

CULTURAL HERITAGE LAW IN POLAND

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Culture Goods in the *Public Domain* under Polish Law – Acquiring and Disposing Difficulties

Abstract: In the Polish legal system there is no general and coherent legal regulation created with the purpose to set the unified rules for acquiring or disposing of culture goods by public entities. Different legal acts contain few regulations in this matter and it results in difficulties in applying the regulations that are presented in this article. The paper presents a short historical background of two major moves within Polish public culture property – nationalization and municipalisation in the scope of museum property. Then the analysis is focused on those regulations of statutory law that are being applied in cases where the issue of acquiring ownership by public entities is examined, together with case law referring to the possibility to acquire ownership in the public domain via adverse possession. Culture goods are also the element of the estate of local government units and state administration units and in this sphere there are no regulations preventing or influencing the unit

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from disposing of the culture good. It is only when the voivodship is the owner of a movable culture object, when the law introduces the rule that the act of disposition (e.g., sale contract) requires the consent in the form of a resolution of the voivodship management board in order to be valid. When immovable culture goods are to be sold by a public entity, the law requires the consent in the form of the administrative decision of an officer from a historical monument protection office (conservation officer), and there is no reason why the freedom of disposition of movable culture goods in public administration should not be limited in a similar way.

Keywords: ownership, museum, estate, inalienability, culture, public administration

Introduction

This article deals with those legal issues concerning tangible and movable culture goods in the possession of the Polish Treasury or museums as well as other public legal persons distinguished under Polish law. However, its content does not refer to books nor documents or photograph stored in public archives or libraries. In the Polish legal system there is no general and coherent legal regulation created with the purpose to set down the rules for the acquiring or disposing of culture goods by public entities. Different legal acts contain few regulations in this matter and this results in difficulties in applying the law.

The first part of this article presents a short historical background of two major moves within Polish public culture property – nationalization and municipalisation. Then the analysis is focused on the regulations of statutory law that are being applied in cases where the issue of acquiring ownership by public entities is examined, together with case law referring to the possibility to acquire ownership within the public domain via adverse possession. Conclusions contain remarks on the need to create adequate legal rules unifying the rules for the acquiring and disposing of culture goods by all public entities and the assessment of the need to introduce the inalienability rule in this field.

The Polish legal system is derived from Roman law and consists, not surprisingly, of two major branches: public and private law. The question of proprietary issues are regulated mostly under private law, specifically in civil law. In the past, before the major economic changes in the political system in the 1980s, civil law generally recognized the division between public and private property, and within Polish legal theory little attention was focused on public property law regulations. In the 1950s the doctrine of law emphasized that this area was to be examined specifically by jurists of administrative public law theory as this type of property

was intended to be placed outside civil law.¹ As we are able to nowadays assess the academic research conducted under the socialist regime it needs to be pointed out that nothing except for general remarks were made in this regard.² Something which may be considered an important reason as to why later this division between public and private property was ousted from legal theory and from the legal notions in statutory law. However, the notion of public property has not totally disappeared from the legal language. Interestingly, it is the domain of culture law where the need for a specific legal treatment of cultural object possessed or owned by public entities is being noticed,³ with special attention being placed on the copyright derived for these goods in question despite the fact that the Polish legislator did not introduce the principle of the non-alienability of public culture goods as it has been done explicitly in the law of France, Spain or Italy.⁴

As this essays refers to movable things only, ones deemed by the term public culture property, it must be first emphasized that the major form of administration and protection for objects of this type are public museums. A Public Museum is an entity embedded in the structures of public administration, created by a minister within the central administration structures or created by a local government administration with or without its own separate legal personality.⁵ Public museum works in the specific sphere of the legal relations of material objects, aimed at the protection and preservation of these items and the question of their origins or proprietary status, have been regarded as of secondary importance. There are few publications on the law regulating the right of ownership of culture goods administered by a museum, however nowadays it is becoming obvious that this is an increasingly urgent need. The object of this article is to present the issue of the ownership relations regarding items housed in public museums, with the possible exception of the legal regulations governing archaeological sites that may be included in a given museum structure.

Public museum usually acts in the market as a private law legal person when a transaction resulting in the acquisition of a culture good takes place and the rules of civil law determine whether the property has actually been acquired. Civil

¹ S. Grzybowski, *Dzieje prawa. Opowieść, refleksje, rozważania*, Ossolineum, Wrocław 1981, p. 241.

² J. Szachułowicz, *Własność publiczna. Powstanie, przekształcanie, funkcje, zarządzanie*, Wydawnictwo Prawnicze, Warszawa 2000, p. 8.

³ When it comes to the legislation of other European countries in this matter see M. Weber, *Unveräußerliches Kulturgut im nationalen und internationalen Rechtsverkehr*, De Gruyter, Berlin - New York 2002, pp. 423-427; see also: A. Jakubowski, *State Succession in Cultural Property*, Oxford University Press, Oxford 2015.

⁴ N. Fyderek, W. Szafrąński, *Sprzedaż muzealiów - niewykorzystana szansa czy brak konieczności*, in: A. Jagielska-Burduk, W. Szafrąński (eds.), *Kultura w praktyce. Zagadnienia prawne*, Vol. 3: *Muzea a rynek sztuki. Aspekty prawne*, Wydawnictwo Poznańskiego Towarzystwa Przyjaciół Nauk, Poznań 2014, p. 11.

⁵ There are public museum without a separate legal identity, but this form is of little importance in practice.

law is supplemented with statutory regulations created specifically for museums, when representation is the matter under question. It is important though that many museums have existed as an organizational unit for more than a century and as the law changes it is necessary to apply different rules in order to assess the validity of an act performed to acquire the ownership of things stored in a museum's collection. Apart from the acts and legal events regulated by civil law, public domain property may be derived from other sources of its formation; in the case of public property the subject literature presents additional routes: international agreements, nationalization, expropriation, a waiving of the right to property and concealment.⁶

The goal of determining the ownership of some of the things placed in museums is sometimes hard to achieve due to the fact that the origins of public museum collections in Poland date back to the nineteenth century. After the proclaiming of Polish independence in 1918, during the Second Republic, the regulation of public museum activities was postponed or even abandoned, and the legal regulation of the status of museum objects was covered by internal museum rules resulting from the observance of the principle of museum autonomy at that time, especially since the state (the Treasury) was not the major founder of collections those days.⁷ The majority of museum funding activity was performed by individuals or local government and private associations. Thus, purchases, donations,⁸ legacies and deposit exhibits were regulated by private law i.e. the relevant civil law. After the Second World War the legal succession of culture property in favor of the Polish state (Treasury), including objects listed in the inventories of museums,⁹ and formerly in local government units in the annexed areas, was regulated by different national laws and specific regulations were included in international agreements.

There was the tendency to unify the structure of public administration and so the ownership of municipal (local government) entities was liquidated on the date of the coming into force of the Act of 20 March 1950 on local organs of state unitary authority and administration,¹⁰ in connection with the main goal – the

⁶ J. Szachułowicz, op. cit., p. 18.

⁷ In 1918 there were 99 public museums in Poland, yet none of them was owned by the state, they existed within the organisational structures of local government, foundations, scientific associations etc. (M. Treter, *Muzea współczesne. Studium muzeologiczne. Początki, rodzaje, istota i organizacja muzeów. Publiczne zbiory muzealne w Polsce i przyszły ich rozwój*, Redakcja "Muzeum Polskiego", Kijów 1917). In 1939 only 11 museums were financially maintained from state budget funds (J. Pruszyński, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, Vol. 1, Zakamycze, Kraków 2001, p. 381).

⁸ A. Jagielska. W. Szafrąński, *Darowizny na rzecz muzeów*, in: W. Szafrąński (ed.), *Wokół problematyki prawnej zabytków i dzieł sztuki*, Vol. 2, Wydawnictwo Poznańskie, Poznań 2008, pp. 69-80.

⁹ At the beginning of the 20th c. museum inventories were kept with a negligible level of details – J. Pruszyński, op. cit., pp. 381-382.

¹⁰ Ustawa z dnia 20 marca 1950 r. o terenowych organach jednolitej władzy państwowej [Act on Unified State Administration dated on 20 March 1950], Dz. U. No. 14, item 130.

liquidation of local government – in accordance with Article 32 paragraph. 2 of this Act. This resulted in former local government property being transferred to the Treasury. Nationalization of communal ownership meant that the Treasury became the owner of vast amounts of property, including also the owner of the property formerly owned by local government and constituting the stock and resources of former local government museums. After the Second World War, the assumption that an item national property belonged solely to the socialist state was considered the supreme rule and it was emphasized that the owner of this property as a whole could only be the people's state i.e., the Treasury. This rule was formed even before the codification of Civil Law itself (1964). The political changes in Poland in 1989 resulted in political and economic changes towards a capitalist system. It was also the time when the idea of the decentralization of public administration was brought back to life. The process of transferring some parts of public property back to municipalities was initiated by specific legal acts and state property has been partially transferred to the newly created local government units on the levels of commune, district and province (Polish: *gmina, powiat, województwo*). What is very important is that there were no provisions explicitly reversing all the effects of the Nationalization Act of 1950 mentioned above.

Considering the above, one needs to state the rule governing public culture property possessed by state museums before 1990, which is that state administered possessions were not only ones owned by the state. Additionally, the state-owned assets were administered by public museums in 1990, when the municipalisation process was begun: when local government structures were brought back. The municipalisation process of that time was not a simple reversal activity of transferring back all the goods that were first nationalized in 1950. Thus, property acquired by local governments before 1950, in the form of movable objects (exhibits and other objects and documents in the collections of public museums) was often excluded from municipalisation and is now often owned by the Treasury as the legal successor of these units under a general title based on the above-mentioned act on nationalization issued in 1950. The provisions listed in the normative act being the municipalisation legal source¹¹ contain general rules applied to public property as a whole, and do not relate to specific works of art nor to object in the possession of public museums. In practice, therefore, whether a given work of art has been covered by these normative acts, requires delving into the inventories held by museums at a given time, the content of which does not always allow for an unambiguous identification of the owner of the object itself. From the date of entry into the state register of cultural institutions a museum may be considered to be a separate entity from the State Treasury and can consequently acquire its own property

¹¹ Ustawa z dnia 10 maja 1990 r. Przepisy wprowadzające ustawę o samorządzie terytorialnym i ustawę o pracownikach samorządowych [Act Implementing the Act on Local Government Structures and the Act on Local Government Employees dated on 10 May 1990], Dz. U. Nr 32, item 191, as amended.

rights. According to the current regulations of Article 33 of the Civil Code, legal persons are: the Treasury and other organizational units, conferred legal personality via specific provisions of legal acts. Pursuant to Article 34 of the Civil Code, the Treasury is in civil-law relations the subject of the rights and obligations that apply to state property not belonging to other state legal persons. Thus, a state legal person, which undoubtedly is the museum vested with legal personality and organized by the Minister of Culture, may be the subject entitled to the property (and other rights *in rem*) of state property. This does not mean, however, that all items of property administered by a public museum belong to one entity. According to Article 27 section 1 of the Law on organizing and conducting cultural activities¹² (referred to hereinafter as the Law of cultural activity), a cultural institution manages independently the assigned and acquired part of the property, guided by the principles of the effectiveness of their use.¹³ This provision shows that the museum as a legal person may acquire ownership of state property through legal action. However, specific rules govern the acquisition, storage and administration of archives but this particular issue is beyond the scope of the subject matter covered by this paper.¹⁴

There are a lot of uncertainties when it comes to the art market, where the acquisition of culture goods in the public sphere is examined.¹⁵ A public museum, according to Article 32 paragraph. 3 of the Act of organising and conducting cultural activity, may receive funds from individuals and legal entities and from other sources, as well as grants from the state budget allocated to cover operating costs and also the costs of art acquisition. Polish law does not provide any formal legal

¹² Ustawa z dnia 25 października 1991 r. o organizowaniu i prowadzeniu działalności kulturalnej, [Act on Organising and Conducting Cultural Activities dated on 25 October 1991], consolidated text: Dz. U. 2012, item 406, as amended.

¹³ See K. Zalańska, *Muzea publiczne. Studium administracyjnoprawne*, Lexis Nexis Polska, Warszawa 2013.

¹⁴ In many public museums there are archives organized as separate units but which do not have a separate legal identity from the museum, they are separated only organizationally and functionally, and their organizational structure is scheduled by the internal regulations of the museum. Materials collected in archives are considered to be part of the national archival collection. The basic legal act governing the principles and functioning of the state archives in Poland is the Act on the National Archival Resources and Archives dated on 14 July 1983 [ustawa z dnia 14 lipca 1983 r. o narodowym zasobie archiwalnym i archiwach], consolidated text: Dz. U. 2015, item 1446, hereinafter referred to as ANARA. Museums are entrusted with only the storage but also the collection and acquisition (obtainment) of archive materials, in accordance with Article 22 section 2 point 2 ANARA. They gather archival materials constituting state archival documents (as defined in Article 15 section 2 ANARA), state archives are also created by materials gathered from the market resulting from the transaction of purchase, donation or by another route.

¹⁵ See also: A. Jagielska-Burduk, D. Markowski, *Wybrane zagadnienia dotyczące sposobów nabywania własności dzieł sztuki i zabytków przez muzea*, "Acta Universitatis Nicolai Copernici. Zabytkoznawstwo i Konserwatorstwo" 2013, Vol. 44; K. Zeidler, *How to Get and not to Give. About Injustice in Restitutions*, in: M. Borák (ed.), *Restitution of Confiscated Art Works – Wish or Reality*, Tilia Publishers, Prague 2008.

framework regarding the value or kinds of object to be bought by a public museum, the Law on museums provide only the general rule that the goal of museums is the administration of cultural objects. Some specific regulations may emanate from the internal statute of a particular public museum, which have to be officially accepted by the Minister or some other higher administrative body that has organized the structure of this museum.

A public museum may also acquire cultural property through the route of inheritance, on its own behalf or on behalf of the Treasury or a local government unit. Only after obtaining legal identity, could public museums begin to acquire the ownership of things by way of succession – as the successor under a will. When statutory inheritance is considered i.e., in the absence of the last will of a deceased person, the municipality or the Treasury may be considered as an heir only when there is no family left or every member of the family has rejected the inherited property. If within the inherited assets are culture goods, their possession may be transferred to the public museum on the base of an act of deposit, as it is the Treasury or municipality who is the owner of the property.

Adverse possession of culture goods and the museums

Adverse possession under Polish Law is the situation where one person performs the factual possession over an object (movable or immovable) which is inconsistent with the title of the true owner, this inconsistency does not necessarily involve the intention to exclude the true owner from having the object or estate which is being possessed.¹⁶ The adverse possessor, when it comes to movables, acquires the ownership title after a period of three years of possession uninterrupted by the owner, but only when the possessor acted in good faith when acquiring the possession and for the entire time afterwards up to 3 years (Article 174 Polish Civil Code¹⁷). Good faith in this case means that the possessor is convinced, basing themselves on the situation in hand, that they are entitled to ownership, when in reality they are not. Problems arise in the case of objects of unknown provenance where the application of the abovementioned provision of the Civil Code is considered. It is very tempting to apply this institution in favor of a museum, especially when the movable cultural property has been transferred

¹⁶ When under the common law of the United Kingdom, this intention may be rigorously required – G. Brennan, N. Casey (eds.), *Conveyancing*, 7th edn., Oxford University Press, Oxford 2014, p. 435.

¹⁷ Article 174 of the Civil Code [ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny, consolidated text: Dz. U. 2014, item 121, as amended] provides that the holder of movable property not being the owner acquires the property if it has the benefit continuously for three years as the independent and free holder, unless he does so in bad faith or the object is listed in national register of lost culture goods. See also W. Kowalski, *Nabycie własności dzieła sztuki od nieuprawnionego*, Zakamycze, Kraków 2004.

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to the museum by way of factual actions or when the type of contract was not specified (e.g., there is no official record or contract testifying to the transfer of property for the relevant acquisition neither is there a protocol or other written document made out by a third person or employees of the museum). It can only be said that the museum holds items without obvious legal title. And although it is generally true that performing adverse possession of movable property in good faith may lead to the prescription of ownership of the object, according to Article 174 of the Civil Code, this is not always the case. The case law on matters relating to the acquisition of the ownership title through the adverse possession by a public entity (Treasury) was established on the basis of the prescription issues of property rights, against this background the courts stated that if the inclusion of objects within the public estate occurred when the state officers were fulfilling public works and when their actions could not be considered as civil law (or private law) actions, the results of those actions must also lie beyond civil law relations. Eventually it was stated that possession acquired by the route of public task performance may not result in creating the possession *in statu usucapiendi* so this does not constitute adverse possession under Civil Law. Hence this possession may not lead to the acquisition of an ownership title. According to the Supreme Court, the essence of adverse possession leading to ownership title must not only be factual possession, which would have its origins in *possessio naturalis*, but also the qualification given by the rule of law comprised in the Civil Code and relating to its scope of regulation, which are only the private law legal relationships (Article 1 of the Civil Code). Objects acquired by the Treasury where the inclusion was exercised within administrative officers' public sphere activity may become included into the private transaction market only based on a specific legal regulation. As state officers always need a legal basis to perform an acquisition, they may not legally act without a legal basis. The need for a legal basis for acts performed as part of the public "imperium" excludes the possession acquired in this mode and prevents its transformation into possession recognized by Civil Law, in particular that leading to ownership.¹⁸ Hence, when it has been determined that the Treasury acquired the cultural object through exercising its power resulting from its public functions, it may not be recognized as the holder under the letter of Civil Law. This reasoning raises obvious implications as to the impossibility of recognizing the period of possession by public agencies or units relating to the prescription time limits under Civil Law. The Highest Court resolution cited above refers also to a situation in which the property was legally included into the estate of the Treasury through actions within the imperium sphere according to law.

¹⁸ The Highest Court resolution of 7 judges dated on 21 September 1993, III CZP 72/93, OSNC 1994, No. 3, item 49.

The Highest Court ruled similarly in another case concerning the effects of possession of immovable property with a historically important monument building, where the inclusion into the Treasury estate was performed legally, on the basis of the Ministry of Culture and Art of 9 May 1946, issued pursuant to Article 17 of the Decree of the President of the Polish Republic of 6 March 1928 on the care of monuments (Dz. U. No. 29, item 265). In its judgment the Supreme Court found that the care performed by the Treasury over the immovable cultural property constitutes an emanation of the imperium power of the State, recognized under public law, and may not be recognized as the performance of its civil activity in the sphere of dominium, within the framework of the matter of civil law. As a consequence, the care performed shall be recognized as a form of factual governance and not possession itself in the civil law sense. All these remarks allow one to advance the thesis: if the inclusion of the possession of culture goods by a public museum (with separate legal identity or more often as an organizational unit of the state¹⁹) was based on a legal act issued on the basis of statutory law provisions and simultaneously being an act of public administration performed in the sphere of *imperium*²⁰ it may not be recognized as adverse possession leading to ownership in the sphere of civil law relations.

Only When the Ownership is Legally Acquired, May the Object Be Disposed

Polish law does not provide *expressis verbis* the strict principle of culture goods inalienability within the public domain, yet it may be recognized as an underlying rule when it comes to public museums' activity. Public museum activity is regulated not only by the Museums Law of 1996,²¹ but also by a law of a more general nature – the Law on cultural activity.²² The provision of Article 27 section 2 of the Law on cultural activity states that a cultural institution (public museums are recognized by law as units of cultural institutions) may dispose of its fixed assets. The laws governing the organization and work of museums since 1962 have also enabled museum director with the possibility to transfer the property of culture goods after acquiring the consent of the Minister. However, the cautious practice of museums and the strong public conviction as to mischievousness within this kind of actions generally prevented museums making such unpopular decisions.²³ However, actually culture

¹⁹ Called in Latin *statio fisci*.

²⁰ As opposite to the *dominium* sphere.

²¹ Ustawa z dnia 21 listopada 1996 r. o muzeach [Act on Museums dated on 21 November 1996], consolidated text: Dz. U. 2012, item 987, as amended.

²² Act on organizing and performing cultural activity.

²³ N. Fryderyk, op. cit., pp. 17-19; W. Katner, *Problem własności muzealiów a roszczenia windykacyjne dawnych właścicieli*, "Kontrola Państwowa" 1992, No. 1, pp. 68-69.

goods gathered in public museums owned by the Treasury or other public entities may not be strictly called *rei extra commercium*, as the objects are subject to various civil law contracts such as: a lease contract, insurance contract²⁴ lending agreements,²⁵ and copyrights contracts as well (license agreements).

Conclusions

In my opinion, the acts of acquiring ownership of culture good into the public domain are not properly regulated and the lack of this results in uncertainty as to the legal status of some objects administered by public museums, which may (and often does) prevent the director of the museum from using the object in exhibitions or from letting other museums (especially foreign ones) to access this object. There is a legal rule that culture goods assembled in public museums may be made available to anyone under the regulations of the Museum Law of 1996 and the Law on Access to Public Information of 2001.²⁶ Yet, the uncertainty over the ownership status of culture goods influences the possibility to access these objects, as they are not publicly presented in practice. Additionally if there is uncertainty as to who is the owner of an object, it is impossible to dispose of it, and although it stays forever within the public domain and although the costs of administration and renovations are covered from public money, the public exhibition of these objects may not always be considered safe.

Arguably, there is no need to expressly introduce the rule of strict inalienability of culture goods possessed by public museums, as the minister has the power to control and prevent unnecessary dispositions of culture goods. Nowadays public interest is more focused on the issue of free access to visual information of objects collected in museums²⁷ via the Internet, than on the question of prohibiting the disposition of these objects. However culture goods are possessed also by local government units and the state administration units and in this sphere there are no regulations preventing or influencing the unit from disposing of the culture good. It is only when the voivodship is the owner of a movable culture object, when the law

²⁴ See I. Gredka, *Ubezpieczenia dóbr kultury w muzeach i zbiorach prywatnych*, Towarzystwo Autorów i Wydawców Prac Naukowych Universitas, Muzeum Pałac w Wilanowie, Kraków – Warszawa 2013.

²⁵ P. Gwoździewicz-Matan, *Umowa użyczenia muzealium w prawie prywatnym*, Wolters Kluwer, Warszawa 2015.

²⁶ Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej [Act on Access to Public Information dated on 6 September 2001], consolidated text: Dz. U. 2015, item 2058, as amended.

²⁷ Where the question of the public's access to culture goods made by the public is discussed, actually, the most important issue nowadays is the issue of making visual and graphical data available to the public online, which is covered by the regulations of the Directive No. 2013/37/EU of the European Parliament and of the Council amending Directive 2003/98/EC on the re-use of public sector information, 26 June 2013, OJ L 175, 27.6.2013, pp. 1-8. This directive is being implemented into the Polish legal system and adequate types of work are being performed within the structures of the Ministry of Administration and Digitization.

introduces the rule that the act of disposition (e.g., a sale contract) requires consent in the form of a resolution of a voivodship management board in order to be valid.²⁸ In any other cases if the piece of art is owned by a public unit, its disposition is conducted in the same way as a non-cultural object, which is not justified, as the value of culture goods does not diminish in time. When immovable culture goods are to be sold by a public entity, the law requires the consent in the form of an administrative decision of an officer from the historical monument protection office (conservation officer),²⁹ and there is no reason why the freedom of the disposition of movable culture goods in public administration³⁰ should not be limited in a similar way.

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²⁸ Article 58, sec. 2 of ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa [Act of Voivodship dated on 5 June 1998], Dz. U. No. 91, item 576, as amended.

²⁹ Article 26 of ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami [Act of Real Estate Management dated on 21 August 1997], consolidated text: Dz. U. 2014, item 518, as amended.

³⁰ Excluding public museums, but including private museum entities.

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