

# SHORT COMMENTARIES

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## Trade and Export of Archaeological Cultural Goods: A Conflict of Ideas

**Abstract:** Under Polish law objects that are archaeological cultural heritage discovered, accidentally found, or acquired as a result of archaeological research, are the property of the state. This is the situation of the original acquisition of the monument. As a further

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consequence, archaeological monuments are excluded from trade (becoming *res extra commercium*). Besides trade, the export of archaeological cultural goods is also highly problematic. In the case of permanent export of a monument abroad, the law imposes the obligation to obtain a permit for such permanent export, issued by the minister responsible for culture and the protection of national heritage. The regulation in Polish law makes it almost impossible for any archaeological cultural goods to be legally exported. The restricted freedom on the market of works of art and monuments in relation to archaeological finds, together with the limited options of mainly temporary export, have created high activity in the black market, calling for a change of approach of the national law towards archaeological heritage. This leads to the question: Should we introduce some legal changes in the ownership rights of archaeological heritage to bring it closer to people?

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**Keywords:** archaeological heritage, ownership of cultural property, export of cultural property, art market

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### Introduction of the Systemic Approach

The discussion we present in this article is placed within the liberalism versus communitarianism dispute, which is one of the most important ideological disputes in our times.<sup>1</sup> The central ideas to be discussed are: ownership of cultural goods; their possession, trade, and export and import; and finally – which seems to be the most important – the Polish cultural heritage law and the protection of archaeological heritage in Poland. On the one hand, there is the idea of a free market and free movement of the archaeological cultural property (which is representative of the liberalism approach), while on the other, there is the concept of the state's ownership of each and every archaeological heritage object (which is representative of the communitarianism approach). The latter is focused on the protection and preservation of cultural heritage; while the former is focused on the protection of private owners' rights. The resolution of this overarching difference in cultural heritage law, especially insofar as concerns the process of applying the law, involves searching for a fair and just solution between the two important and contradictory values represented by liberalism and communitarianism.

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<sup>1</sup> See more: K. Zeidler, M. Łągiewska, *Liberalism Versus Communitarianism in Cultural Heritage Law*, "International Journal for the Semiotics of Law" 2021, Vol. 34(3), pp. 657-668.

Ownership rights as they were formed already in Roman law are rights *in rem* and represent the only complete right to a thing. They are the broadest subjective rights, allowing the owner to use a thing to the exclusion of others, and within its framework an owner enjoys the maximum of rights over the thing. Traditionally, the bundle of rights of the owner consists of: *ius possidendi* (the right to possess), *ius utendi* (the right to use), *ius fruendi* (the right to derive benefits), and *ius disponendi* (the right to dispose of).<sup>2</sup> Property, of course, is subject to legal protection. It is sometimes defined both positively and negatively, by indicating the rights of the owner or by specifying the limitations of non-owners in relation to the object of ownership.<sup>3</sup>

However, property is not only a legal category. It is also a category of other social sciences such as, in particular, psychology, sociology, economics, and political theory. Thus property is not only of great social and economic importance, but also of political significance. It affects the sense of stability of citizens, and in modern states is also the basis of socio-economic development. On psychological grounds it is pointed out that possession, or the desire to possess, belongs to the nature of humans. Possession of something has very important psychological and behavioural effects. Possession plays an important role in the self-identification of a person, and determines the formation of his or her identity. Thus, for example, an increase in one's state of possession gives rise to a positive effect, i.e. an increase in self-esteem, while the loss or decrease in one's state of possession often causes a feeling of shrinkage in one's personality. Therefore, ownership and the possession of something can have a positive effect on the attitudes and behaviour of people, as well as fulfilling a patriotic function in society and the state.<sup>4</sup>

The ownership of archaeological goods has created a strong discussion among society, where the two approaches (liberalism and communitarianism) constantly clash with each other, causing unforeseen problems. In this article the main and leading question is whether it is right and fair to restrict ownership rights in only one category of cultural heritage, when the rest of it is treated differently, creating a gulf in the rights protecting cultural heritage. Our aim is to outline the problem and start the discussion. We wish to stress the need for further research in this field (research which is currently lacking in the Polish system, whereas it is clearly

<sup>2</sup> G. Mousourakis, *Fundamentals of Roman Private Law*, Springer, Berlin-Heidelberg 2012, p. 126; also see W. Rozwadowski, *Prawo rzymskie. Zarys wykładu wraz z wyborem źródeł* [Roman Law. Lecture Outline with a Selection of Sources], 2nd ed., ARS BONI ET AEQUI, Poznań 1992, p. 119.

<sup>3</sup> K. Zeidler, *Ograniczenia prawa własności w świetle sporu liberalizmu z komunitaryzmem* [Restrictions on Property Rights in the Light of the Dispute between Liberalism and Communitarianism], "Gdańskie Studia Prawnicze" 2016, Vol. 36, p. 535.

<sup>4</sup> Z. Zaleski, *Psychologia własności i prywatności* [The Psychology of Property and Privacy], Żak, Warszawa 2003, pp. 15-112.

visible in other countries<sup>5</sup>). This could provide some needed data for any future developments and movements.

The main methods used in this article are dogmatic and theoretical legal ones. The apparatus we use derives from the theory and philosophy of law, international law, constitutional law, civil law, administrative law, and the law of protection of cultural heritage applicable in Poland. Being aware of the terminological demarcations accompanying the understanding of the concept of archaeology and archaeological heritage in contemporary sources of law, in the context of this article we use the concept of archaeological heritage in the broadest sense, using it interchangeably with the other phrases, such as archaeological goods, archaeological findings, or archaeological monuments.<sup>6</sup>

### On Defining Archaeological Heritage and Archaeological Cultural Goods

Everyone can envision monuments differently. If one asked an architect what a monument is, he would likely answer giving an example of some spectacular Renaissance church or palazzo. A historian would probably suggest an Acropolis or historically important battlefield. For an art historian, the sculpture of Michelangelo or van Gogh's painting would be worth designating as cultural heritage. However, if someone would dare to ask an archaeologist for a definition of a monument, the answer could start with examples of: burial pits, bones, cemeteries, post-holes, pottery, flints, privy, hearth, jewellery, smithery products, trash pits,

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<sup>5</sup> See J.H. Merryman, *The Public Interest in Cultural Property*, "California Law Review" 1989, Vol. 77(2), pp. 339-364; L. Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination*, Oxford University Press, Oxford 2019; N. Gupta, R. Nicholas, *Being Seen, Being Heard: Ownership of Archaeology and Digital Heritage*, "Archaeologies: Journal of the World Archaeological Congress" 2022, Vol. 18(3), pp. 495-509; L. La Follette (ed.), *Negotiating Culture: Heritage, Ownership, and Intellectual Property*, University of Massachusetts Press, Amherst 2013.

<sup>6</sup> "Archaeological heritage" is a term commonly used in international conventions, for example in the European Convention on the Protection of the Archaeological Heritage. However, the term "archaeological heritage" is not present in any Polish legislation, aside from the ratified conventions that are incorporated into the Polish legal system. As the definition of archaeological heritage from the Convention is significantly similar to the definition of an archaeological monument in the Polish Act of 23 July 2003 on the Protection and Guardianship of Historical Monuments, the terms could be used interchangeably without any misunderstanding in terms of definition. As to the terms "archaeological finding" and "archaeological good", the first is commonly used by an archaeologist (which is not necessarily connected to the legal definition of a monument, but mostly used within archaeological excavations and their profession), while the second is strongly connected with trade and commodity goods. Yet, both of them, despite their obvious differences, are still describing parts of archaeological heritage as commonly understood, and allow us to identify them without the need of having one unified concept. For more see J. Stepnowska, *The Value of Cultural Property. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects as an Example of a Value-Based Approach to Cultural Property Restitution*, PhD dissertation, University of Gdańsk, Gdańsk 2023.

sculptures, and walls. In other words, they would cover virtually every possible movable find and other eventual archaeological objects which can be found in multiple geological layers of ground. Thus an archaeologist presumably has the widest concept of a monument. However, there is a very specific legal definition of an archaeological monument in international law and in the internal law of a specific state, including in Polish legislation, which has to be followed.

The European Convention on the Protection of the Archaeological Heritage (revised, Valletta, 16 January 1992)<sup>7</sup> gives the definition of archaeological heritage in its Article 1. It provides the possibility of a wide interpretation of archaeological heritage, as all remains and objects and any other traces of mankind from past epochs should be considered as such. The Convention displays different forms that should be taken into account (like constructions, moveable objects, and developed sites), but does not limit the term “archaeological heritage” only to them. This definition has created the framework for the legislation of most European countries.

In Article 3(1) of the Polish Act of 23 July 2003 on the Protection and Guardianship of Historical Monuments<sup>8</sup> we find a definition of a monument – it is “an immovable or movable thing, their parts or complexes, being the work of a man or related to his activities, and constituting a testimony of a bygone era or event, the preservation of which is in the interest of the society due to its historical, artistic, or scientific value”. Later, in Article 3(4) we read that an archaeological monument is “an immovable monument, which is a surface, underground, or underwater remnants of human existence and activity, consisting of cultural stratifications and the products contained therein or their traces, or a movable monument, which is its product”.

The concept of an archaeological monument has the nature of a specific, qualified category of a monument.<sup>9</sup> In order to designate something as an archaeological monument, firstly the finding must fulfil all of the requirements from the general definition of a monument, and later add any more specific prerequisites. The doctrine points out that the Polish legislator in the cited definition did not use terms or explicit time caesuras emphasizing the antiquity of archaeological heritage, and that the definitional criteria used are basically ahistorical.<sup>10</sup> Because of that, a Neolithic flint, gothic sword, or 20th century Messerschmitt fighter can be seen as archaeological monuments equally worthy of general legal protection.

<sup>7</sup> CETS 143. It replaced and updated the original London Convention of 1969 (European Convention on the Protection of the Archaeological Heritage, ETS 066).

<sup>8</sup> *Ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami*, Dziennik Ustaw 2022, item 840, with amendments (consolidated text).

<sup>9</sup> M. Trzeciński, *Wokół definicji zabytku archeologicznego* [On the Definition of an Archaeological Monument], *“Ochrona Zabytków”* 2007, Vol. 4, p. 112.

<sup>10</sup> W. Kowalski, *Zabytek archeologiczny* [Archaeological Monument], in: K. Zeidler (ed.), *Leksykon prawa ochrony zabytków*, C.H. Beck, Warszawa 2010, p. 432.

Poland was one of the first countries to introduce a surface research scanning program. When the Polish Archaeological Record (*Archeologiczne Zdjęcie Polski*) program was created in the 1980s, no one expected such a large number of new archaeological sites. The whole territory of Poland was divided into rectangular areas of the same dimensions, each with an area of 37.5 square kilometres.<sup>11</sup> Archaeologists walked the length and breadth of each of the rectangles, conducting surface research and looking for new sites. This resulted in a substantial number of new archaeological sites and physical objects that had to be later stored and preserved somewhere. The mission to identify archaeological monuments imposed by the 1992 Convention<sup>12</sup> was and still is done in an exemplary way. Most of the archaeological sites are included in local spatial plans and are taken into account before the commencement of any construction activities.<sup>13</sup> Some archaeological sites are completely excluded from any investment plans as a subject to be kept intact for future generations, and some are under strict restrictions, with the obligation to perform scientific research. But the problems appear when there are movable monuments.

It is worth mentioning the discretionary power of the conservatory offices on each of the local, regional, and national levels, which has a possibility to either consider something as a monument (or not) via an administrative decision. As a rule, more objects are recognized as an archaeological monument than the other way around. Despite the fact that most findings are discerned as a testimony of a bygone era and represent either historical, artistic, or scientific value, not each and every finding should be preserved by calling it a monument, as there is a lack of societal interest in preserving them all. Some archaeological findings represent the same, well-known facts and are considered only as mass objects and not as unique valuable discoveries. The values of such objects are very low, if any. Yet they are still protected by law after the conservatory offices' decisions. Currently there are hundreds of thousands of archaeological monuments in Polish registers, most of them left uncontrolled in public and even private museums, or worse, stored only in their warehouses, cellars, and basements with no hope for being presented to the public due to a lack of space and expectations.

### The Ownership of Archaeological Cultural Goods

Archaeological heritage seems to be overprotected in Poland. According to the Polish – and not only the Polish – law on the protection and preservation of cultural

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<sup>11</sup> See *Krajowy program ochrony zabytków i opieki nad zabytkami na lata 2014-2017. Archeologiczne Zdjęcie Polski* [National Program for the Protection and Care of Historical Monuments for 2014-2017. Polish Archaeological Record], Narodowy Instytut Dziedzictwa, Warszawa 2016.

<sup>12</sup> In particular in Art. 2.

<sup>13</sup> In particular fulfilling the requirement of Art. 5 of the 1992 Convention.

property,<sup>14</sup> objects that are archaeological cultural heritage discovered, accidentally found, or acquired as a result of archaeological research are the property of the state. This means that every item found after the Act on the Protection and Care of Historical Monuments entered into force belongs to the state. This is the situation with respect to the original acquisition of the item. As a further consequence, archaeological monuments are therefore excluded from trade (becoming *res extra commercium*), thus being treated differently than the rest of cultural heritage. But the state is going even a step further by locking numerous such items away from public knowledge, with unforeseen consequences. All of such archaeological finds are subsequently deposited in museums or in other organizational units. Only a small percentage of them are ever presented in exhibitions, while the rest remain locked in warehouses.

Museums are rarely the legal owners of the findings deposited in them. By an administrative decision, as mentioned in Article 35, the state is only depositing a monument in a museum (or other administrative unit) which provides permanent storage, carrying out inventory and appropriate conservation work concerning the monument, while also making such monuments available to others for scientific research.

At the same time a museum (and only a museum, to the exclusion of other administrative units like universities) as a depositary has the right to apply later for a transfer of ownership of a specific monument, which would allow for its free trade. However, this is a rare case due to the discretionary power of conservatory offices, and there is no reassurance of the final outcome of any such transfers. Also, for each monument a separate transfer of rights would need to be obtained, which mushrooms the bureaucracy.

Every year monuments from archaeological excavations (which number in the thousands in each of the 16 regions in Poland) have to be deposited somewhere. Museums are forced to accept archaeological findings, regardless of their warehouse capacities. As a rule, museums, deemed as the most fitting to preserve monuments, have decided to give promises to investors to accept the findings after carrying out their obligatory research. Because of this situation, museums and other administrative units accepting monuments are left with hundreds of tons of archaeological finds (with both high and low scientific, artistic, or historical value) that are not their own private property, and hence cannot ever be sold.

Museums, as the main depositary, have no way to provide proper conservation services because of the vast number of findings. Their lack of staff and insufficient funding means that most of the findings are left without any, or only with basic, conservatory treatment. The need for museums to create an interesting exhibition and bring in profits eliminates the possibility of presenting most of the monuments.

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<sup>14</sup> E.g. Italy or Greece (with monuments up to the year 1453).

Mass findings are forced to remain in the darkness of warehouses, with no hope to be useful or viewed one day.

Scientific units – meaning mostly universities and specifically institutes of archaeology – also have ownership problems. Archaeological artefacts, especially ones stemming from the academic researches, are usually stored in the warehouses of archaeological institutes at universities. They are deposited there by the same administrative decision as in the case of a museum. However, without statutory regulation the universities cannot have ownership rights to the monuments, because according to the 2003 Act, only museums, and not universities belonging to another organizational unit, can ask for a transfer of rights. In Poland, only one institute of archaeology (the Jagiellonian University) has established its own academic museum (Collections of the Institute of Archaeology), specifically in order to make possible the transfer of rights. Selected artefacts are presented in the Museum of the Jagiellonian University, while the rest of the collections are didactical in nature. Other Polish universities do not conduct such activities, and thus have no possibility to own any archaeological monuments and further use them for educational purposes.

### Archaeological Heritage Is Not a *Res Extra Commercium* Category

Another legal institution of Roman law origin was already mentioned above – namely *res extra commercium*. A further consequence of the legal regulation of the original acquisition of archaeological monuments is that they are excluded from trade. They are thus presumably treated differently than the rest of cultural heritage. No other monuments belong to the state *ex lege*. This provision has been deemed to have led to a situation whereby trade in almost all archaeological objects is virtually non-existent in Poland, and any activities on the art market raise doubts as to their legality and raise the spectre of the existence of a black market.

However, it needs to be emphasized that the above is not a precisely proper description of the legal status of archaeological cultural goods under Polish law. The division of items into those in common circulation and those excluded from trade was already present in ancient Rome. In Roman law, a division was made on the basis of divine law (so-called *res extra commercium divini iuris*), which include *res sacrae* (things devoted to religious worship such as, e.g., temples), *res religiosae* (things dedicated to the cult of the dead, e.g. tombs) and *res sanctae* (things entrusted to the gods), as well as for the things taken out of business under human law (*res extra commercium humani iuris*), among which were especially *res omnium communes* (i.e. free goods for common use, e.g., sea, air) and *res publicae* (as things owned by the state and for public use, such as roads).<sup>15</sup> It should be stressed that

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<sup>15</sup> K. Kolańczyk, *Prawo rzymskie* [Roman Law], Wolters Kluwer, Warszawa 2007, p. 266.

both in ancient Rome and in the Polish legal order, it is impossible to find a full catalogue of items that could be excluded from trade.<sup>16</sup> Yet archaeological heritage is excluded from commercial transactions, together with all legal transactions that have such an item as their object, regardless of the nature of these activities and their payment.

It is worth mentioning that in some situations trade in archaeological heritage is legal and takes place. Not every archaeological monument is excluded from free market circulation in Poland. A prime example of this is when archaeological monuments are legally acquired abroad and then legally brought into the country and placed into the Polish market. A second situation of possible trade in archaeological heritage can be as a result of a decision of the relevant administrative body. One can envisage a situation in which the minister responsible for culture and the protection of national heritage grants permission for the sale of museum artifacts upon a request of the museum director, a request to which the museum council expresses a favourable opinion (see Article 23 of the Act of 21 November 1996 on Museums).<sup>17</sup> While these situations are rare, they are possible. Thirdly, there can be a situation in which an archaeological monument is acquired by inheritance, and the testator became the owner of the monument in the past, i.e. before the regulations of Polish law described above were in force (*lex retro non agit*). Lastly the case of a legal purchase from another person with full rights to dispose of the monument also needs to be mentioned.<sup>18</sup> Finally, but only signaling a *possible* action, there could be a situation whereby the acquisition of ownership of an archaeological heritage from an unauthorized person took place while acting, however, in good faith.<sup>19</sup> In this case provenance research of such a monument is of a vital importance. Thus it cannot be said with full certainty that all archaeological heritage is part of *res extra commercium*, as there is still the possibility of its potential trade in some circumstances. Yet ironically it was the false labelling of archaeological heritage as being *res extra commercium* that started the discussion whether archaeological monuments should be owned at all by the state *ex lege*.

<sup>16</sup> A. Obłąd, „Rzeczy wyłączone z obrotu” (*res extra commercium*) w polskim porządku prawnym [Res Extra Commercium in the Polish Legal Order], in: J. Jezioro et al. (eds.), *Wybrane zagadnienia polskiego prawa prywatnego: księga pamiątkowa ku czci Doktora Józefa Kremisa i Doktora Jerzego Strzebinczyka*, E-Wydawnictwo, Wrocław 2019, pp. 185-195.

<sup>17</sup> *Ustawa z dnia 21 listopada 1996 r. o muzeach*, Dziennik Ustaw 2022, item 386 (consolidated text).

<sup>18</sup> Possession of full rights to dispose of a monument can derive from, e.g., the fact of possessing the monument before the Act came into force in 2003, or the sale of legally inherited monument.

<sup>19</sup> K. Zeidler, M. Trzciński, *Wykład prawa dla archeologów* [Lecture in Law for Archaeologists], Wolters Kluwer Polska, Warszawa 2009, p. 92.

### Export of Archaeological Cultural Goods

Besides trade in, the export of archaeological cultural goods is also highly problematic. In the case of permanent export of a monument abroad, the legislator has imposed the obligation to obtain a permit for such permanent export abroad, issued by the minister responsible for culture and the protection of national heritage. This regulation in Polish law makes it almost impossible for any archaeological cultural goods to be legally exported.

According to Article 51 of the 2003 Act, archaeological heritage that is dated as 100 years old or older, and is part of archaeological collections or has been obtained as a result of archaeological excavations or accidental discoveries, can be exported permanently only after receiving a one-time permit for the permanent export of the monument abroad, issued by the minister responsible for culture and the protection of national heritage. The legislator has decided to impose one new criteria, not used anywhere else, which makes an export even more difficult. Nowhere earlier was there any distinction of the importance of monument based on the age of the archaeological monument, yet this provision introduced a distinction in protection based on a monument's age. From the theoretical point of view that would mean that it is possible to export anything aged less than 100 years without any permission, and findings over 100 years old only after obtaining permission. However reading on, Point 5 of the same article does not allow for permanent export of: 1) monuments enlisted in the register of monuments; 2) enlisted on the List of Heritage Treasures; 3) included in public collections owned by the state; or 4) entered in the inventory of a museum or included in the national library resource. It would seem that these are only exceptions, i.e. individual cases mentioned at the end of the provision. But this is not the case with respect to archaeological monuments.

The practice has shown that archaeological monuments are almost always enlisted in either the register of monuments (as an immovable monument), or included in public collections or museums (as movable findings), and they are almost always the property of the state, with only a few exceptions. The exceptions include the already above-mentioned possibility of transfer of ownership rights to the museum and/or other institution; inheritance of a monument belonging to a testator before the Act came into force; purchase of a monument abroad and later bringing it to Poland, and a few others.<sup>20</sup> This leaves little to no room for the permanent export abroad of Polish archaeological heritage. However, archaeological cultural goods are allowed to be imported into Poland. What is left in options is only a temporary export that allows only for the short term movement of such cultural goods abroad, and no permanent exchanges between states. This means that Polish archaeological heritage is always bound to be stocked in Poland. It should always come back

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<sup>20</sup> See more: *ibidem*, pp. 91-93.

to its home place, with no legal way of exchanging, distributing, and/or sharing the physical material which tells about the local culture around the world without any time limits. The limitations described above are so restrictive only with respect to the archaeological heritage.

Regulating the import and export of works of art is necessary for many reasons, including, *inter alia*, crime prevention. Limitations should also be aimed at the protection of the national cultural heritage itself. But it seems that these limitations are not helpful with respect to preventing illicit actions.

## Restrictions as a Catalyst for a Growing Black Market

Restricted freedom on the market of art and monuments in relation to archaeological findings, together with the limited options of mainly temporary export, have created high activity on the art black market. Not being able to legally possess archaeological heritage (specifically movable objects) gives rise to the need to find other solutions, which are not legal. The black market for cultural goods is one of the most lucrative, just after drugs, weapons, and counterfeit goods, and brings with it the problem of money laundering.

What's more, we should consider here the problems of the destruction and pillage of cultural sites, including archaeological sites, and the illegal excavation of archaeological cultural goods. Times of war are especially dangerous for cultural heritage, and in this case one need look no further than to examples from Iraq, Afghanistan, and Syria.<sup>21</sup> In the past many problems were created which are still not resolved – Nazi-looted art and monuments; war booty of the Soviet army and troops; or even earlier cultural property looted during colonial periods. Counterfeit documents regarding the origins of such objects, their opaque ownership histories, and other falsified administrative documents impede the research into goods without a provenance history. All these difficult situations make the problem of protection of archaeological heritage even more problematic.

Besides the above, the problem also involves the ever more popular re-enactments of historical events, the producers of which are creating beautiful, yet problematic, replicas of archaeological objects in order to imitate the old days. Even though their aim is not to create forgery, these replicas also appear on the art market. Archaeotourism, which is becoming more attractive, is luring fans of handmade jewellery, pottery, and clothing, which – besides bringing great benefits

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<sup>21</sup> Read more: UNESCO, *Call by UNESCO and Partners to Fight Against Illicit Trafficking of Afghan Cultural Property*, 26 October 2022, <https://www.unesco.org/en/articles/call-unesco-and-partners-fight-against-illicit-trafficking-afghan-cultural-property>; or UNESCO, *UNESCO Trains Professionals to Fight Against Illicit Trafficking of Ukrainian Cultural Property*, 20 January 2023, <https://articles.unesco.org/en/articles/unesco-trains-professionals-fight-against-illicit-trafficking-ukrainian-cultural-property> [both accessed: 25.07.2023].

to the idea of open museums and bringing local communities closer to their own heritage – is also creating a grey market for products that are produced using the old techniques and soon begin to look like the original monuments. Besides honest re-enactors, there are groups that specifically produce counterfeit artifacts from Poland to be then sold abroad as coming from illegal excavations. These replicas are often so good that it is difficult if not impossible to distinguish them from the authentic objects. The fact it is supposedly coming from an illicit excavation is ironically bidding up the price automatically.

Archaeologists blame, besides the law, the antiques dealers for this practice. Collectors and traders argue that most transactions related to the sale of antiquities are concluded legally. Some say that the growing interest in archaeology is coming from adventurous movies, which are causing more harm than good by promoting treasure hunting. While there is not enough space here to develop this specific topic, it should be stressed that what is mentioned in this point of the article is only the tip of the iceberg.

### Looking into the Future

It is easy to see that in the dispute between liberalism and communitarianism – if reduced to considerations of limiting the right to property – the underlying concept, and at the same time the fundamental value here, is the “common good”; or in another sense, the “community interest”, which at different times and in different branches of law is called the “public interest” or “social interest”. It is the protection of the common good that becomes the most compelling rationale for interference with property rights in archaeological goods.<sup>22</sup> However, this does not explain why only the archaeological heritage is treated in this way, with the exclusion of other pieces of heritage that can appear on the art market, like for example worldwide known paintings. This brings us to the two-pronged question: Should we still treat archaeological heritage with a stricter law than other elements of national heritage, or should we make it more common and available to the people?

Much cultural property (both movable and immovable) is owned by the state, yet a considerable amount of it is also owned by other bodies, such as private individuals, trusts, associations, foundations, churches, non-governmental organizations, or even commercial companies. There is a strong movement toward the privatization of cultural heritage.<sup>23</sup> The only doubts should be on how to introduce some ideas into the archaeological heritage sector.

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<sup>22</sup> K. Zeidler, *op. cit.*, p. 540.

<sup>23</sup> Examples of different ownership of heritage in Great Britain include the United Kingdom National Trust as a private institutional ownership; private ownership trusts looking after redundant churches as historic buildings: the Churches Conservation Trust (the United Kingdom), the Redundant Churches Trust (Scotland), and Förderkreis Alte Kirchen; English Heritage as an NGO.

The above-described problems call for considering a change of approach in national laws relating to archaeological heritage. Should archaeological heritage be still understood as a *res extra commercium*? Or maybe the legislation in the field of cultural heritage protection should be going other way, for example following the English, more liberal, law.

Article 5 of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972)<sup>24</sup> calls for adopting a general policy which aims to give the cultural and natural heritage a function in the life of the community. When immovable monuments like palaces, sacred places, gardens, etc. are owned by private owners, they very often perform some public function. They are transformed into hotels, restaurants, events, and meeting places. The same is true with respect to movable heritage presented inside these monuments. Paintings are accessible in galleries, and are on sale in auction houses, allowing people to have closer access to their past and to their heritage.

At present, at least in Poland, archaeological heritage does not belong to people; it is taken away from them. As archaeological monuments belong to the state there is no internal feeling in society that they are something that belongs to them and is part of them. What is found on their property and designated as an archaeological monument belongs to the state *ex lege*. They not only lose any profits (like financial profits from selling the finding) but also usually have little or no impact on what happens to the monument. People are scared to notify local conservatory offices about any discoveries as they are afraid of repercussions and further costs connected with the obligation to carry out obligatory excavations and cover most of the maintenance costs of the findings.

The Polish definition of a monument is an imprecise definition that gives a lot of room for manoeuvre. It is specialists from the offices for the protection of monuments or museum professionals who are able to assess whether a given item is a monument, or not. The assessment depends on interpretation.

According to Article 64(1) of the Constitution of the Republic of Poland of 2 April 1997,<sup>25</sup> everyone has the right to property, other property rights, and the right to inherit. We further read that this ownership may be limited only by statute and only to the extent that it does not violate the essence of the right of ownership. Therefore, it seems appropriate to ask whether the monument protection service is right in calling for the most extensive protection of archaeological monuments? Does the doctrinal approach to the protection of archaeological monuments not contradict the principle of sustainable development referred to in Article 5 of the Polish Constitution – which should be understood as such socio-economic development in which the process of integrating political,

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<sup>24</sup> 1037 UNTS 151; ratified by Poland already in 1976.

<sup>25</sup> *Konstytucja RP z dnia 2 kwietnia 1997 r.*, *Dziennik Ustaw 1997*, No. 78, item 483, with amendments.

economic, and social activities takes place, while maintaining the natural balance and durability of basic natural processes in order to guarantee the possibility of meeting the basic needs of individual communities or citizens, of both contemporary generations and future generations? The protection of archaeological heritage seems to be more of a restrictive, closed-to-the-public system rather than one based on sustainable development. Keeping heritage in the hands of only one entity (the state) does not allow for obtaining the full potential of protecting, promoting, and using the heritage.

The subject of ownership rights to heritage resources is a topic of considerable discussion and debate in many states. However, not everywhere is the public opinion taken into consideration in such discussions and debates. Some studies have demonstrated that respondents strongly disagree that the government should own all archaeological objects and archaeological sites.<sup>26</sup> Not only should these types of studies encourage the conduct of similar research in Poland, but they also show the current lack of reliable information and the state of the poorly-researched topic of public archaeology in Poland. The opinions and attitudes of people should have a crucial role in creating conservation laws and programs that are aimed at benefiting both the public interest and heritage.

Perhaps changing provisions – or at least starting the discussion about the principle role of ownership of archaeological monuments in Poland to reflect the similar ownership of other monuments – would provide answers to many doubts. Changing provisions would not only allow for them to be objects of trade (which is allowed with any other type of monument owned privately), but also would open the door for the export of monuments to spread the knowledge about the heritage, which is becoming less and less national and more recognized as a part of the world heritage.

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<sup>26</sup> D. Pokotyło, N. Guppy, *Public Opinion and Archaeological Heritage: Views from Outside the Profession*, "American Antiquity" 1999, Vol. 64(3), pp. 400-416.

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## SHORT COMMENTARIES

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