Paula Chmielowska

MONUMENTA ARCHAEOLOGICA IN USU COMMERCIALI

Liberalism versus communitarianism debate in cultural heritage law

Summary

This research presents a comprehensive legal, philosophical, and policy-oriented examination of archaeological heritage, with particular emphasis on the question of ownership and its consequences for preservation, accessibility, and societal value. Situated at the intersection of cultural heritage law, property law, and legal theory, the research critically examines the prevailing assumption that archaeological monuments must remain permanently excluded from commerce and subject exclusively to state ownership. Instead, it advances a more nuanced framework that seeks to reconcile public interest, private rights, ethical responsibility, and effective heritage management.

At the outset, cultural heritage is conceptualised as a foundational element of collective memory and identity. Heritage, both tangible and intangible, is understood not merely as a vestige of the past, but as a dynamic and evolving resource that shapes social cohesion, cultural continuity, and economic development. Archaeological heritage is identified as a particularly complex subset of cultural heritage, often regulated more restrictively than other cultural assets. While paintings, historic buildings, and movable monuments may circulate under defined legal conditions, archaeological artefacts are frequently treated as exceptional objects subject to absolute state control and exclusion from legal circulation.

The research argues that this exceptional treatment requires critical reassessment. Archaeological heritage, while undeniably significant, is not inherently incompatible with private ownership or regulated market participation. Contemporary pressures, including globalisation, urban expansion, climate change, and armed conflict, pose increasing threats to archaeological sites, exposing the limitations of traditional state-centred protection models.[1] Simultaneously, technological developments in digital documentation, virtual access, and heritage dissemination demonstrate that effective preservation and public engagement no longer depend solely on physical custody by state institutions.

[1] See: J. Basedow, T. Kono (eds.), *Legal Aspects of Globalisation:Conflicts of Laws, Internet, Capital Markets and Insolvency in a Global Economy*, Kluwer Law International B.V., London 2000.

A central focus of the research lies in the legal and ethical dimensions of ownership rights. International legal instruments, particularly those developed under the auspices of UNESCO, are examined for their role in shaping global understandings of archaeological heritage as part of the common heritage of humanity. While these conventions aim to prevent looting and illicit trafficking, the research highlights a persistent tendency to equate state ownership with effective protection. Empirical realities, however, reveal that illegal excavation, trafficking networks, and the destruction of archaeological contexts continue despite strict legal prohibitions.

The research devotes some attention to the consequences of looting, framing it not only as a legal or economic issue but also as a profound epistemic loss. The removal of artefacts without proper documentation destroys their archaeological context, severely limiting their scientific and historical value. Beyond this, looting disrupts cultural narratives and weakens community identity by severing artefacts from the landscapes and histories to which they belong. The research further observes that looting is often driven by socio-economic hardship, producing short-term individual gains while undermining long-term opportunities for sustainable development, such as heritage-based tourism and community engagement.

A key argument advanced in the research challenges the assumption that excluding archaeological artefacts from commerce reduces looting or intentional destruction. No clear correlation is identified between strict non-commercial classification, particularly through the concept of *res extra commercium*, and improved protection outcomes. Instead, the research suggests that rigid interpretations of this Roman-law concept may inadvertently contribute to legal ambiguity, fostering grey markets while preventing transparent and regulated circulation.

The research's philosophical foundation is grounded in the tension between liberalism and communitarianism. Liberal perspectives emphasise individual rights, private property, and market mechanisms, while communitarian approaches prioritise collective memory, shared identity, and public ownership. Rather than treating these paradigms as irreconcilable, the research demonstrates how heritage law has oscillated between them, often inconsistently. Archaeological heritage has traditionally been governed through a predominantly communitarian framework, however, excessive reliance on this model risks alienating local communities, limiting public engagement, and overburdening state institutions with responsibilities they may lack the capacity to fulfil.

These theoretical concerns are reinforced through an examination of practical governance challenges. The research highlights chronic funding, infrastructure, storage capacity, and specialised personnel deficiencies within archaeological institutions. As a result, large volumes of artefacts remain inventoried but inaccessible, unresearched, or inadequately conserved. In this context, exclusive state ownership does not necessarily ensure effective preservation or public access and may instead contribute to bureaucratic inefficiencies and cultural invisibility.

A central thesis of the research asserts that ownership alone does not inherently restrict the legal circulation of property unless such restriction is explicitly established by law. Applied to archaeological heritage, this principle challenges the assumption that state ownership automatically justifies exclusion from transfer, exchange, or private possession. The research identifies multiple legal scenarios in which ownership of archaeological artefacts may legitimately vest in entities other than the state without undermining public interest or heritage protection.

Building on this premise, the research advocates a conceptual shift from ownership to stewardship. Stewardship emphasises responsibility, care, and accountability rather than absolute dominion. This framework aligns with ethical archaeological practice, indigenous perspectives, and contemporary approaches to cultural heritage management. By adopting stewardship as a guiding principle, the research suggests that both public and private actors can contribute meaningfully to the protection and promotion of archaeological heritage, provided that clear legal safeguards and ethical standards are maintained.

The comparative dimension of the research further elucidates these arguments through an analysis of three distinct legal models: the highly conservative, state-centred framework of Italy, the hybrid system employed in Germany, and the comparatively liberal regime of England. Each model reflects different balances between public control and private involvement. The comparative analysis demonstrates that flexible, mixed approaches tend to offer more effective outcomes in terms of preservation, accessibility, and social utility than rigidly centralised systems.

In its concluding synthesis, the research calls for a reassessment of existing legal frameworks governing archaeological heritage. It advocates clearer distinctions between ownership and protection, greater reliance on stewardship-based governance, and the transparent inclusion of archaeological artefacts within regulated legal markets. Such an approach is presented not as a departure from heritage protection, but as a means to enhance accountability, reduce illicit trade, and foster broader public engagement.

Ultimately, this research conceptualises archaeological heritage not as a static resource to be isolated from society, but as a dynamic cultural asset whose long-term protection depends on legal clarity, ethical responsibility, and inclusive participation. By proposing an integrative framework that bridges liberal and communitarian perspectives, it contributes to ongoing debates on cultural heritage law and offers pathways for more sustainable and socially responsive heritage governance.