REVIEW OF COMPARATIVE LAW
VOLUME XXII
YEAR 2015

LEGAL ACTS OF THE PROVINCIAL MONUMENT CONSERVATOR[1]. THE NEED FOR RESEARCH ON THE LEGAL ACTS OF THE PROVINCIAL MONUMENT[2] CONSERVATOR

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ABSTRACT

The study of legal acts of the provincial monument conservator is important for several reasons. They are important from the point of view of legal theory and from the point of view of law enforcement.

[1] The term "provincial monument conservator" can also be translated into English as "voivodeship inspector of monuments". Compare e.g. an English translation of the art 89 point2 of the Act of 23 July 2003 on the protection and guardianship of monuments; on the Internet at: //www.unesco.org/culture/natlaws/media/pdf/poland/poland_act2302003_entof.pdf [Access: 10-12-2015 -attention – invalid legal status of the act]

[2] 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 provides a definition of a monument in art 3 point 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;

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The birth of a new branch of law is always met with resistance from those scholars who are used to the good, old, proven and reliable classification schemes. The law, however, is an area in which one of the good, old, proven and reliable features is a continuous change. This is a special "sign of the times" of modern legislation. Permanent amendment is a constant challenge for law researchers. Numerous changes may lead to the situation where a group of legal norms defined as one or several laws begins to look like it has separated from the branch of law from which it stems from. It is a progressive process that may eventually result in the separation within the branch of law, or beyond due to the fact that the legislator consistently introduces variations from the parent branch of the law. The situation is similar with legal norms which may be called monument protection law. It is located at such a point in its evolution that it can be separated, among others, from administrative law, but it is not well established separate branch of law, despite having its own rules, case-law and doctrine. The quest for answers to the question about the future of monument protection law (or more broadly, Cultural Heritage Protection Law[3]) among the branches of law will inevitably be carried out by means of the analysis of legal institutions and the legal status of public authorities. The search for an answer to this question is possible through the research of the legal acts of the provincial monument conservator.

Key words: monument protection law, historical monument, provincial monument conservator

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[3] K. Zeidler, *Prawo ochrony dziedzictwa kultury jako nowa gałąź prawa*. [in] the same (ed.), *Prawo ochrony zabytków.* Warszawa-Gdańsk 2014, p. 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".

is a progressive process that may eventually result in the separation within the branch of law, or beyond due to the fact that the legislator consistently introduces variations from the parent branch of the law. The situation is similar with legal norms which may be called monument protection law. It is located at such a point in its evolution that it can be separated, among others, from administrative law, but it is not well established separate branch of law, despite having its own rules, case-law and doctrine. The quest for answers to the question about the future of monument protection law (or more broadly, Cultural Heritage Protection Law[4]) among the branches of law will inevitably be carried out by means of the analysis of legal institutions and the legal status of public authorities. The search for an answer to this question is possible through the research of the legal acts of the provincial monument conservator.

Balancing the responsibilities in monument protection between the citizen and the state is a difficult matter. In the light of the constitutional protection of property giving duties to the holder of the monument cannot mean the imposition of public burdens which are a covert form of expropriation or discouragement from the guardianship of monuments. Therefore, the evaluation of a regulation in this respect is not just a theoretical consideration, but this is the evaluation of norms, the law intended to have a practical, everyday impact on dealing with the monument by the holder and on their protection of the common good. Hence the question of the place of monument protection law in the legal system. Are we dealing with a new branch of law or just a subsystem within the framework of administrative law? Interpreting imprecise norms requires axiological basis for monument protection system. The positive law should be analysed, in particular in terms of its morality, justice, purpose and legal security. It is my hypothesis that in monument protection law the role of non-legal, customary, moral norms is very important. One of the purposes of scientific research should be seeking answers to the question about the future of

[4] K. Zeidler, *Prawo ochrony dziedzictwa kultury jako nowa gałąź prawa*. [in] the same (ed.), *Prawo ochrony zabytków.* Warszawa-Gdańsk 2014, p. 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".

monument protection law among the branches of the law. The search for an answer to this question must also be carried out through research of the legal acts of the provincial monument conservator.

Before identifying research problems related to the legal acts of the provincial monument conservator, universal problems for these acts should be formulated so that the conclusions of the research could form the basis for the evaluation of their whole system.

First problem : to study the scope of interference of the provincial monument conservator into individual rights.

Second problem: to determine the limits of an acceptable scope of margin of decision in the activities of the provincial monument conservator.

Third problem: to define the impact of the extent of formalization of legal acts of the provincial monument conservator on their effectiveness.

The legal acts of the provincial monument conservator should be the subject of the research, with partial exception of permits which have already been researched and analysed by T. Sienkiewicz, however, since the publication of his monograph entitled 'Permit in monument protection' (2013.), there were further changes in the law on permits[5], which does not make the total exclusion of these acts from the research possible. The major administrative problem will be to determine the limits of acceptable margin of decision in the activities of monument protection authorities. As the most important disadvantage of monument protection law is a vague scope of margin of decision , it will be shown that the lack of clear criteria for the evaluation of the factual state related to the issuing of some formal decisions by monument protection authorities and defining the term "monument" through a factual point of view and not a legal one, can deprive a subordinate entity in administrative relationship of legal security in the exercise of individual rights. The plan of a research on the legal acts of the monument protection authorities should be made according to this research problem, taking into account

[5] See. eg. Regulation of the Ministry of Culture and National Heritage of 14 October 2015. on carrying out conservation, restoration works, construction works, studies of conservation, architectural research and other activities in relation to the monument entered into the register of monuments as well as archeological research and search for monuments (Dz. U. pos. 1789).

administrative police, formalization of procedures, scope of margin of decision in administrative proceedings.

It is therefore necessary to specify the subject of the research through examples, in other words by mentioning the most important legal acts of the provincial monument conservator. Among the legal acts related to administrative regulation it is necessary to distinguish decisions and other legal acts of the provincial monument conservator. The most important legal acts of administrative police and regulation in monument protection are administrative decisions. They are issued mainly on the basis of the Act on protection and guardianship of monuments[6], but not only. They also include decisions issued on the basis of the Act on real estate[7] and the Act on the nature protection[8]. Part of the decisions has a special name: the permit and the decisions based on the Art. 83a on nature protection has a special name: the licence. Among all decisions there is a group of decisions, issued pursuant to the Act on protection and guardianship of monuments ,about entering into the register of monuments and these are as follows:

1) the decision to enter into the register of monuments a historical monument (Art. 9, paragraph 1)[9]
2) the decision to enter into the register of monuments a movable historical monument (Article 10).

Another group of decisions of the provincial monument conservator are permits for activities referred to in the Act on protection and guardianship of monuments in art. 36 paragraph 1 and permits for the temporary export of the monument abroad. The permits issued based on the art. 36 paragraph 1 include the following permits for:

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[6] Act of 23 July 2003 on protection and guardianship of monuments (Dz. U. consolidated text from 2014 item 1446, as amended).

[7] Act of 21 August 1997 on real property management (consolidated text Dz. U. 2015, item 1774, as amended)

[8] Act of 16 April 2004 on the nature protection (consolidated text Dz. U. of 2015, item 1651).

[9] In the procedurę specifica in Art. 9 paragraph. 1 of the Act on protection and guardianship of monuments the surroundings of the monument entered into the register, as well as the geographical, historical or traditional name of this monument can also be entered into the registry.

1) conducting conservation, restoration or construction works on the monument entered into the register;
2) performance of construction works in the surroundings of the monument;
3) conducting conservation research of the monument entered into the register;
4) conducting architectural research of the monument entered into the register;
5) conducting archaeological research;
6) relocating of the immovable monument entered into the register;
7) permanent relocation of movable monument entered into the register in disturbing the traditionally established design where the monument is located;
8) executing a division of the immovable monument entered into the register;
9) changing the purpose or manner of a monument entered into the register or the utilisation of that monument;
10) placing on the monument entered into the register: technical devices, boards or advertisements within the meaning of Art. 2 point 16b and 16c of the Act of 27 March 2003 on planning and spatial development (Dz. U. of 2015. Pos. 199, 443 and 774) and inscriptions, subject to Art. 12 paragraph. 1 of the Act on protection and guardianship of monuments;
11) taking other actions that could lead to disturbance of the substance or changing the appearance of the monument entered into the register;
12) searching for hidden or abandoned movable monuments, including archaeological monuments, using all kinds of electronic and technical devices as well as diving equipment.

The permits issued by the provincial monument conservator for temporary export of monuments abroad include:

1) single permit for temporary export of a monument abroad (Art. 53 paragraph. 1);
2) open individual permit for the temporary export of a monument abroad (Art. 54 paragraph. 1);
3) many-time general permit for the temporary export of a monument abroad (art. 55 par. 1).

The group of permits issued by the provincial monument conservator should also include the permit to resume stopped research, work or other activities concerning the monument (Art. 44 paragraph. 3), whose character allows it to be included both in the group of decisions related to administrative regulation and in the group of decisions related to administrative police, as well as the permit of the provincial monument conservator to sell, exchange, donate or to transfer for perpetual usufruct of real estate entered into the register of monuments, owned by the State Treasury or local government units, as well as making these properties as non-cash contributions (in kind) to companies (Art. 13, paragraph. 4 of the Act on real estate).

Apart from permits, the group of decisions related to administrative rationing includes the permit to remove trees or shrubs issued pursuant to Art. 83a of the nature protection Act.

Legal acts of the provincial monument conservator are also recommendations. They do not have a form of an administrative decision. It is an appropriate form for both administrative regualtion and administrative police. The following can be distinguished:

1) post-inspection recommendations (Art. 40 paragraph. 1) as an expression of administrative police;
2) conservation recommendations (Art. 27) as an expression of administrative regulation.

A manifestation of the activity of the provincial monument conservator is a requirement for obtaining his prior opinion when applying for an approval of a different kind of administration, in other proceedings. The following opinions issued by the provincial monument conservator are the examples of the use of the form of an opinion.

1) Opinion issued pursuant to Art. 9 paragraph 3 point 4f) of 28 March 2003 Railway Act[10]. It is an indispensable attachment to the application of PKP Polish Railway Lines SA or the appropriate local government authorities, to provincial governor to issue a decision on establishing the localization of railway line (art. 9 paragraph. 1 of the above-mentioned Act).

[10] Consolidated text Dz. U. of 2015, item 1297, as amended

2) The opinion issued pursuant to Art. 11paragraph 1 point 8 f) of the Act of 10 April 2003 on special rules for the preparation and implementation of public road investments[11]. It is an indispensable attachment to the request of a proper road manager for the issue by provincial governor or district governor a decision for execution of a road investment project (art 11 paragraph 1 of the above mentioned Act).
3) The opinion issued pursuant to art. 6 paragraph. 1 point 9 i) of the Act of 12 February 2009 on special rules for the preparation and implementation of investments in respect to aerodromes for public use[12]. It is an indispensable attachment to a request of a unit establishing or managing an aerodrome, or Polish Air Navigation Services Agency, to a province governor to issue a decision about approval for the execution of the investment in respect to aerodromes for public use (Art. 3 of the above-mentioned Act).
4) The opinion issued pursuant to art. 11 paragraph 9 point 6c of the Act of 27 March 2003 on spacial planning and development[13] regarding the solutions adopted in the draft study of conditions and directions of spatial management of urban or rural commune.
5) Before submitting the draft project of landscape audit for passing by the Regional Council the regional board gets the opinion about the project from the provincial monument conservator (Art. 38b paragraph. 2 point 2 c) of the Act on spacial planning and development)
6) Where it is justified by the nature of the revitalization area, once the municipal council passes resolution to start proceeding with the municipal revitalization program, the mayor, the head of the commune or president of the city applies for a consultation on the draft of municipal revitalization program for the provincial monument conservator in terms of the forms of protection of monuments (Art. 17 paragraph. 2 point 4b second tiret of the Act on revitalization[14]).

[11] Consolidated text Dz. U. of 2015, item 2031.

[12] Dz. U. No. 42, item 340, as amended

[13] The Act of 27 March 2003. on planning and spatial development (consolidated text. Dz. U. of 2015., pos. 199, as amended).

[14] Act of 9 October 2015 on revitalisation (Dz. U. item 1777).

Another form of interference with the provincial monument conservator into individual rights is a form of agreement contained in the above mentioned Act of 27 March 2003 on planning and spacial development.

1) Once the municipal council passes resolution to start proceeding with the local plan, the mayor, the head of the commune or president of the city applies for agreement on the draft plan i.e. with the relevant provincial monument conservator in respect to shaping the master plan of the area[15].
2) Decisions issued pursuant to Art. 51 par. 1 of the Act on spacial planning and development (the location of an investment for public use) shall be issued after having agreed with i.e. the provincial monument conservator – in relation to the areas and objects covered by forms of monument protection, referred to in the art. 7 of the Act on protection and guardianship of monuments and included in the municipal list of monuments[16].

Legal acts of the provincial monument conservator appropriate for administrative police in monument protection can also be distinguished into administrative decisions and other forms. Administrative decisions include mainly the decision to stoppage of various activities issued on the basis of the Act on protection and guardianship of monuments. They are administrative decisions to stoppage the following actions performed without the permission of the provincial monument conservator or in a manner not conforming to the scope and conditions specified in the permit for:

1) conservation, restoration works, restoration or architectural research carried out in relation to a monuments entered into the register (art. 43 point. 1);
2) construction works carried out in relation to a monument entered into the register or in its surrounding (art. 43 point 2);
3) archaeological research (art. 43 point 3);
4) relocation of immovable monument entered in the register (Art. 43 item 4);

[15] Art. 17 item 6 b) eighth tiret of the act on planning and spacial development.
[16] Art. 53 par 4 item 2 of the Act on planning and spacial development.

5) permanent relocation of movable monument entered into the register in disturbing the traditionally established design where a monument is located (Art. 43 item 4);
6) the division of immovable monument entered in the register (Art. 43 item 4);
7) placing on the monument entered into the register: technical devices, boards or advertisements the meaning of art. 2 point 16b and 16c of the Act of 27 March 2003 on spacial planning and development (Dz. u. of 2015. Pos. 199, 443 and 774) and inscriptions, subject to Art. 12 paragraph. 1 of the Act on the protection and guardianship of monuments(art. 43 item 4);
8) taking other actions that could lead to disturbance of the substance or changing the appearance of a monument entered into the register; (art. 43 item 4);
9) searching for hidden or abandoned movable monuments, including archaeological monuments, using all kinds of electronic and technical devices as well as diving equipment. (Art. 43 item 4).

The group of decision on stoppage the actions includes also a decision on stoppage conservation, restoration or construction works in relation to a monument not entered in the register (Art. 46 paragraph. 1).

In addition to the decision on stoppage the actions there is also a group of decision ordering to take specific actions. That group includes the following decisions:

1) ordering the restitution of a monument to its former state specifying the time limit for carrying out these actions (Art. 44 paragraph. 1 item 1, Art. 45, paragraph 1, item 1);
2) ordering the arrangement of the site specifying the time limit for carrying out these actions (Art. 44 paragraph. 1 item 1, Art. 45 paragraph. 1 item 1);
3) imposing an obligation to obtain a permit from provincial conservator for carrying out the previously stopped research, works or other actions in relation to a monument (Art. 44 paragraph. 1 item 1);
4) imposing an obligation to take specific actions in order to ensure the conformity of research, works or other actions carried out in relation to the monument to compliance with the scope and con-

ditions specified in the permit, indicating the time limit for carrying out these actions (Art. 44 paragraph. 1 item 3);
5) obliging to bring the monument to the best possible condition by means of the indicated methods and within the specified time limit (Art. 45 paragraph. 1 item 2);
6) ordering to carry out conservation or construction works (Art. 49 paragraph. 1).

Another group of administrative decisions constitute the decisions verifying the scope of rights and obligations of a subordinate entity in administrative relationship specified individually based on an administrative decision which includes a decision on cancellation:

1) single permit for temporary export of a monument abroad;
2) open individual permit for the temporary export of a monument abroad;
3) many-time general permit for the temporary export of a monument abroad (art. 56 par. 1);

and also:

4) The decision to change or reverse a permit issued pursuant to Art. 36 paragraph. 1 (Art. 47);
5) permit for the recommencement of the stopped research, works or other actions carried out in relation to a monument (Art. 44 paragraph. 3) – already mentioned above.

On the basis of the above mentioned forms, it should be noted that the legal forms of the provincial monument conservator can serve a very radical interference into property law. The examples of which are the following decisions that deal with:

1) specifying the amount of the claim of the State Treasury on account of the substitute carrying out conservation or construction works, their scope and the due date of this claim (Art. 49 paragraph. 3);
2) securing a movable monument entered in the register in the form of establishing temporary seizure (Article 50, paragraph 1);
3) becoming a property of the State Treasury (Art. 50, paragraph. 4 item 1).

Provincial monument conservation may also submit requests aimed to restrict the exercising or deprivation of property law, the requests being the following:

1) tacit mortgage on the real property (Art. 49, paragraph. 4);
2) temporary seizure occupation on a monument property (Art. 50 paragraph. 3);
3) expropriation of immovable monument (Art. 50, paragraph. 4 item 2).

In addition to the forms resulting from administrative law it should be noted that the provincial monument conservator shall carry out the actions in respect to criminal law and misdemeanour law, an example of which is a notice of a crime or misdemeanour (Art. 41 of the Law on protection and guardianship of monuments, see Art. 304 Code of Criminal Law), or apply the legal instruments such as the an indictment brought by him as a prosecutor in criminal proceedings or a request for penalty brought by him as a public prosecutor (Art. 95 paragraphs 2 and 3 of the Act on the protection and guardianship of monuments). He shall also use forms appropriate to the civil law (see. e.g. the agreement with Art. 75 of the Act on protection and guardianship of monuments). The above mentioned forms demonstrate selected examples giving an idea of the powers of provincial monument conservator.

Considering the scope of interference of the provincial monument conservator into individual rights the essence of administrative regulation and administrative police must be referred to. A regulatory function of administration, as written by J. Lukasiewicz, "can be reduced to unilateral do's and don'ts, to the imperious influence of administration on various spheres of life of citizens. This function is mainly implemented through the coercive measures. Needless to say, such measures are of potential character- their use is supposed to guarantee effectiveness of coercion. Imperious quality of administration requires justification of actions by authorizing provisions"[17]. Administration activities concerning the safeguarding of cultural heritage contain characteristics of both administrative regulation and administrative police[18]:

[17] Compare J. Łukasiewicz, *Zarys nauki administracji.* Warszawa 2007, p. 142.

[18] About administrative police see also in: T. Sienkiewicz, *Przesłanki skuteczności policji administracyjnej.* [in:] T. Guz, W. Bednaruk, M.R. Pałubska (eds.), *Ius et historia. Ksiega pamiątkowa dedykowana Profesorowi Jerzemu Markiewiczowi*. Lublin 2011.

1) administrative regulation – because administration authorities provide a subordinate entity in administrative relationship with a sphere of possible action;
2) administrative police – because monument protection authorities are equipped with a range of competences of a coercive and controlling nature, which are reinforced by a series of penalty provisions, not only administrative, but also of criminal nature.

Conditions of regulation are even defined in the Constitution. This deprivation of liberty may take place only in situations prescribed by law. No one shall be compelled to do that which is not required by law[19] – as the Constitution states. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights[20]. Administrative regulation restricts through a legal norm of the law the freedom of legal entities to conduct some activities**,** because of the values protected by the law more important than the values that are subject to limitation. It occurs in an administrative relationship. It means that at least one party of this relationship is public administration authority that can, in an imperious way, determine the rights and obligations of the entity applying for an abolition of legal restrictions in its current or planned activities.

The verification of the fulfilled conditions in regulation procedure is done through activities called administrative police. The main difference between administrative regulation and the administrative police is the essence of carrying out the verification. Regulation is a form of determining the limits of freedom of the entity applying for a special status in respect to other entities involved in legal transactions. Controlling activities included in the scope of administrative police usually refer to the fulfilment of the conditions to carry out a given activity, e.g. in relation to the monument. These controlling activities do not need to occur at the beginning of a regulated action. In the case of activities called administrative

[19] Art. 31 par. 2 sentence 2 of Constitution of the Republic of Poland.
[20] Art. 31 par. 3 Constitution of the Republic of Poland.

police, the verification usually occurs not only at the beginning, but also in the course of carrying out a regulated activity, and therefore this police means a wide range of legal means of a controlling and coercive nature. At the beginning of an activity covered by regulation there is usually a choice – it can either be undertaken – through an authorization, permit, etc., or not. When public administration undertakes police operations, a subordinate entity in administrative relationship has to prove the fulfilment of the statutory prerequisites or conditions set out in the procedure of regulation. The administration by applying police activities has significant influence on the entity engaged in regulated activities, due to the fact that after obtaining special rights in the procedure of regulation , it has to meet certain requirements, and if they are not fulfilled, it most often bears the consequences in the form of sanctions, even a criminal one. "The essence of the concept of <<the police >> in a functional sense is defined by:

1) an objective, which is to protect the interests of the state specified by the law established before violations or restore the state before the breach;

2) the ability to use coercion as a means to achieve this objective.

It should also be stated that the police is by nature a negative nature, in other words it only serves to remove threats to the public interest, and is not directly addressing the social needs"[21] – writes B. Dolnicki.

The concept of regulation is ambiguous, but always associated with some restrictions of human freedom[22] The very concept is quite controversial[23] The limitations of the regulation may be either substantial or for-

[21] B. Dolnicki, *Nadzór nad samorządem terytorialnym*. Katowice 1993, p. 63.

[22] See C. Kosikowski, *Prawo gospodarcze publiczne.* Warszawa 1994, p. 121-122 – Rationing constitutes a special kind of state activity that involves the application of legal imperative measures and aimed at creating specific conditions necessary for the proper conduct of organizing economic relationp. His activum is reflected in the possibility of taking in a specific cases defined by law temporary interference with a domain of legally restrained independence of business entities. Within the legal understanding regulationg means the possibility of administration of interfering with the domain of the rights of the business entities in respect to appropriate individual rights of those entities".

[23] Zob. T. Kocowski, *Reglamentacja działalności gospodarczej w polskim administracyjnym prawie gospodarczym*. Wrocław 2009, p. 60 – „It is the notion of legal language , not legislative , which of course makes it to have been applied and being applied now in various meanings, often without explicit clarification of the sense in which it has been used . When describing the phenomena occurring in the economy it has traditionally been associated

mal[24]. It should also be pointed out that the state, through its coercive apparatus, may enforce restrictions on freedom that have nothing to do with the law or the civilized administration that respects the law. Limiting the rights of individuals will be able to bear the name of administrative regulation if the national community will introduce restrictions on freedom for the common good. Otherwise it will not be an administrative regulation, but an administrative fear[25].

The concepts of administrative regulation and administrative police do not mean the same, even though both manifestations of administration to some extent restrict human freedom. In the literature, there are three types of views on this issue – administrative police equates administrative regulation or it is thought to be a part of the administrative regulation, or both the administrative police and administrative regulation are treated as separate and equal functions[26]. The administrative police should certainly be counted as one of the spheres of the interference of administration[27].

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with with specific, executed mainly by means of imperative measures, the influence of the state on the economy which aimed at restriction of the freedom of economic activity , namely the scope of freedom of taking and running a business activity."

[24] See M. Waligórski, *Administracyjnoprawna reglamentacja działalności gospodarczej.* Poznań 1994, p. 27-Determining the nature of administrative rationing of economic activity it can be therefore assumed , in the broad sense that it consists in stipulated by law restricting the freedom in respect to taking and running economic activity. The restrictions of the freedom of establishing and running economic activity are set forth in the legislation by substantial and formal conditions".

[25] Compare T. Sienkiewicz, *Przesłanki przemiany prawa w terror.* Roczniki Wydziału Nauk Prawnych i Ekonomicznych KUL, T. II, Z. I, 2006, p. 35-50.

[26] See J. Boć (ed), *Prawo administracyjne.* Kolonia Limited 2007, p. 355-356.

[27] See there also, p. 355 i n.; the author indicated in the chapter titled: *Sfery ingerencji administracji* – administrative police, rationing, tangible benefits, intangible benefits and ban on administation interference. As T.Kocowski indicates: „In the literature related to the subject it is indicated within the sphere of rationing activity of the administartion one distinguished so called a sphere of so called administrative police. It is stressed that administrative police administrative is not a normative concept (ignoring the provisions of the national police), it constitutes a product of literature , and as a concept-tool it is used to identify the specific relationship between an entity (a citizen, an entrepreneur) and administration acting for the public interest, addressing a number of primarily commanding protective actions ensuring the exercising of administrative substantive law. The police becomes currently again one of the essential functions executed by the state bodies also in the domain of economics becoming more significant, which seems to be proven by

It should be noted that the objective and purpose of regulation and of police are different. "In particular, police has to ensure the inviolability of the existing order, property and some individual rights of human being that are subject to legal administrative protection."[28] J. Boć indicates that regulation" has also creative functions in terms of purposeful shaping of economic activity. Other differences ,relevant to legal acts, illustrate the frequency and a variety of designs of discretionary norm(in regulation the content of decision is covered by discretion; in police – the interpretation of the legal condition for resolving e.g. a concept of public order), and the different role of policy in relation to public administration and policy in public administration, an uneven stability of the legal basis, way of formation of legal situations, the effectiveness and scope of securing the evidence for the court proceedings, and finally the time frame of situations defined by imperious forms"[29]. Moreover, the "contemporary overlapping of scopes of police and regulation means that these scopes developed historically and independently of each other in that sense that police was ahead of regulation and regulation absorbed the police"[30]. Both administrative regulation and administrative police are reflected in the legal acts of the provincial monument conservator[31].

The aim of future research should demonstrate the advantages and disadvantages of formalization of legal acts of the provincial monument conservator. It must be shown through examples how regulation works in practice. It should be an attempt to analyse the system of monument protection with special reference to inequality of entities in administrative relationship when the formalization and the scope of margin of decision are incorrect. The obligation to obtain approval of administration authority constitutes an interference of public authorities into individual rights, especially those derived from property law. The necessity of prior acceptance by administration of any decision always constitutes a restriction on

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extension of a catalogue of properties protected with police provisions in the economics with a value defined as <<public morality>>." T.Kocowski, *Reglamentacja…,* p. 83-84.

[28] See J. Boć (ed), *Prawo administracyjne.* Kolonia Limited 2007, p. 356.

[29] Ibid.

[30] Ibid.

[31] See T. Sienkiewicz, *Pozwolenie w ochronie zabytków*. Lublin 2013, p. 91-105.

human freedom. The degree of this restriction must not destroy human being's freedom as human being has the right to have a control over their property, including a historical one. Hence a basic question: how to determine the scope of interference of the provincial monument conservator so that there are no violations of individual rights while acting in the public interest, namely protecting monuments? The results of planned research should answer this question.

Teleological dimension of the interference of public structures into individual rights arising from the statutory definition of monument protection directly affects the shape of the legal status of the holder of a monument in administrative law. This is a current research area for several reasons. Firstly – administrative law is characterized by inequality of entities in administrative relationship. The dominance of public authorities in monument protection law is particularly evident while expressing the intention of performing some significant activities in relation to the monument. The interference of public administration authority into the intention – before taking some action in relation to the monument is an important limitation of the individual rights. A question must be answered in what way a compulsory contact with the public administration the fact of holding the monument affects the respect for individual rights. The extent of formalization and margin of decision should be indicated. Secondly – the system of monument protection based on the actions of many public institutions could work more efficiently. Defining the defects of the law can be a basis for a design of the changes in this respect. Thirdly – the lack of administrative and legal literature on the legal acts of the monument protection that cover this issue thoroughly.

The impact of the formalization of legal acts of monument protection authorities particularly in the norms of administrative law on the implementation of individual rights of the holder of the monument should be examined. Incorrect scope of formalization deepens the inequality of entities in a public law relationship at the expense of an applying entity. This is due to the strengthening of the position of administration to subordinate entity by means of a number of formal requirements to be fulfilled by the applicant exercising their own individual rights. Unauthorized excessive domination of administrative legal situation by the public authorities occurs when equipping it with numerous powers of administrative police,

without specifying the obligations of a subordinate entity or giving them obligations in disproportionate numbers to its purpose and scope. The results of the research should show at least some significant issues related to administrative law, affecting the situation of this specific group of applicants, primarily petitioners to the provincial monument conservator. The study of the rights of a subordinate entity in public law shows that it is significant from a social point of view because incorrectly established public law can lead to abuse of power. When one of the parties is an entity whose status requires the acceptance of administration to exercise its rights, it causes an unfavourable legal situation for them because there is a tendency of the state to abuse their privileged position. This may result in actual discrimination arising from the holding of the monument. For these reasons, this area of research is an important legal problem from a practical point of view. The relation of the state to the people dependent in some way on the acceptance of administration in the exercise of their individual rights determines the character of the state – whether it is a liberal, welfare, totalitarian etc. state. In accordance with the art. 5 of the Constitution of the Republic of Poland shall safeguard its national heritage. An important research problem is to answer the question whether current legal norms allow us to effectively do so using legal acts of the provincial monument conservator.

Another important problem to be researched is the scope of formalization and margin of decision. In particular, whether the incorrect extent of formalization and margin of decision are a source of administrative fear. A question must be answered whether the prohibition of discrimination is respected and if the monument protection law now helps or interferes into the exercise of individual rights of the holder of the monument. The domestic sources of law should primarily be taken into consideration, despite the fact that the issues of culture protection are also present in the international context.

The current state of knowledge in the field of legal research of the legal acts of monument protection authorities should result mainly from analyses of normative acts that have been in place for many years. The legal acts of monument protection authorities were formalized in varying degrees; in the decree of the Regency Council on the guardianship of monuments of art and culture of 31 October 1918. (Dz. U. Pr P. P (Journal of Laws of the

Polish State)1918. No. 16, pos. 36), in the Regulation of the President of the Republic of 6 March 1928 on the guardianship of monuments (Dz. U. No. 29, pos. 265), in the Act of 15 February 1962 on protection of cultural property (the original text: Protection of cultural property and museums) (Dz. U. No. 10, pos. 48, as amended), as well as the current Act of 23 July 2003 on protection and guardianship of monuments (consolidated text. Dz. U. of 2014. pos. 1446, as amended). Therefore, because of history of rulings of conservation authorities, this topic deserves a scientific research.

The topic of interference of public structures into human freedom in the form of administrative regulation and administrative police is mentioned in a lot of studies, which cannot be said for monument protection law. Monument protection law was commented mainly by J.P. Pruszyński, W. Sieroszewski and contemporary scientists – M. Cherka, M. Drela, P. Dobosz, R. Gołat, A. Jagielska-Burduk W. Kowalski, M. Trzciński, K. Zalasińską, K. Zeidler. In the legal literature there are present publications from international law[32] and legal civil[33], criminal[34] and philosophical[35] works. Administrative issues were primarily raised in monographs of J.P. Pruszyński[36], P. Dobosz[37] and K. Zalasińska[38]. However, apart from the monograph by Tomasz Sienkiewicz entitled Permit in monument protection, there are no scientific studies of the legal acts of the monument protection authorities. This justifies a legal research of the legal acts of the provincial monument conservator and shows their significance from the

[32] See e.g. J. Zajadło, K. Zeidler, *Prawna ochrona zabytków na wypadek wojny*. Ochrona zabytków, Nr 1-2/2003.

[33] See e.g.. M. Drela *Własność zabytków*. Warszawa 2006.

[34] See e.g. M. Trzciński, *Przestępczość przeciwko zabytkom archeologicznym.* Warszawa 2010.

[35] See e.g. K. Zeidler, *Restytucja dóbr kultury ze stanowiska filozofii prawa.* Warszawa 2011.

[36] See e.g.. J. Pruszyński, *Ochrona zabytków w Polsce. Geneza. Organizacja. Prawo.* Warszawa 1989; J. Pruszyński, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna.* Vol. I and II, Zakamycze 2001.

[37] See e.g. P. Dobosz, *Administracyjnoprawne instrumenty kształtowania ochrony zabytków*. Kraków 1997.

[38] See e.g. K. Zalasińska*, Muzea publiczne. Studium administracyjnoprawne*. LexisNexis 2013.

point of view of not only the development of the doctrine of monument protection law or administrative law.

The overall study plan should comprise the following four main stages:

1) critical analysis of existing sources of law and a summary of the conclusions drawn from the analysis of the constitutionally defined task of safeguarding national heritage;
2) the scientific query about the latest critical studies concerning the activities of monument protection authorities;
3) study of the case law on the use of legal facts of monument protection authorities;
4) analysis of the implementation – an evaluation of the law in action in the application of legal acts of the provincial monument conservator;

Specific research objectives should be formulated as follows: to examine the scope of interference of the provincial monument conservator into individual rights; to determine the limits of acceptable scope of margin of decision in the activities of monument protection authorities; determine the effect of the extent of formalization of legal acts of monument protection authorities on their effectiveness ; to examine the impact of specific characteristics of the legal acts of monument protection authorities on the place of monument protection law in the legal system. In the light of these objectives a critical analysis of existing sources of law and a summary of the conclusions drawn from the analysis of the constitutionally defined task of safeguarding the national heritage should be made. Logical and linguistic analysis of normative acts regarding legal acts of the provincial monument conservator must be carried out in the context of administrative (construction law, planning and spatial development, supervision of conservation, monument and nature protection), civil, criminal and misdemeanour law. These regulations should be evaluated. The analysis of conceptual grid will help determine the legal status of the entity in monument protection law. A parallel query might be done about the latest scientific critiques concerning the activities of monument protection authorities and study of the case law on the use of the legal acts of monument protection authorities. Comparative study of legal facts of the provincial monument conservator will make it possible to assess the relevance of the application of conditions for issuing administrative decisions by the provincial monument

conservator. The study of the merits of the scope of margin of decision of the provincial conservator in individual legal acts and their degree of formalization will enable to assess whether the changes concerning the extent of formalization of these acts are relevant The analysis of the provincial monument conservator activities should be conducted with the help of public information requests. Evaluation of the activities must be done in accordance with the law. Conclusions from the study will show the scope of interference of the provincial monument conservator into individual rights and will make the evaluation of the extent of that interference possible. At the end, there will be a study of the admissibility of a theoretical concept of the individual's right to the protection of national heritage and the admissibility of the arguments for the creation of a new branch of law – monument protection law. Interdisciplinary quality of legal research of the legal acts of the provincial monument conservator stems from the fact that as a public administration authority it may be in monument protection cases: a party – in administrative and civil proceedings; auxiliary prosecutor – in criminal proceedings; public prosecutor – in misdemenaour proceedings. Thus, among the researchers , in addition to experts in administrative law, there should be an expert in civil law and an expert in criminal law or misdemeanour law.

Preliminary studies on the legal acts of monument protection authorities have already been carried out. Recently published work covering a small portion of this reality, as an introduction to further research in this area is the habilitation monograph by T. Sienkiewicz entitled Permit in monument protection, Lublin 2013. On the basis of experience arising in the course of studies, a thesis about the legitimacy and possibility of examining the legal acts of the provincial monument conservator can be justified. Due to the vastness of the subject, the works are planned to last 36 months. It should be added that in addition to the scholarly work – teaching at the Catholic University of Lublin, the manager of this project has been working as a legal counsel in the Regional Office for Monument Protection in Lublin for more than four years, which makes him knowledgeable about the application of the law by the monument conservator in Lublin voivodeship.

Results of preliminary tests formulated especially in the above mentioned monograph Permit in monument protection, supports conclusion

that the main drawbacks of monument protection law is a vague scope of margin of decision stemming from: 1)an open directory of permits, resulting in deceptively defined obligation; 2) the lack of precise criteria of the evaluation of the factual state related to the issuing of a permit or a refusal to do so; 3) defining the term "monument" through the factual prism, not legal, which for the subordinate entity in administrative relationship, may result in the deprivation of legal security in the exercise of individual rights.

The scope of margin of decision in monument protection will often be defined by extralegal custom, the case law in similar cases, as well as the theory of conservation. Legislative work undertaken in the near future should aim to ensure legal security for both parties of administrative relationship-both subordinate entity, as well as public administration authority by clarifying the conditions to be evaluated and the deformalization of proceedings. This should result in the efficient implementation of procedures for the verification of the conditions for granting or refusal of any permits. This is important due to the fact that by giving permits public administration interferes into individual rights. These changes are necessary because, according to the Preamble of the Constitution, public institutions, including administration of monument protection should be reliable and efficient – to protect the common good.

The methodology to be used in planned studies will be based on a dogmatic, comparative and historical method. Legal hermeneutics and empirical method will also be applied. During the analysis of normative acts, particular attention will be paid to the quality and morality of law. The law quality criteria defined by Gustav Radbruch will be adopted as a starting point of the evaluation of a regulation: justice, purpose and legal security, and also morality of law, and also "eight ways to fail in making laws" outlined in the work of Morality of law[39] by Lon L. Fuller.

Dogmatic method is irreplaceable in the interpretation of provisions, often with legislative errors, including logical ones. This method is used when examining language used in legal acts primarily in terms of its clarity and unambiguity. The language used by the legislator is of particular importance in determining the meaning of terms, including determining

[39] Warszawa 1978, p. 68 and the following

definitions. This method will be of particular use when making critical comments of regulations. The interpretation should be made in accordance with the rules of legal studies[40]. Positive law will also be analysed in terms of a question whether the equality of recipients of substantive or procedural norms is maintained. The historical method shows changes in the legal acts of monument protection over many years. Subsequent amendments to the legislation determine the directions that indicate progress towards a particular model of the state, as well as determine the directions of changes in the system of monument protection. In examining the law it should be kept in mind that the law is the expression of the will of the people, and at the same time the law is a set of norms related to the state. The purpose of the state and of the law are inseparable[41] . By examining the purpose of the law we can find the answer to the question about the purpose of the state, about the scope of protection of public interest, also in monument protection. In addition, the comparative method might be worth using in analysing legal norms. Legal hermeneutics[42] and empirical method could also be used.

Among these methods special attention should be paid to the comparison of different legal acts of the provincial monument conservator. The comparative study may involve legal institutions[43], also compared in administrative dimension[44]. It is an utilitarian art[45]. In this utilitarian sense, it is worth using a comparative method to determine the meaning

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[40] Compare Ibid, p. 159.

[41] See G. Radbruch, *Zarys filozofji prawa.* Warszawa-Kraków 1938, p. 72.

[42] More about hermeneutics see in: J. Stelmach, B. Brożek, Metody prawnicze. Zakamycze 2004, p 224 and the following

[43] See. R. Tokarczyk, *Komparatystyka prawnicza.* Zakamycze 2002, p.70 – „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"..

[44] Compare J. Łukasiewicz, *Słowo o systematyzacji badań komparatystycznych w zakresie zjawisk administracji publicznej.* [in:] M. Bujňáková, J. Łukasiewicz, (ed), *Aktualne problemy prawa w Republice Słowackiej i Rzeczypospolitej Polskiej. Międzynarodowa Konferencja Naukowa Rzeszów, 19-21 April 2004* . Rzeszów 2005, p. 288.

[45] See. Z. Brodecki [in:] Z. Brodecki, M. Konopacka, A. Brodecka-Chamera, *Komparatystyka kultur prawnych*. Warszawa 2010, p. 15 – „The usefulness of comparative law is its decisive quality ".

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[46]. 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"[47]. In the history of Polish law 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"[48]– as is noted by M. Pozniak – Niedzielska. 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[49]. It is also a part of the evaluation of the law, for example its quality. Comparing

[46] Compare M. Ancel, *Znaczenie i metody prawa porównawczego. Wprowadzenie ogólne do badań prawno porównawczych.* Warszawa 1979, p. 157„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".

[47] M. Rybicki, *Badania prawnoporównawcze. Ich znaczenie dla rozwoju nauk prawnych i dla praktyki*. [w:] A. Łopatka (ed.) *Metody badania prawa. Materiały sympozjum Warszawa 28-29 IV 1971 r.* Wrocław, Warszawa, Kraków, Gdańsk 1978.,p. 29.

[48] M. Poźniak – Niedzielska, *Komparatystyka w polskim prawie cywilnym*. [in:] *Folia Societatis Scientiarum Lublinensis*. Vol. 26. 1984. HUM. 2.

[49] See R. Tokarczyk, *Komparatystyka…*, p. 34. – „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."

is also used in public institutions during various processes related to their functioning. There are also various criteria for comparison.

The comparison can be made in a historical 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[50]. 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 multifaceted 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[51]. 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

[50] See Z. Brodecki, M. Konopacka, A. Brodecka-Chamera, *Komparatystyka…,* s. 17 – „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".

[51] About multi-faceted quality of comparative study of the law see in: R. Tokarczyk, *Komparatystyka…*; about comparison of legal cultures see in: Roman Tokarczyk, *Współczesne kultury prawne*. Kraków 2003.

law)"[52] -writes Z. Brodecki. 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[53]. The view that comparative law is not considered as an independent scientific discipline is present in the literature[54], and some point out that this is a comparison of laws, which is a part of the comparative literature[55]. When monument protection law uses comparative legal method many concepts undefined by the legislator can be clarified[56.] The comparison of legal acts of monument protection shows the conditions of making positive and negative decisions in the whole system of these acts.

Justifying the research of the legal acts of the provincial monument conservator in an interdisciplinary aspect, it is still worth keeping in mind that the results of these studies will provide arguments in favour or against the concept of creating a new branch of law relating to monument protection. K. Zeidler asks about the status of cultural heritage protection law in the legal system and gives the following answer :"It can now be regarded as a specific and comprehensive branch of the law (...). It is interdisciplinary, which means it contains regulations in the field of constitutional law, international law, administrative law, criminal law, civil law and so on. It is also based on the methods of regulations specific to these branches of law. Limiting this branch of law (…) to only one of the so-called classical branches of law, e.g. to administrative law, is,

[52] Z. Brodecki, M. Konopacka, A. Brodecka-Chamera, *Komparatystyka…*, p. 16.

[53] See. R. Tokarczyk, *Komparatystyka…*, p. 27-28.

[54] See . M. Rybicki, *Badania…*, p. 31 – „there is no sufficient arguments to consider >>comparative law<< as an independent, autonomous discipline".

[55] See R. Tokarczyk, *Komparatystyka…*, p. 28 – „Comparative law is essentially a comparison of rights, comparative study of the law, which belongs to the broader concept of comparative literature".

[56] Compare M. Rybicki, *Badania…*, p. 35 – „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".

from a methodological point of view, a mistake“[57]. Each branch of law separates itself from others also through its own distinctive legal acts. For these reasons, it is worth conducting a research on the legal acts of the provincial monument conservator.

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[57] K. Zeidler, *Prawo ochrony dziedzictwa kultury jako nowa gałąź prawa*. [in:] the same (ed.), *Prawo ochrony zabytków*. Warszawa-Gdańsk 2014, p. 32-33, see par. 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”.

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