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ARTYKUŁY

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Exporting art under Polish law

Abstract

One of the best ways to promote an artist is to sell his work to a famous, international collection. There are strong voices in law and art economy, claiming that Polish legal regulation regarding art export is unnecessarily strict and complicated, which results in suppressed promotion of arts and cultural development. In the following article, I am exploring this problem by analyzing current Polish legal regulations as well as contemporary cases relevant to the topic. I am also investigating the problem by delving into Polish history, especially the aftermath of the Swedish Deluge and World War II, which both resulted in looting and destruction of Polish cultural heritage on a catastrophic scale. I determine that Polish legal regulations regarding art export are, in fact, on the strict side and are constructed to keep cultural heritage inside the borders. However, this approach is completely justified by the cultural and political climate in which those regulations were conducted. That being said, more than half a century after the last major art looting that took place on Polish grounds, it is time to reevaluate and adjust some of the legal regulations. I conclude my article with the proposition of expanding autonomy for the museum's board of directors in dealing with exhibits under their care.

Keywords: Poland, art export, art market, Polish law, looting, protection of cultural heritage.

Introduction

Imagine being an artist, someone who can evocate extreme emotions with their work, who can create a whole new world with their mind. Imagine how wonderful it would be if your art found its way to every last corner of the Earth. How amazing it would be

to show your work on every continent, your work existing among the works of other influential artists, observed and admired by people from different backgrounds and cultures. One of the best ways to promote an artist is to sell his artwork to a famous, international collection. Whether the collection is private or public, this type of sale comes with huge exposure and prestige. There are strong voices in both legal and economic discourse claiming that the Polish law that regulates exporting art and cultural heritage abroad is too strict and thus suppresses the promotion of both Polish art abroad and economic development. Experts argue that lengthy administrative procedures and hard-to-obtain, mandatory permits discourage potential buyers from investing in Polish art.¹ According to some researchers, Polish law is tailored to hoard cultural property and keep as much of it as possible inside the country. This practice may put acclaimed Polish artists at a massive disadvantage, as after they pass away, the freedom to sell and thus promote their work may be severely limited. Essentially, if a work of art is old enough or worth enough, it is that much harder for it to leave Poland. In the following article, I would like to present the details of the Polish legal system concerning art export, highlight major historical events that shaped it, and, by analyzing relevant cases, determine whether current law is crippling the promotion of Polish art abroad.

Methodology

Although scientific disciplines differ in their understanding of concepts, methods used, objects of examination, problem awareness (when different disciplines perceive different problems), and research goals, in the case of security studies, it may be useful to draw inspiration from other disciplines in a way that is auxiliary to their research.² For the purpose of this paper, I have decided to combine traditional legal research, such as analyzing cases and legislation and to take a deep dive into the historical background surrounding the phenomenon in question.

Most traditional approaches to legal research use empirical and normative methods, which are often complementary to each other. Empirical legal research differs from doctrinal research developed in the normative discipline of law (i.e., “law on paper”) because it seeks to capture real-life evidence (law in practice) regarding the world based on either the researcher’s and/or other people’s observations or experiences. Finding and indicating flaws in the underlying current policy (in terms of effectiveness and implementation) and then suggesting necessary changes to the law (law reforms) often requires the consideration of the social references underlying the law, as well as the impact of the current law on certain social constructs in practice. Thus, in epistemological terms, a space is created for the use of empirical legal research such as case

¹ P. Rosik (2022, May 7). *Zagranica niechętnie kupuje polską sztukę, wszystko przez złe prawo i postawę urzędników*. <https://strefainwestorow.pl/artykuly/inwestycje-alternatywne/20220507/polska-sztuka-inwestowanie-eksport-dziel-ograniczenia-prawo> (access: 20.02.2023).

² S. Taekema, B. van Klink (2011). *On the border: Limits and possibilities of interdisciplinary research*. In B. van Klink, S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law*. Mohr Siebeck. Tübingen, p. 7.

studies.³ T.C.M Hutchinson gives an idea of what type of case study research could be embedded into empirical legal research and for what reasons:

- exploratory reasons: the legal case study will allow the exploration of typical examples of legal cases that have produced varied legal outcomes, e.g., a legal case study that covers the data from trial transcripts and decisions or interviews with litigants;
- illustrative (descriptive) reasons: the legal case study can be illustrative by indicating and comparing practices in various organizations and explaining their differences; and
- explanatory reasons: the legal case study will explain significant reasons underlying a certain legal process.⁴

In the article “Making the case for case studies,” Aikaterini Argyrou demonstrates arguments for and against case study research. The pros include the following:

- It offers opportunities to verify responses by comparing a number of different approaches to resolving an issue.
- It allows the researcher to look at a particular situation in depth and more broadly.
- It allows a contextual view rather than an artificially constructed view of experiences.
- It illustrates the complexities of social and political relations, their relationships, and the effects of one on the other.

The disadvantages include the following:

It lacks the validity of a proper sample and objective quantitative proof (if not used in a mixed setting).

It may only reflect the situation through the eyes of the researcher: the data may be more reflective of the view of the beholder rather than the subject (fears of bias).

The “insider view” being presented is, by definition, idiosyncratic-individual and not as encompassing as a bird’s eye external sweep of the situation.⁵

Because social phenomena are essentially made by history and do not occur in a vacuum, as a complementary method, I have used a historical analysis approach.

Analysis of historical conditions that took place during the creation of a specific legal institution contributes to the understanding of why it was created and what arguments supported its current constitution. An explanation of the changes within the legal institution over time allows us to better understand its current, binding shape. Some researchers⁶ even point out that without knowledge of historical development, without knowledge of the past of political institutions and old legal systems, and also, without the use of retrospection, it is impossible to correctly understand contemporary

³ A. Argyrou (2017). *Making the Case for Case Studies in Empirical Legal Research*. “Utrecht Law Review”, 13(3), 95–113.

⁴ T.C.M. Hutchinson (2002). *Research and Writing in Law*. Lawbook. Pymont, p. 104.

⁵ A. Argyrou, *Op. cit.*

⁶ J. Bardach (2001), *Themis a Clío, czyli prawo a historia*. Liber. Warszawa.

systems and laws.⁷ However, this statement may be too extreme of an opinion as basic knowledge of historical background is always a useful addition to any given social research.

Legal regulations

In the Polish legal system, the export of cultural property abroad has a statutory rank. It is regulated in a Legal Act⁸ concerning the protection of Monuments and its Regulation⁹ detailing issues regarding the export of monuments abroad. Polish regulation distinguishes between two types of export: temporary and permanent, adjusting the rules accordingly. For this paper's objectives, I will mainly focus on the latter. There is, however, a group of monuments that are banned from permanent export altogether and can only be exported temporarily under strict conditions. In many other cases, monuments can be exported legally and permanently only with a special permit given by the Minister of Culture and National Heritage. In accordance with a Polish legal regulation, a one-time permit is mandatory in the case of the following:

- a) archaeological artifacts that are more than 100 years old and are part of archaeological collections or have been obtained as a result of archaeological research or accidental discoveries;
- b) integral parts of specific interior design, monuments of architecture, statues, and works of art that are more than 100 years old;
- c) watercolors, gouaches, and pastels made on any given material that are more than 50 years old and of value 16,000 PLN or higher (approx. \$3,680);
- d) mosaics and drawings made in any technique and on any material, which are more than 50 years old and of value higher than PLN 12,000 (approx. \$2,760);
- e) original works of graphics, original posters, and matrices used for their production that are more than 50 years old and of value higher than PLN 16,000 (approx. \$3,680);
- f) works of painting made using any technique and on any material, which are more than 50 years old and of value higher than PLN 40,000 (approx. \$9,200);
- g) original sculptures, statues, or their copies (made with the same technique as the original) that are more than 50 years old and of value higher than PLN 20,000 (approx. \$4,600);
- h) singular photographs, their negatives, and films that are more than 50 years old and of value higher than PLN 6,000 (approx. \$1,380);
- i) manuscripts that are singular or a part of a bigger collection that are more than 50 years old and of value higher than PLN 4,000 (approx. \$920);

⁷ M. Bieszczad (2020). *Przydatność podejścia historycznego do badań nad polskim prywatnym prawem konkurencji*. "Przegląd Prawniczy TBSP UJ", 1, 54–66.

⁸ Ustawa z dnia 23 lipca 2003 roku o ochronie zabytków i opiece nad zabytkami, Dz.U. 2022 poz. 840, art. 52–62.

⁹ Rozporządzenie Ministra Kultury i Dziedzictwa Narodowego z dnia 18 kwietnia 2011 roku w sprawie wywozu zabytków za granicę, Dz.U. 2011 nr 89, poz. 510.

- j) books that are singular or in collections that are more than 100 years old and of value higher than PLN 6,000 (approx. \$1,380);
- k) individually printed maps or musical scores that are more than 150 years old and of value higher than PLN 6,000 (approx. \$1,380);
- l) botanical, zoological, anatomical, mineral, or coin collections of value higher than PLN 16,000 (approx. \$3,680);
- m) modes of transportation that are more than 50 years old and of value higher than 32,000 PLN (approx. \$7,360);
- n) other monuments that are not specified on the list but are older than 50 years old and of value higher than 16,000 PLN (approx. \$3,680).¹⁰

This extensive list, including the mention of “other monuments that aren’t specified,” essentially covers every existing object of cultural heritage imaginable. While it is definitely a smart move for the legislator to cover its blind spots, these regulations leave potential buyers with the burden of a formalized administrative procedure. According to Polish regulation, anyone who is interested in getting a one-time permit for exporting a monument permanently abroad has to identify himself, specify the object in question, attach a photo of an object, and provide justification for planned export.¹¹ Also, the person applying for a permit has to present a written statement that the object in question is not excluded from permanent export. Monuments that are banned from permanent export altogether (essentially from being sold out to both private and public collections) are those registered as National Treasures or property of treasury and those listed on the National Museum’s inventory.

At first glance, the rules in this particular case may seem a bit excessive, but they are also clear and easy to follow. The regulation that details how to obtain a permit is written in simple instructions and provides templates for mandatory documents.

Historical background

To get a better understanding of where the aforementioned regulations are rooted, a bit of historical contest is needed. Throughout its dynamic history, Poland has suffered from many art lootings and thefts over the ages. The most outstanding of which happened during the Swedish Deluge (1655–1660) and World War II (1939–1945).

According to the Polish Foundation for the Reconstruction of Damage Done During the Swedish Deluge, the conflict resulted in the complete destruction of 88 cities, 186 villages, 81 castles, 136 churches, and 89 palaces.¹² Each of those places had its own unique history and treasures that are now lost forever, either looted or completely destroyed. From the Warsaw Royal Palace alone, invading troops took works of masters such as

¹⁰ Ustawa z dnia 23 lipca 2003 roku o ochronie zabytków i opiece nad zabytkami, Dz.U. 2022 poz. 840, art. 51.

¹¹ Rozporządzenie Ministra Kultury i Dziedzictwa Narodowego z dnia 18 kwietnia 2011 roku w sprawie wywozu zabytków za granicę, Dz.U. 2011 nr 89, poz. 510.

¹² Dzieje.pl (2016, July 14). *Potop szwedzki przyniósł Polsce straty o wartości 4 mld złotych*. <https://dzieje.pl/aktualnosci/potop-szwedzki-przyniosl-polsce-straty-o-wartosci-4-mld-zlotych> (access 20.02.2023).

Rubens, van Dyck, and Dolabella in addition to royal tapestry and even marbles. Royal Crypts and Royal Cathedra in Krakow were also plundered, including a multitude of liturgical instruments such as crosses, chalices, monstrances, and candlesticks.¹³ This attack on cultural heritage had a huge negative toll on the country's general progress and development because it deprived future generations of certain continuity and material evidence of belonging.

However, the largest plunder of Polish heritage, on a historical scale, took place during World War II and was part of the German plan to annihilate Polish culture altogether. Literature, music, film, fine arts, museums, historical architecture, and statues took massive blows within this meticulous and consistently executed plan. The purpose of this demolition was to uproot Polish citizens from their legacy and tradition and to make them feel inferior and consequently easy to manipulate. Methods used for this eradication of Polish culture can be categorized into four main types of activities: destroying monuments, looting, extermination of culture creators, and elimination of its organizational foundations. During the German invasion, concerts and art shows were banned, as well as higher education for artists to halt the nurturing of fresh talents. Various acclaimed artists, including musicians, painters, sculptors, and writers, were presented with the choice to either work for foreign invaders or completely change their occupation, which essentially resulted in the plummeting of their skills as they channeled their artistic energy elsewhere. On the other hand, the desolation of architecture and prominent monuments attempted to annihilate individuality and character in the landscape. The general assumption was that a country without any specific scenery would be easier to blend into the invader's empire. Major architectural landmarks were not only intentionally destroyed but also banned from being restored. Some buildings, like Belweder, for example, were spared but severely mutilated by rebuilding and readapting. Portable objects of cultural significance were consistently stolen either by "official securing" or "loan," or bluntly taken by soldiers. Objects that suffered during the invasion were not only high-value art like paintings or sculptures but also assorted collections and archives. Losses in cultural heritage caused by warfare during World War II were estimated at 235,48 million dollars.¹⁴ The Division for Looted Art, which is a Department within the Polish Ministry of Cultural and National Heritage, is running an online database of wartime losses. To date, it has gathered information on over 63,000 objects, including archives, ceramics, instruments, clocks, dolls, puppets, paintings, coins and medals, vehicles, sculpture, glass, fabrics, carpets, embroidery, lace, furniture, militaria, and jewelry.

This gruesome dive into history, completed with a sequence of formidable numbers and figures, is not merely a complaint about the tragedy within the Polish nation, but rather a background for explaining why legislators decided to form the law the way they did. It is imperative to remember that law is not made in a vacuum but is a

¹³ *Ibidem*.

¹⁴ M. Kłusek, T. Luterek (2022). *Straty Rzeczypospolitej w zakresie kultury i sztuki*. In *Raport o stratach poniesionych przez Polskę w wyniku agresji i okupacji niemieckiej w czasie II Wojny Światowej*, vol. I (pp. 254–301). Instytut Strat Wojennych im. Jana Karckiego. Warszawa, pp. 254–301.

product of times and circumstances. A recovering nation was determined to halt the great loss of its national treasures and made laws correspondingly. Consequently, the protection of national heritage has been incorporated into the Constitution as one of the guiding principles.¹⁵

Case study

Now that the years have passed and the law has had a chance to establish itself within the broader legal system and get assessed during real-life events, it is time to evaluate if it does work and if it is aligned with the wants and needs of its users. The general conflict that occurs within the framework of the aforementioned legal act is between ownership rights as an individual law and the protection of national heritage for the general population. In every case, appointed authorities have to determine which claim is stronger. The Polish legal system allows interested parties to reject the initial decision and get their case resolved by the court. I am going to review three cases concerning exporting cultural heritage abroad, which will allow me to analyze how this matter is being dealt with by the authorities and consequently establish whether the Polish resolution for exporting art abroad is too strict and in need of revision.

The first case, from 2021, concerns an oil painting depicting a simple landscape sold at a Polish auction to a foreign citizen. The buyer, a person living outside of Poland, wanted to leave the country and take his property with him. He applied for the permit and waited for the administrative procedure to be completed. To his surprise, the case took over a year to conclude. At first, his formal application lacked the necessary elements, which was resolved quickly after formal notification from the authorities. In this case, however, authorities took an unusually long time to establish if the painting in question was, in fact, an important piece of cultural heritage, even after getting an opinion from an Art History Professor stating that similar paintings were already in abundance in Polish national collections and that theme, repetition, and poor artistic value made this painting a perfect candidate for permanent export. The administrative body did not seem entirely convinced and waited for a second opinion. The case took so long to resolve that the owner of a painting sued the Polish Ministry for lack of necessary action. The case was resolved in favor of the plaintiff. The court concluded that although, in some cases, thorough and extensive analysis is needed, this was not one of those cases. The Polish Ministry had obtained an outside opinion of a specialist as well as its own expertise and knowledge, which, in the case of a simple landscape, should have sufficed in making a swift decision.¹⁶

The second case revolved around a historical automobile. The car in question was one of a kind and in mint condition. From 1912 to this day, it has been fully functional. Its estimated value was 1160000 PLN in 2019. The car has been an object of court dispute twice in the last five years. Each time, a new owner wanted to export the car

¹⁵ *Konstytucja Rzeczypospolitej Polskiej* z dnia 2 kwietnia 1997 roku, Dz.U. 2009 nr 114, poz. 946, art. 5.

¹⁶ Wyrok WSA w Warszawie z 13 maja 2021 roku, VII SAB/Wa 56/21.

abroad, and each time Polish authorities argued that it was too important and rare to be taken away permanently. Each side of this dispute had strong arguments. The owner claimed that he merely wanted to exercise his ownership rights and that he did not intend to exhibit the car to the public. He claimed that the car did nothing to contribute to cultural heritage as it remained locked in his garage. Moreover, he argued that the car was not originally produced in Poland and its first owner was not even a Polish citizen, which makes his property inconsequential for both Polish history and culture. The Polish Ministry of Culture conducted extensive research to establish the automobile's connection to Polish culture as well as its significance to the automotive industry. Multiple expert opinions showed that the car was one of a kind in the sense that there had never been any others like it. At the beginning of the 20th century, cars were made by special order and customized for the client. In other words, every single car in 1912 was like a Bugatti Divo—made for a few chosen ones as an ultimate sign of luxury and opulence. Despite the obvious material value of a car, researchers showed that although its first owner was not a Pole, the car was still a valuable piece of Polish history and cultural heritage. It was registered and used on Polish territory at one point being a tool of a foreign nobleman who decided to become a Polish citizen and died fighting alongside Poles for their freedom. In this case, the Court sided with the Polish Ministry of Cultural Heritage, arguing that the car was, in fact, too rare and important to give up. The verdict outlined the car's singularity and history established in Polish records. Moreover, the court explained that, given the object's cultural value, keeping it within the country was imperative. The ruling, however, did not negate the owner's right to execute his ownership, just within established frames.¹⁷

In the last case, conflict occurred on a similar basis to the first one. A foreign citizen bought the painting *Peacock's Adventures* by Erna Rosenstein (1913–2004), an acclaimed contemporary artist connected with Grupa Krakowska and Tadeusz Kantor. The buyer wanted to take it abroad to her collection. The Polish Ministry of Culture, however, decided that painting is too valuable for Polish culture and history to be taken permanently abroad. The new owner appealed to the court for the resolution. In this case, the court sided with the plaintiff. Further investigation into the matter revealed that the Polish Ministry collected four different experts' opinions, three of which clearly established that although *Peacock's Adventures* was a moving and masterly piece of art, keeping it inside the country was not essential for the preservation of Polish culture, primarily because there were enough copies of the author's work within Polish museums and collections. Only one, and chronologically last, of the expert opinions argued that the painting was too valuable for export. During the court investigation, the deceased artist's son voiced his concerns about promoting his mother's work abroad and sufficiently celebrating her life's work. It was also pointed out that because of the public nature of the auction where the painting was sold, national museums had access to it as well, but none of them showed any interest in buying it, which may have led to the conclusion that there were enough copies of artists' work in the public domain. The Court overruled the Ministry's decision arguing that even though meticulous analysis

¹⁷ Wyrok WSA w Warszawie z 3 grudnia 2020 roku, VII SA/Wa 1156/20.

of such cases is generally recommended, collecting new opinions until reaching a favorable outcome to one's case is not a proper way of conducting business, especially for the government administrative body.¹⁸

As we can see throughout these cases, exporting art and other objects of cultural significance permanently abroad occurs through rather strict and sometimes lengthy administrative procedures, but the process is not unjust when it comes to promoting Polish art abroad. In two of the three presented cases, the court sided with the plaintiff (new owners), and as a result, two paintings found their places in collections abroad, thus contributing to the promotion of Polish art abroad. In the case of the antique car, the stakes were just too high to let it go. Even though the current owner intended to keep it hidden from the general public, the owner's intentions tend to change with time. There is a high probability that, eventually, the car will find its way to an exhibit or other form of showcase for such a rare and unique object. Another important matter connected with keeping it within the Polish border and, consequently, legal system is the car's general preservation and safety as a historical object of great value. The Polish legal system guarantees certain obligations placed on monument owners that assure the safety and integrity of objects.¹⁹ This is another example of the preservation of cultural property and assuring its safety at the expense of property rights and ownership. However, this case is fully justified. There was too much damage and destruction over the ages to let greed or neglect destroy whatever was left. Imagine for a moment that the current car owner would want to disassemble it and sell it for the parts or make it part of a live explosion, etc. Under different legislation, he might as well be able to do it. I do believe that people should manage their property as they see fit, but in the case of cultural heritage, just as in the case of the environment, we do not merely own it, we are responsible for preserving it for future generations. Therefore, we should do the best we can in that area. A great work of art, by its sheer nature and definition, should last longer than its original owners. Owning it should be treated as a privilege and should carry certain responsibilities.

Conclusion

Conflict between individual and public interest is unavoidable in social dynamics. What is beneficial for one group of people may negatively impact the other. Legal regulations are no exception. It is up to lawmakers, however, to be attentive and flexible enough to create a system that is well-aligned with current needs. When it comes to art export, Polish law is undeniably on the strict side, and it is not hard to imagine how that can cause difficulties for art dealers and art collectors alike. Even if someone is interested in purchasing a certain object and has the means and will to do it, the time-consuming administrative procedure and costs associated with it may not seem worth his while. It is definitely a shame, considering how moving and poignant Polish art can be. Current

¹⁸ Wyrok WSA w Warszawie z 25 maja 2021 roku, VII SA/Wa 278/21.

¹⁹ Ustawa z dnia 23 lipca 2003 roku o ochronie zabytków i opiece nad zabytkami, Dz.U. 2022 poz. 840., art. 28.

regulation, however, was created under challenging circumstances: the country was rebuilding after the war. Years of oppression that tried to actively crush its sense of belonging by destroying heritage and hindering cultural development left it vulnerable and exhausted. The same war trauma that deprived the nation of so many monuments left its people with particular creative sensitivity. For many artists, their work is a way of taming their demons and working through their emotional upheavals.

How, then, do we find a balance between protecting cultural heritage for future generations and letting Polish art thrive abroad?

For starters, a certain hierarchy needs to be created. Establishing a position for Polish art abroad is an important task, but not as important as preserving cultural heritage for posterity. Culture is one of the most significant nation-building factors and has an immense impact on shaping humanity at its core. The current legal system is working towards this goal. As presented in various cases, the general principle is that if an artist is well represented within the public domain, his work can be sent abroad. Only the absolute rarities are kept inside the borders. It may be considered selfish and too intrusive upon someone's property, but when done with care and consideration, it brings more good than harm.

With that being said, there is always room for improvement. Within the current legal system, selling art (especially if it is a monument) to foreign collections is extremely difficult. And that is not beneficial to either preserving or promoting Polish culture. Voluntary sharing of cultural goods between nations should be supported and encouraged by lawmakers. Temporary traveling exhibitions are the embodiment of that principle but are not always the best way to go about it. Sending many valuable objects abroad and bringing them safely back is a massive logistic venture. Due to huge costs, museums might not be able to organize such a venture as often as they would wish. Moreover, temporary exhibits, due to obvious reasons, can only be visited by a limited number of people as they only occupy the space for a certain time. While temporary exhibits are still a great promotion, as they can showcase multitudes of artists' work at once, selling singular works of acclaimed Polish artists to foreign collections could massively improve the promotion of Polish art abroad. As a resolution to this quandary, a simple change in law regulations could be made. By giving museum boards and directors more freedom in selling the art that is under their care, lawmakers could gain an immense advantage in promoting national art abroad. There is no point in keeping valuable objects in storage just for the sake of owning them. If an artist is overrepresented in the public domain, it would be prudent to share his work with the rest of the world while simultaneously gaining extra funds. Boards and Directors are educated, smart people who are well aware of the nature of the collection that is under their care. Therefore, it should be in their discretion to organize it as they see fit.

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