of the regulation of the MKiDN).

13. THE PRINCIPLE OF RECORDING THE FEATURES IDENTIFYING A HISTORICAL ARTEFACT IN THE FILES OF THE PROCEDURE

In the event of a positive review of the application for: a single permit for the temporary export of a historical artefact abroad, or a multiple individual permit for the temporary export of a historical artefact abroad, these permits are "accompanied by a colour photograph of the artefact with the seal and signature of the authority issuing the permit on the reverse and the information that it is an appendix to the permit", pursuant to para. 11 of the above-cited regulation of the MKiDN. The obligation to attach a photograph to the permit has not been stipulated in the case of submitting the application for a multiple general permit for the temporary export of artefacts abroad.

The permit to export the artefact abroad is an administrative decision. Pursuant to Article 104(1) CAP, "a public administration body shall deal with the matter by issuing a decision, unless the provisions of the code provide

otherwise." An administrative decision is a formalized administrative act that must contain elements specified by law – pursuant to Article 107(1) CAP.

The regulation of the MKiDN on the export of historical artefacts abroad includes appendices specifying the form of the permit[24], which contain additional elements: 1) a single permit for the temporary moving of a historical artefact abroad additionally includes a description of the object, the validity period of the permit and an indication of the country to which the item is exported; 2) a multiple individual permit for the temporary moving of a historical artefact abroad additionally includes a description of the object and the validity period of the permit; 3) a multiple general permit for the temporary moving of historical artefacts abroad additionally includes an indication of the person authorized to sign the list of exported artefacts and the validity period of the permit.

Taking the above into account, it should be noted that the transfer of an artefact across the border within the European Union requires the person transporting the item across the border to have legal awareness as to whether the transported object is a historical artefact. If it is a historical artefact, the person transporting it must be aware as to whether the item being transported is included in the catalogue of items for which a permit to export an artefact abroad is required. The model of operation adopted by the Polish legislator assumes high formalization of permits, their temporary nature and criminal liability specified in the cases provided for in Article 109(1) APM.

14. THE PRINCIPLE OF MAKING THE RETURN OF THE ARTEFACT TO THE TERRITORY OF POLAND PROBABLE

If the applicant obtained: 1) a single permit for the temporary export of a historical artefact abroad, or 2) a multiple individual permit for the temporary export of a historical artefact abroad, or 3) multiple general permit for the temporary export of a historical artefact abroad, it should be noted that the natural person or organizational unit that received the above-mentioned permit, is obliged to bring the exported artefact back to the country within the period of validity of this permit. Artefacts included in public collections, which are the property of the State Treasury, local government units and other organizational units included in the public finance sector, or artefacts in their possession or included in the national library resource,

[24] Appendix No. 1 – a single permit for the permanent moving of a historical artefact abroad; Appendix 2 – a single permit for the temporary moving of a historical artefact abroad; Appendix 3 – a multiple individual permit for the temporary moving of a historical artefact abroad; Annex 4 – a multiple general permit for the temporary moving of historical artefacts abroad.

temporarily exported abroad for exhibition purposes or for the purpose of arranging the interiors of diplomatic missions and consulate offices do not have to be imported into the territory of the Republic of Poland during the period of validity of the permit, in the event of applying for another permit for the temporary export of the artefact abroad. The application is submitted no later than 90 days before the expiry date of the permit. The application is accompanied by a current description of the state of preservation of the historical artefact. Applications submitted after the 90-day deadline shall not be considered, and the applicant is informed about it. The next permit specifies the conditions and method of displaying and storing the artefact as well as the manner of performing an inspection of the state of preservation and use of the artefact, within the period of validity of this permit. In the event of issuing a decision refusing to grant another permit or leaving the application without consideration, the applicant is obliged to bring the exported historical artefact to the territory of the Republic of Poland within 60 days from the date on which the decision became final or from the date the applicant receives information about leaving the application without consideration. (cf. Article 56a APM).

CONCLUSION

By studying the aforementioned principles and permits analysed in this article, one can attempt to decode the theory of legal phenomena in the sphere of state interference in the movement of historical artefacts across the border in the methodological sense of the word "theory" – "thus as a collection of scientific statements systematized in a specific manner" [Ziembiński 1977, 5]. This theory can be decoded in the dimension of administrative law through the analysis of normative statements.[25] "In general, in any stabilized society, certain habits of behaviour in certain situations arise, which over time gives the basis for the formulation of certain patterns of behaviour" [Ziembiński 1977, 70]. Such extralegal habits also occur in the area of public administration activities related to monuments. The Act on the protection and guardianship of monuments should be interpreted taking into account non-legal norms based on knowledge, e.g. expressed in Rouba's conservation theory [Rouba 2008, 102, 107]. Often, non-legal norms of knowledge are reflected in the legal model. Therefore, the analysis of legal norms in the context of norms related to extra-legal knowledge will give a full image of the state's will to protect national heritage, as well as reveal the theory of activities of public administration in this area, which can be called the theory of state interference in the export of historical artefacts abroad.

[25] On statements which can be considered as norms of conduct, see Ziembiński 1977, 23.

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