Assessment Report

Monumenta Archaeologica in Usu Commerciali: Liberalism versus Communitarianism in Cultural Heritage Law, by Paula Chmielowska

1. Introduction

This dissertation examines the legal status of archaeological monuments, with particular emphasis on whether archaeological artefacts should be treated as objects excluded from commerce or whether they may, under certain conditions, remain within legal circulation. Its central concern is whether state ownership of archaeological artefacts necessarily entails their exclusion from trade, transfer, and private participation. The author's main argument is that ownership and legal circulation must be carefully distinguished. The fact that archaeological artefacts belong to the State Treasury does not, by itself, mean that they are automatically res extra commercium. Exclusion from commerce requires a clear legal basis. In the absence of such an explicit rule, the legal status of archaeological artefacts should not be inferred solely from the identity of the owner.

The dissertation develops this argument through several layers. It first clarifies the conceptual relationship between cultural heritage, cultural property, monuments, archaeological heritage, and stewardship. It then examines international, European, and Polish legal frameworks for the protection of archaeological monuments. The theoretical core of the dissertation is framed through the debate between liberalism and communitarianism: liberalism is associated with individual rights, ownership, and circulation, while communitarianism is associated with collective memory, cultural identity, and public protection. This opposition is then translated into the legal distinction between res extra commercium and res in commercio.

The dissertation ultimately argues for a more flexible model. Archaeological heritage must be strongly protected because of its historical, scientific, cultural, and social value. However, protection should not be reduced to state ownership or automatic exclusion from commerce. Instead, the author proposes a model based on regulated circulation, provenance control, public responsibility, and stewardship.

2. Chapter-by-Chapter Summary

Chapter 1 provides the conceptual foundation for the dissertation. It clarifies the meanings of cultural heritage, cultural property, cultural goods, monuments, archaeological heritage, archaeological monuments, and archaeological stewardship. The chapter emphasises that archaeological monuments should not be understood merely as "things" or as state property. Rather, they are complex entities connected to cultural heritage, collective memory, community identity, scientific knowledge, cultural rights, and responsibility toward future generations.

Chapter 2 examines the legal frameworks for the protection of archaeological monuments at the levels of international law, European law, and Polish domestic law. It shows that, although the protection of archaeological heritage often appears to be based on state ownership and public control, the actual legal picture is more complex. The relevant regimes include exceptions, ambiguities, private participation, reporting obligations, cost allocations, storage duties, and possible forms of legal circulation. The chapter therefore prepares the later argument that archaeological heritage protection cannot be reduced to the question of ownership alone.

Chapter 3 develops the theoretical framework of the dissertation through the debate between liberalism and communitarianism. Liberalism is presented as a position that emphasises individual rights, private property, freedom of circulation, and limits on state intervention. Communitarianism, by contrast, stresses common goods, collective memory, cultural identity, and the state's duty to protect shared heritage. The chapter uses this dichotomy to show that disputes over archaeological monuments are not merely technical questions of cultural heritage law, but reflect a deeper normative conflict between individual rights and collective interests.

Chapter 4 translates this theoretical opposition into the legal distinction between res extra commercium and res in commercio. It examines whether archaeological monuments should be treated as things outside commerce or whether they may, under certain conditions, remain within legal circulation. The chapter's central claim is that state ownership, public value, or cultural importance does not automatically make an object legally inalienable. Exclusion from commerce requires a clear legal basis. This distinction is crucial for the dissertation's broader critique of the automatic association between archaeological heritage and res extra commercium.

Chapter 5 shifts the analysis to a more practical and administrative-law dimension. It examines the discretionary authority of conservators under Polish law in the protection of archaeological monuments. The chapter also addresses problems arising from broad legal definitions of archaeological monuments, the management of mass archaeological artefacts, storage and conservation burdens, and the social utility of archaeological material. It shows that protection is not achieved merely by declaring objects to be publicly owned or legally protected. Effective protection also requires institutional capacity, transparent criteria, adequate storage, access, and meaningful public use.

Chapter 6 provides the comparative-law part of the dissertation. It compares the protection of archaeological monuments in Italy, England, and Germany. Italy is presented as a conservative model based on strong state ownership and public control. England represents a more liberal model, in which private ownership, reporting incentives, and cooperation with finders play a greater role. Germany is treated as an intermediate or mixed model, especially because of the diversity of approaches among the Länder and the use of Schatzregal. Through this comparison, the chapter tests the issues discussed in Chapters 4 and 5: state ownership or private ownership, and res extra commercium or res in commercio.

The conclusion synthesises the dissertation's argument while addressing both lege lata and lege ferenda. As a matter of existing law, the author argues that state ownership of archaeological artefacts does not automatically entail their exclusion from legal circulation. As a matter of future legislation, the author proposes a more flexible model in which important and culturally sensitive artefacts remain strongly protected, while certain lesser-valued or mass artefacts may be subject to regulated circulation. This proposal is linked to a broader shift from ownership-centred thinking toward stewardship, provenance control, public responsibility, and the socially useful management of archaeological heritage.

3. Comments

3.1. Regulated Circulation and Preventive Land-Use Control

One important issue concerns the relationship between the dissertation's proposal for the regulated circulation of excavated artefacts and the preventive logic of land-use control. The dissertation is formally concerned with the protection of archaeological monuments, a category that includes both immovable archaeological sites and movable archaeological artefacts (pp. 121–122). It therefore does not treat archaeological heritage solely as a matter of ownership over objects after excavation. Indeed, the dissertation discusses in situ preservation, the preservation of archaeological context, development-related threats, prior archaeological assessment, excavation control, the duties of investors, reporting obligations in cases of accidental discovery, and the discretionary powers of conservators (pp. 65–66, 77, 93–94, 139–142, 219–221). These elements show that archaeological heritage protection begins before excavation.

Nevertheless, the central argument of the dissertation is directed primarily toward the legal status of excavated movable artefacts. Its main legal question is whether archaeological artefacts, especially those owned by the State Treasury, should automatically be treated as objects outside commerce, or whether ownership and legal circulation should be distinguished (pp. 19–21, 279–282). This focus raises a further question: how does the proposed model of regulated circulation relate to the preventive legal regime that restricts development of archaeologically sensitive land?

This question is important because land-use control protects not only existing physical objects, but also the possibility of future archaeology. Development control, archaeological impact assessment, excavation permits, reporting duties, and in situ preservation preserve information that may not yet be fully known, interpreted, or even discoverable with present methods. In this sense, archaeologically sensitive land is not merely a container of future movable artefacts. It is itself part of the archaeological record.

The dissertation's proposal for regulated circulation should therefore be assessed against this preventive logic. If post-excavation circulation is not carefully limited, it may create or reinforce incentives to excavate, develop, or remove archaeological material rather than preserve it in situ. The issue is not that the dissertation fails to recognise preventive measures before excavation. Rather, the point is that the relationship between this preventive logic and the proposal for regulated circulation could have been developed more explicitly. In particular, the dissertation leaves somewhat unclear how a model that permits circulation after excavation should be structured so as to ensure that it does not weaken the prior duty to preserve archaeological sites, cultural layers, and contexts before excavation. Otherwise, the proposal could come into tension with the rationale of land-use restrictions designed to protect archaeological context and future archaeological knowledge.

A clearer hierarchy would strengthen the argument. First, archaeologically sensitive land should be protected through planning controls, development restrictions, archaeological assessment, reporting duties, and, where appropriate, in situ preservation. Second, excavation should be permitted only where justified, lawful, professionally conducted, and properly documented. Third, only after lawful excavation, complete documentation, expert assessment, and preservation of the relevant archaeological context should the legal system consider whether certain redundant, low-sensitivity, or mass artefacts may be subject to regulated circulation.

With such a hierarchy, the dissertation's proposal becomes more coherent. Regulated circulation would not function as a justification for excavation or development. Rather, it would operate only as a narrowly confined post-excavation mechanism within a broader framework of archaeological stewardship. On this understanding, circulation may be acceptable not because archaeological heritage is treated as an ordinary market object, but because only a limited category of artefacts, whose removal has already been justified and documented, may be managed through controlled legal circulation.

3.2. Communitarianism and Other Critiques of Liberalism

The dissertation frames its theoretical analysis through the opposition between liberalism and communitarianism. This choice is understandable. Liberalism provides a vocabulary of individual rights, private ownership, legal circulation, and limits on state intervention.

Communitarianism, by contrast, provides a vocabulary of common goods, collective memory, cultural identity, and public responsibility. For a dissertation concerned with the tension between private rights and public protection in cultural heritage law, this framework is useful and accessible.

However, communitarianism is not the only critique of liberalism that could be relevant to archaeological heritage. Other theoretical approaches could also illuminate the issues addressed in the dissertation. Republican theory, for example, would focus on freedom from domination and could be used to analyse both state control and market power. Commons theory and public trust doctrine would shift attention from ownership to shared management and intergenerational responsibility. Legal pluralism would be particularly useful for understanding the coexistence of state law, professional ethics, local norms, museum practices, international soft law, and market rules. Postcolonial and decolonial theories would be important where archaeological heritage is linked to colonial extraction, museum collections, restitution, and unequal knowledge production. Care ethics and stewardship theory would also support the dissertation's emphasis on responsibility, preservation, and future generations.

The dissertation's choice of communitarianism is therefore defensible, but not inevitable. It is particularly effective in explaining why archaeological heritage may be treated as a common good rather than an ordinary commodity. Yet the dissertation's own final move toward stewardship arguably fits better with commons theory, public trust, legal pluralism, and stewardship theory than with communitarianism alone. These frameworks would allow the author to move beyond the binary opposition between individual ownership and collective identity, and toward a more relational model of responsibility, access, and governance.

3.3. Stewardship: Replacement of Ownership or Qualification of Ownership?

The dissertation proposes a shift from ownership-centred thinking toward stewardship. The author sometimes presents stewardship as an alternative to ownership-centred thinking, and even describes it as opposed to ownership rights (pp. 20-21, 287-289). Archaeological heritage should not be governed solely through the language of title, exclusion, and transfer. It also requires duties of preservation, documentation, access, public education, and responsibility toward future generations. This is one of the dissertation's strongest insights.

However, a question remains as to whether stewardship should be understood as a replacement for ownership. Ownership remains legally necessary. It determines who has title, who may possess, transfer, or manage the object, who bears costs, who may claim compensation, and who is responsible for legal violations. If stewardship is presented as an alternative to ownership, the legal structure may become unclear. This is especially problematic where land is concerned. The owner of land, the developer, the State Treasury, the museum, the archaeologist, and the local community may all have different roles. Stewardship alone cannot allocate these rights and duties without a supporting legal framework.

A stronger approach would be to understand stewardship as a qualification of ownership. In this view, ownership remains in place, but its exercise is shaped by the public interest in archaeological heritage. The owner of land may retain ownership, but that ownership is burdened by duties of investigation, notification, temporary suspension of works, site protection, documentation, and, where necessary, in situ preservation. Similarly, the owner or holder of movable archaeological artefacts may retain legal title, but that title is subject to duties concerning conservation, provenance, access, registration, and restrictions on transfer.

This approach also makes it possible to understand stewardship as a concretisation of the public-interest limitations inherent in ownership. In constitutional or civil-law terms, stewardship may be treated as the specific content of the social function of ownership, or of the public welfare limitations imposed on property rights, in the field of archaeological heritage. It does not abolish ownership, but it explains why ownership of heritage-related land or artefacts cannot be exercised in the same way as ownership of ordinary commodities.

Such a formulation would also help connect the dissertation's treatment of excavated artefacts with the protection of land before excavation. Stewardship would apply not only after objects have been discovered, but also before excavation, when the primary object of protection is the archaeological context itself. It would therefore provide a bridge between land-use control, archaeological preservation, movable artefact management, and regulated circulation.

For this reason, the dissertation's stewardship argument is promising, but it should be refined. The most persuasive formulation would not be "stewardship instead of ownership," but rather "ownership subject to stewardship duties." This would preserve the legal clarity of ownership while giving substantive content to the public responsibilities that arise when land or objects form part of archaeological heritage.

3.4. Intergenerational Justice and the Irreversibility of Archaeological Loss

The dissertation's stewardship argument would be strengthened by a more explicit engagement with intergenerational justice. Archaeological heritage is not only a resource for present owners, communities, states, museums, or researchers. It is also a non-renewable cultural and informational resource for future generations. Once an archaeological site is destroyed, once a cultural layer is removed without proper documentation, or once an artefact is detached from its context without adequate recording, the resulting loss cannot be fully repaired. This irreversible character makes archaeological heritage particularly suitable for analysis through the lens of intergenerational justice.

The dissertation's main theoretical framework, the opposition between liberalism and communitarianism, tends to focus on the relationship between individual rights and present collective interests. Communitarianism is useful for explaining why archaeological heritage may be treated as a common good connected to memory, identity, and public responsibility. However, it does not necessarily give sufficient attention to the interests of future generations. Intergenerational justice adds this missing temporal dimension. It asks not only what the present community may claim, but also what present actors owe to those who will inherit the archaeological record in the future.

This point is particularly relevant to the protection of land before excavation. Undiscovered archaeological remains are not simply potential objects of future ownership. Current decisions concerning development, excavation, preservation, and documentation therefore affect the opportunities available to future researchers and communities. From this perspective, in situ preservation, development control, archaeological impact assessment, and careful documentation are not merely administrative requirements. They are mechanisms through which the present generation preserves options for the future.

Intergenerational justice also helps clarify the conditions under which regulated circulation of excavated artefacts may be justified. If certain mass or lesser-valued artefacts are to be made available for exchange or sale, this should not be justified solely by present convenience, storage shortages, or market demand. It must also be shown that such circulation does not deprive future generations of significant archaeological information, cultural meaning, or access. This requires lawful excavation, full documentation of context, expert assessment, public registration, preservation of representative samples, and exclusion of culturally sensitive or scientifically important objects from circulation.

In this sense, intergenerational justice does not necessarily oppose all circulation of archaeological artefacts. Rather, it provides a standard for determining when circulation is acceptable. Regulated circulation may be compatible with heritage protection if it preserves the informational, cultural, and educational value of the artefacts for the future. Conversely, circulation becomes problematic if it encourages unnecessary excavation, weakens in situ preservation, obscures provenance, or transfers culturally significant material into inaccessible private hands.

The concept of stewardship is therefore best understood as a responsibility owed not only to present communities but also to future generations. This reinforces the point that stewardship should not replace ownership, but should qualify its exercise. Owners, developers, museums, public authorities, collectors, and researchers may all hold different legal rights, but when archaeological heritage is involved those rights are burdened by duties of care, documentation, preservation, access, and transmission. Intergenerational justice gives these duties a stronger normative foundation.

3.5. Definition, Classification, and Value Assessment of Archaeological Artefacts

A further issue concerns the definition and classification of archaeological artefacts. The dissertation's proposal for regulated circulation depends heavily on the possibility of distinguishing between artefacts that must remain under strict public protection and artefacts that may be treated more flexibly. This distinction is particularly important in relation to so-called mass archaeological artefacts.

The author rightly observes that not all archaeological artefacts have the same scientific, cultural, symbolic, or social value. This observation is important because it challenges the assumption that every excavated object should necessarily be subject to the same legal regime. However, the development of clearer criteria for classification is crucial. If certain artefacts are to be made available for regulated circulation, the law must specify how such artefacts are to be identified. Relevant criteria might include rarity, representativeness, scientific value, cultural sensitivity, connection to a specific community, relationship to the archaeological context, condition, duplication, and educational potential. Without such criteria, the distinction between protected artefacts and circulable artefacts may become uncertain or arbitrary.

This point is closely connected to the problem of administrative discretion discussed in Chapter 5. If the law does not define the relevant categories with sufficient clarity, excessive discretion may shift to conservators, museums, or other administrative authorities. That would create uncertainty for landowners, developers, museums, collectors, and researchers. It could also undermine the legitimacy of the proposed model of regulated circulation. For this reason, the dissertation's de lege ferenda proposal would be strengthened by a more detailed framework for value assessment and classification.

3.6. Institutional Feasibility

A final issue concerns institutional feasibility. The dissertation proposes a more flexible model in which certain archaeological artefacts may circulate under regulated conditions, while public responsibility and stewardship remain central. This is an attractive proposal, but its effectiveness depends on institutional capacity. The relevant legal framework must be capable not only of defining rights and duties, but also of implementing them in practice.

First, the empirical basis of the proposal could be developed further. The dissertation argues that strict state ownership does not necessarily prevent illicit excavation and that private ownership or legal circulation does not necessarily increase black-market activity. This is plausible, and the comparative discussion of Italy, England, and Germany supports the point to some extent. Yet the relationship between ownership models, reporting incentives, illegal excavation, provenance transparency, and market behaviour is partly empirical. The dissertation would therefore benefit from a more explicit engagement with evidence concerning how different legal models affect actual behaviour by finders, landowners, developers, collectors, museums, and enforcement authorities.

Second, the proposed stewardship model must address the allocation of costs. If landowners or developers are expected to finance archaeological investigations, preserve sites, suspend construction, or document finds, the law must clarify when these burdens form part of the ordinary social function of ownership and when compensation or public funding is required. Similarly, if museums or research institutions are expected to store, conserve, catalogue, and provide access to archaeological artefacts, they must have adequate financial and administrative support. Stewardship cannot function merely as a set of moral duties. It requires a realistic distribution of financial and institutional responsibilities.

Third, the proposal for regulated circulation requires administrative infrastructure. Provenance checks, expert assessment, public registration, digital databases, transfer records, conservation standards, and monitoring mechanisms would all be necessary. Without these mechanisms, regulated circulation may become difficult to distinguish from ordinary market circulation. Conversely, if the regulatory burdens are too heavy, the system may be impractical and may fail to attract cooperation from private actors.

For these reasons, the dissertation's proposal is strongest when understood not simply as a doctrinal argument about ownership, but as a governance model. Its success depends on whether the legal system can create credible institutions, transparent procedures, adequate funding, and incentives for cooperation. The shift from ownership to stewardship is persuasive if stewardship is supported by enforceable duties, clear cost allocation, reliable documentation systems, and institutional capacity.

4. Overall Assessment

This dissertation makes a valuable contribution to the debate on archaeological heritage law by challenging the automatic association between archaeological artefacts, state ownership, and exclusion from commerce. Its strongest insight lies in the distinction between ownership and legal circulation. The author convincingly argues that the fact that archaeological artefacts belong to the State Treasury does not, by itself, mean that they are necessarily res extra commercium.

The dissertation is also valuable in showing that archaeological heritage protection cannot be reduced to ownership. Protection requires a broader institutional framework, including excavation control, documentation, conservation, storage, access, provenance research, public education, and administrative capacity. The discussion of mass archaeological artefacts is particularly useful because it exposes a practical problem often overlooked in cultural heritage law: the legal system may formally protect objects that institutions are not realistically able to conserve, study, or make accessible. The author's proposal for a more differentiated treatment of archaeological artefacts therefore responds to a genuine problem.

The theoretical framework of liberalism and communitarianism is effective as an initial way of presenting the tension between private rights and collective cultural interests. It helps explain why archaeological artefacts are difficult legal objects: they are capable of ownership and circulation, but they also embody memory, identity, scientific knowledge, and public responsibility. However, the theoretical analysis could be broadened. Communitarianism is not the only possible critique of liberalism, and the dissertation's own emphasis on stewardship may be better supported by commons theory, public trust doctrine, legal pluralism, care ethics, or postcolonial approaches, depending on the context.

The author recognises the importance of in situ preservation, development control, and archaeological context, but the relationship between these concerns and the proposed regulated circulation of artefacts could have been developed more explicitly. A stronger version of the argument would make clear that circulation is possible only after lawful excavation, full documentation, expert classification, and preservation of the relevant archaeological context. Otherwise, the proposal may appear to risk weakening the principle of pre-excavation protection.

The concept of stewardship is promising, but it should be refined. Stewardship can be understood as the legal and ethical content of the public-interest limitations inherent in ownership. This formulation would allow the concept to apply both to excavated artefacts and to land that may contain archaeological remains. It would also preserve the legal clarity of ownership while giving substantive content to duties of care, documentation, preservation, and access.

Overall, the dissertation offers an important and thought-provoking argument. It does not simply defend market circulation, nor does it deny the public value of archaeological heritage. Rather, it seeks to move beyond the rigid opposition between state ownership and private ownership, or between res extra commercium and res in commercio. Its most persuasive contribution is the claim that archaeological heritage should be protected through a differentiated and responsibility-based framework. To make that claim fully convincing, however, the proposed model needs clearer criteria for classifying artefacts, a stronger account of pre-excavation land protection, and a more developed institutional design for stewardship, cost allocation, provenance control, and regulated circulation.

I conclude that this thesis deserves a 'cum laude' rating.

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Toshiyuki Kono
Honorary Distinguished Professor
Kyushu University