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Treasure hunting – a hobby or a crime? Legal and criminological perspective*

Introduction

The law on the protection of cultural heritage is a comprehensive, autonomous, multidisciplinary branch of law[1]. Thus, the surveys in this area should also include research based on penal sciences. Criminology, as an interdisciplinary science, shall play a special role in diagnosing the causes of pathologies which affect cultural heritage, characterising their manifestations and proposing possibilities for counteracting them.

Pursuant to the Act on the Protection and Guardianship of Monuments of 2003[2], searching for tangible cultural heritage in Poland is generally allowed, though not without restrictions (only upon permission of a Provincial Conservation Officer). The new law has repealed the solutions of its predecessor, i.e. the Act on the Protection of Cultural Property of 1962[3]. Regulatory liberalisation combined with the improving access to and efficiency of specialised search equipment led to a boom for amateur treasure hunting at the turn of the 20th and the 21st centuries. According to current estimates, around 120,000 people in Poland look for the objects of cultural heritage[4].

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[1] K. Zeidler, *Rzeczpospolita Polska. Ustawa z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami*, Tokyo 2019, pp. 113–122.

[2] Act of 23 July 2003 on the Protection and Guardianship of Monuments (consolidated text Journal of Laws 2020, item 282 with amendments), hereinafter referred to as the APGM.

[3] Act of 15 February 1962 on the Protection of Cultural Property (consolidated text Journal of Laws 1999, No. 98, item 1150 with amendments), hereinafter referred to as the APCP.

[4] M. Trzciński, *Poszukiwanie zabytków*, [in:] K. Zeidler (ed.), *Leksykon prawa ochrony zabytków. 100 podstawowych pojęć*, Warsaw 2010, p. 284.

Pursuant to Art. 36.1.12 of the APGM, this sort of activity involves searching for hidden or abandoned cultural heritage, including archaeological heritage, with the use of any type of electronic equipment, technical equipment and diving gear. The act defines tangible cultural heritage in Art. 3.1 and distinguishes two types thereof – immovable (Art. 3.2) and movable (Art. 3.3)[5]. Archaeological heritage constitutes a special category, designated under Art. 3.4. While the act authorises amateur hunts for tangible cultural heritage, the conditions and modes for obtaining relevant permissions are strictly regulated. In reference to the title hereof, let us declare upfront that any hunt for tangible cultural heritage conducted without a permit of the conservation authorities shall constitute an offence under Art. 109c, criminologically defined as an illicit search for tangible cultural heritage.

Criminological aspects

Aetiology of the phenomenon

W. Pływaczewski indicates that the traditional supply channels of the national and global market for cultural heritage objects are drying up, while the demand for such antiquarian artefacts continues to grow[6]. Illicit treasure hunters exploit the illusory anonymity of the Internet to find a market for the acquired goods. Public presentations of the discoveries made by professional archaeologists, which often take the form of sensational media reports containing the exact locations of the find, further stimulate the dynamic escalation of the practice[7]; just like the fact that illicit searches are usually conducted in remote, sparsely populated areas. Meanwhile, amateur search equipment is getting more affordable, accurate, and accessible. Finally, the idleness of witnesses and law enforcement authorities inspires a sense of impunity[8].

When explaining the causes of illicit treasure hunting, we may refer to such criminological theories as the economic approach (Gary Becker and Isaac Ehrlich), the crime opportunity theory (Marcus Felson), the social learning

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[5] More in: M. Duda, *Art. 12. Za zabytki nieruchome w myśl ustawy…*, [in:] K. Zeidler, M. Marcinkowska (eds.), *Dekret Rady Regencyjnej z 1918 r. o opiece nad zabytkami sztuki i kultury z komentarzem, czyli eseje o prawie ochrony dziedzictwa kultury*, Gdańsk 2017, pp. 92–99; J. Narodowska, *Art. 18. Za zabytki ruchome w myśl ustawy…*, [in:] K. Zeidler, M. Marcinkowska (eds.), op. cit., pp. 130–136.

[6] W. Pływaczewski, *Grabież i niszczenie dziedzictwa podwodnego kultury*, „Prokuratura i Prawo" 2008, No. 2, p. 28.

[7] J. Narodowska, M. Duda, *Eksploracja archeologiczna obszarów leśnych*, [in:] W. Pływaczewski, M. Duda (eds.), *Nielegalna eksploatacja obszarów leśnych*, Olsztyn 2013, p. 193.

[8] M. Duda, *Nielegalne poszukiwania zabytków jako zagrożenie dla dziedzictwa kulturalnego*, [in:] W. Pływaczewski, B. Gadecki (eds.), *Ochrona dziedzictwa kulturowego i naturalnego. Perspektywa prawna i kryminologiczna*, Warsaw 2015, p. 170.

theory (Albert Bandura), the theory of neutralisation techniques (Gresham Sykes and David Matza) or the broken windows theory (James Q. Wilson and George L. Kelling). However, we must refrain from their broader description for reasons of space.

Source literature indicates that illicit treasure hunting constitutes the direst threat to archaeological heritage. The danger arises as the hunts are conducted by amateurs without expert qualifications, oblivious to the archaeological research methods, who fail to evidence or properly handle their finds. This situation fuels the incessant conflict between professional archaeologists and amateur hunters. The archaeologists place particular value on the original historical and archaeological context of the discovery. An invasive excavation conducted by an unqualified individual, with no respect for archaeological research methods, often leads to the damage or destruction of the cultural layers and the artefact itself. The stratigraphy of the find allows to date the find and identify its archaeological and historical context. In addition, unprofessional handling of an artefact removed from soil or water may lead to its damage or destruction[9].

However, we may also point to the positive aspects of amateur treasure hunting. Many detectorists are history buffs fascinated with the search for material traces of history and the study of centuries past. They conduct their surveys within the confines of the law, secure their finds, take an inventory, and hand over the artefacts to the relevant institutions (museums, conservation officers). Detectorists often search locations offering no reasons to expect any archaeological discoveries[10]. We could dare say that their exploratory activity, when compliant with the law, may enrich the cultural heritage. Lawful hunts conducted in line with archaeological research methods by competent individuals may complement the work of professional archaeologists[11].

Manifestations of the phenomenon

The recency of Art. 109c of the APGM prevents from formulating any reliable assessments of the scale, dynamics or structure of the illicit hunts. The correspondence of the author with the Ministry of Justice reveals that the database of the National Criminal Register (KRK) contains no final and binding convictions under Art. 109c of the APGM since 2018 (date of entry into force of Art. 109c of the APGM). The court statistics for offences under the

[9] O. Jakubowski, M. Trzciński, *Przestępczość przeciwko dziedzictwu kulturowemu – charakterystyka zjawiska,* [in:] M. Trzciński (ed.), *Praktyczne aspekty zwalczania przestępczości przeciwko dziedzictwu kulturowemu*, Gdańsk 2019, pp. 149–150.

[10] J. Narodowska, M. Duda, *Wandalizm zabytków z perspektywy kryminologicznej*, „Santander Art and Culture Law Review" 2017, No. 1, pp. 44–45.

[11] M. Trzciński, *Przestępczość przeciwko zabytkom archeologicznym. Problematyka prawno-kryminalistyczna*, Warsaw 2010, p. 141.

APGM, published on the Ministry of Justice website, cover the period 2008–2020 and also do not include any cases of an offence under Art. 109c APGM (this would only be possible for the period 2018–2020). From 2021 onwards, the statistics are not published in this form. The data appears to present a reason for concern and confirm the high dark figure of crime (even up to 100%). This thesis is further corroborated by the juxtaposition of the number of individuals involved in treasure hunting (approx. 120 000) with the number of permits for amateur hunts issued annually by conservation officers (approx. 100)[12].

Incidentally, the statistics for petty offences under Art. 111 of the APGM present a similar picture. Research conducted in the years 2003–2008 by J. Witt across the courts of the Gliwice region revealed no legal case qualified under this article[13]. The author's inquiry conducted in the District Court of Olsztyn yielded the same result. A nationwide study conducted in 2012 by O. Jakubowski revealed only seven offences under this article[14].

Consequently, we must present the criminological picture of the practice only on the basis of former data on petty offences under Art. 111 APGM. It may be interesting to attempt a typology of illicit hunters for historical artefacts and describe their M.O.[15]

The first group includes amateur hunters. These individuals often come from different, frequently upper-class, social backgrounds. Amateur hunters regard their activity as a hobby, a passion, a pastime practised in the bosom of nature. They call themselves detectorists, treasure-seekers, explorers, history buffs, militaria enthusiasts or archaeology geeks. They have their own associations and post on online message boards. Amateur hunters hunt chiefly for old coins, militaria, stamps, banners, orders, medals and badges. They scour the fields and the forests, usually at the weekend. Their most widespread tools are a metal detector (magnetometer) and a survival shovel. They keep their artefacts or often hand them over to conservation offices or museums. In most cases, amateur hunters either fail to realise that they are breaking the law or hope that nobody will pay attention to their eccentric hobby[16].

The second group of perpetrators includes professional hunters. These people search methodically, for financial profit, in full awareness of the ille-

[12] M. Sabaciński, M. Trzciński, *O potrzebie zmian w zakresie poszukiwań zabytków i używania wykrywaczy metali*, „Cenne, Bezcenne, Utracone" 2017, No. 1, pp. 60–64.

[13] J. Witt, *Analiza metod obrony detektorystów przed odpowiedzialnością z art. 111 u.o.z.*, [in:] I. Gredka-Ligarska, D. Rozmus (eds.), *Legalne/nielegalne poszukiwanie zabytków i obrót zabytkami. Na styku archeologii i prawa*, Sosnowiec 2017, p. 151.

[14] O. Jakubowski, *Karnoprawna ochrona zabytków – rozważania nad kierunkami zmian prawnych*, [in:] K. Zeidler (ed.), *Prawo ochrony zabytków*, Warsaw–Gdańsk 2014, p. 491.

[15] The source of the research material were interviews conducted by the author with members of the local historical and exploratory association, users of the Internet forums and individual searchers of monuments.

[16] M. Duda, *Nielegalne poszukiwania…*, p. 154; J. Narodowska, M. Duda, *Wandalizm zabytków…*, pp. 44–45.

gitimate character of their actions. They target protected locations of archaeological interest where treasure hunting is prohibited (such as burial mounds, medieval hill forts, the sites of immovable cultural heritage). They also appropriate their finds, usually with a view to commercial resale, thus fuelling an illicit trade in archaeological artefacts – mainly on the Internet. The activity of professional hunters may be classed into the criminological category of property crime perpetrators. In many cases, their criminal activity is their regular source of income, which also places them in the criminological and legal category of career criminals (Art. 65 of the Polish Penal Code)[17].

The third group of perpetrators includes organised crime groups that loot archaeological sites. These criminals seek cultural heritage across the battlefields, war fortifications, cemeteries and other burial sites. Their existence is suggested in source literature, but yet unconfirmed in any national criminology studies[18]. An interesting case of premeditated and planned illegal hunts conducted jointly and in agreement by three perpetrators with the use of professional exploration equipment has been reported by A. Olech[19]. However, the judicial decision glossed by A. Olech does not adopt the qualification under Art. 258 of the PC[20]. As criminologists have reported cases of organised cultural heritage crime, we cannot rule out the possibility that Poland will become an arena for organised crime groups dealing in illicit hunts for cultural heritage.

Furthermore, it is interesting to examine the lines of defence adopted by illicit hunters to escape legal liability. Firstly, an illicit hunter may claim that a search permit is required only in the case of searches conducted in the areas entered in the register of cultural heritage sites. Secondly, the explorers caught *in flagranti delicto* may maintain that their objective is to find meteorites, retrieve lost keys or wedding rings that are their property or clean the area of scrap. Thirdly, they may decide to inform law enforcement authorities that they are indeed involved in a search for cultural heritage objects, but only lost ones, rather than hidden or abandoned. Fourthly, in an attempt to obstruct justice, detectorists may claim that they do not own the metal detectors that served to commit the crime. Fifthly, when threatened with exposure of their

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[17] Act of 6 June 1997 Penal Code (consolidated text Journal of Laws 2020, item 1444 with amedments), hereinafter referred to as the PC.

[18] W. Pływaczewski, op. cit., pp. 24–37; A. Olech, *Glosa do orzeczenia Sądu Rejonowego w Tomaszowie Lubelskim z dnia 2 lutego 2016 roku (sygn. akt II K 662/14, niepubl.)*, „Santander Art and Culture Law Review" 2018, No. 1, p. 98; A. Grajewski, *Przestępczość przeciwko dziedzictwu archeologicznemu i możliwości jej zwalczania w świetle obowiązującego prawa*, „Kurier Konserwatorski" 2017, No. 14, p. 14.

[19] A. Olech, op. cit., pp. 97–105.

[20] Judgment of Tomaszów Lubelski District Court of 2 February 2016 (file signature II K 662/14, unpublished) and judgment of the Zamość District Court of 9 May 2016 (file signature II Ka 263/16, unpublished).

illicit activity, the perpetrators may abandon their finds by their reburial or otherwise[21]. We will forgo a more detailed analysis of these methods for reasons of space. Yet, we may judge that they are insufficient to protect against criminal liability under Art. 109c of the APGM, even though the non-existence of any final and binding decisions referring to this article in the first year of its validity (the only year available in criminal statistics) may suggest irregularities in this regard.

In addition to the illicit hunts for cultural property themselves, we should consider offences that are perpetrated in the course of exploratory activity.

Illicit treasure hunting often goes hand-in-hand with vandalism against cultural heritage. The excavation of movable archaeological heritage (artefacts) out of immovable archaeological heritage (archaeological sites) may lead to their damage or destruction. The perpetrators are interested only in the objects of commercial value; those deemed worthless get destroyed or abandoned together with the surrounding cultural stratigraphy. A permanent detachment of the artefact from its cultural context presents an irreparable loss for culture and science, as it obviates any professional archaeological work[22]. Such M.O. of the perpetrators is subject to the application of Art. 109c and Art. 108 of the APGM (cumulative qualification of the offence)[23].

A natural consequence of illicit hunts is the resulting annexation of the find. Depending on the circumstances, the offence may be classed as theft under Art. 278 of the PC or appropriation under Art. 284 of the PC[24]. If the artefact in question is deemed to have great cultural importance, the offence falls under Art. 294 § 2 of the PC. Alternately, if the value of the artefact is up to PLN 500, the offence falls under Art. 119 of the Polish Petty Offence Code[25].

Upon the unlawful seizure of a cultural heritage object, the perpetrator may attempt its marketing, usually on the Internet (auctions, message boards) or at a street market (flea market). This practice may be combined with offences such as the acquisition of property obtained by means of a prohibited act under 291 or 292 of the PC (the purchase of a cultural heritage artefact obtained by means of a prohibited act) or fraud under Art. 286 of the PC (misleading the purchaser during the sale of cultural heritage artefact).

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[21] J. Witt, op. cit., pp. 145–151.

[22] J. Narodowska, M. Duda, *Wandalizm zabytków*..., p. 44.

[23] J. Narodowska, M. Duda, *Ochrona zamków oraz pałaców i dworów szlacheckich na Warmii i Mazurach – aspekty prawnokarne i kryminologiczne*, „Studia Prawnoustrojowe" 2019, No. 43, pp. 250–253.

[24] B. Gadecki, *Ochrona podwodnego dziedzictwa kultury. Aspekty prawnokarne i kryminologiczne*, Warsaw 2014, pp. 80-85.

[25] Law of 20 May 1971 Petty Offence Code (consolidated text Journal of Laws 2019, item 821 with amendments).

To increase the value of the artefact for sale, the perpetrator may alter it, which meets the criteria of an offence under Art. 109a of the APGM. At the moment of sale, the perpetrator commits an offence classified under Art. 109b of the APGM. The export of cultural heritage objects, which presents a particular detriment to Polish cultural property, is criminally liable under Art. 109 of the APGM.

In addition, we should note the cases of hunts conducted at burial sites (such as cemeteries, burial mounds, graves), which is a way of acquiring war memorabilia, elements of uniform, dog tags or personal property of the deceased[26]. Such deeds meet the criteria of the crime of the spoliation of a corpse, grave or another place of repose of the dead under Art. 262 § 2 of the PC.

In course of their illicit hunts, the explorers often acquire firearms, weapon parts (chassis, action body, barrel, lock, receiver, drum) or ammunition, particularly the arms and ammunition used in the period of World War I and World War II. Such deeds satisfy the definition of the crime of illegal possession of firearms or ammunition under Art. 263 § 2 of the PC.

Just as often illicit hunts conducted in the former areas of armed conflict lead to the acquisition of mines, fuses, grenades and shells. Their possession and storage meet the description of an offence under Art. 171 § 2 of the PC.

Counteracting the phenomenon

Counteracting illicit treasure hunting is an important and necessary mission, as confirmed by the fact demonstrated above – that the phenomenon leads to further pathologies against cultural heritage such as unlawful seizure, acquisition obtained by means of a prohibited act, destruction, smuggling or forgery of cultural heritage[27].

In the event of a discovery of an illicit treasure hunt, the procedure should focus not only on the punishment of the perpetrator but also on the precise determination of the location of the hunt and potential finds, identification of other individuals who could make illegal use of the archaeological site in question, estimation of the value of the acquired artefacts (including not only monetary value but also the historical, artistic or scientific importance). Furthermore, the procedure should involve emergency archaeological research, a description of the condition of the archaeological site, and preventive measures (such as monitoring) to counteract further plundering.

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[26] A. Grajewski, *Problematyka prawno-kryminalistyczna okradania oraz nielegalnych ekshumacji grobów wojennych*, [in:] M. Trzciński, O. Jakubowski (eds.), *Przestępczość przeciwko dziedzictwu kulturowemu. Diagnoza, zapobieganie, zwalczanie*, Wrocław 2016, pp. 95–102.

[27] M. Sabaciński, *Nielegalne wykopaliska jako forma destrukcji zabytku*, [in:] M. Trzciński, O. Jakubowski (eds.), op. cit., p. 162.

Additionally, source literature contains arguments that hunting for cultural heritage, in reality, constitutes archaeological research and therefore should be deemed legitimate only for people with specialised qualifications[28].

There is a range of possible measures to counteract the phenomenon of illicit hunts, including:

– raising the level of awareness and knowledge among the police force, prosecutors, and judges to ensure that crimes against cultural heritage are not downplayed, marginalised, or deemed to have insignificant social consequence;
– introducing lectures on cultural heritage law, crimes against objects of cultural heritage, and legal archaeology in the faculties of law;
– introducing common social education and raising awareness of archaeological heritage and the importance of its preservation;
– informing law enforcement authorities about the detected cases of illicit hunts by the citizens or making citizen's arrests (Art. 243 of the Polish Code of Criminal Procedure);
– locating, evidencing, documenting and securing as many archaeological sites as possible;
– installing video surveillance at archaeological sites of particular value;
– issuing more permits for searching objects of cultural heritage on strictly defined conditions regarding the documentation, handling and transfer to a museum or a conservation officer;
– establishing close cooperation between the Police Force, the Border Guard, the Customs and Treasury Service, State Forests and social organisations combating crime against cultural heritage (associations of explorers);
– monitoring of the antique market, exploration-related message boards, auctions and online transactions for objects of cultural heritage[29].

Legal aspects

Introductory matters

On 22 June 2017, the Act on the Protection and Guardianship of Monuments was amended to include Article 109c. The new provision establishes criminal liability for searching for objects of cultural heritage without permission or in violation of its terms. In its current wording, the article stipulates

[28] J. Wrzosek, *Poszukiwania zabytków ruchomych, w tym zabytków archeologicznych, w świetle obowiązujących przepisów. Uwagi archeologa*, „Kurier Konserwatorski" 2017, No. 14, p. 14.

[29] M. Sabaciński, M. Trzciński, *Kilka uwag o zwalczaniu przestępczości przeciwko zabytkom archeologicznym*, „Ochrona Zabytków" 2009, No. 3, pp. 67–74.

as follows: "Whoever searches for hidden or abandoned objects of cultural heritage without permission or in violation of its terms, including with the use of any type of electronic devices, technical devices, and diving gear, is subject to a fine, restriction of liberty, or deprivation of liberty for up to two years". The article came into full force and effect on 1 January 2018. Simultaneously, Art. 111 of the APGM, which established liability for a petty offence of the same definition, was repealed. Consequently, doctrinal views expressed in the context of the former petty offence under Art. 111 of the APGM are valid *mutatis mutandis* also in the context of the offence under Art. 109c of the APGM. As a side note, we may add that the amendment has largely modified the system of legal protection of cultural heritage with the introduction of administrative fines (Art. 107a–107i of the APGM) imposed by the Provincial Conservation Officers. This change reflects the tendency to replace liability for petty offences with tort liability. In conclusion, as observed by B. Gadecki, the penal-law protection of cultural heritage *sensu largissimo* encompasses liability for offences, petty offences and administrative torts[30].

Origins of the regulation

To begin with, it is worth noting that Art. 109c has been added to the Act on the Protection and Guardianship of Monuments almost on the centenary of the first Polish legal act on cultural heritage protection. Simultaneously, let us note that in that hundred years and four successive legal acts on the matter, legal structure regarding treasure hunting has remained largely unchanged. Searching for objects of cultural heritage requires a permit from the relevant conservation authority under pain of criminal sanctions.

Regulations on treasure hunting were also contained in the predecessor of the applicable act, i.e. the Act on the Protection of Cultural Property of 1962. Art 21 thereof sets forth that "all projects and works performed with respect to cultural heritage, as well as all archaeological and excavation works, require the permission of the relevant Provincial Conservation Officer". Pursuant to Art. 77, the performance of excavation works without permission was prohibited under pain of incarceration or a fine.

A solution on treasure hunting was also included in the Ordinance of the President of the Republic of Poland on the protection of monuments of 1928[31]. Art. 26 thereof stipulates that "archaeological and paleontological searches may be conducted upon permission of the conservation authority of the first instance and are subject to its supervision". The offender was subject to the

[30] B. Gadecki, *Zmiany w zakresie karnoprawnej ochrony zabytków w związku z uchwaleniem ustawy z dnia 22 czerwca 2017 roku o zmianie ustawy o ochronie zabytków i opiece nad zabytkami oraz niektórych innych ustaw*, „Santander Art and Culture Law Review" 2018, No. 1, p. 83.

[31] Regulation of the President of the Republic of Poland on the Care of Monuments (Journal of Laws 1928, No. 29, item 265).

penalty of incarceration for up to four weeks and a fine of up to PLN 500 under Art. 36.

Searching for objects of cultural heritage was discussed also in the Decree of the Regent Council on the protection of monuments of art and culture of 1918[32]. Art. 25 thereof sets forth that "all private archaeological searches shall be conducted upon permission of the Minister of Religious Affairs and Public Education". Any infringement thereupon was prohibited under pain of up to three months of incarceration pursuant to Art. 34[33].

The object of protection

The object of protection granted under Art. 109c of the APGM is the condition of hidden or abandoned objects of cultural heritage which may be damaged or destroyed as a result of unprofessionally conducted searches with the use of specialised equipment[34]. Furthermore, it is the inviolability of the cultural heritage and the proper procedure during hunts for hidden or abandoned objects of cultural heritage[35]. Finally, illicit searches stimulate illegal trade in artefacts and the destruction of archaeological sites[36].

Objective side of the offence

In the case of offences under Art. 109c of the APGM, the offence may take two forms: searching for hidden or abandoned cultural heritage without permission or searching for hidden or abandoned cultural heritage against the terms of the permit.

Pursuant to Art. 36.1.12 of the APGM, the search for hidden or abandoned movable objects of cultural heritage, including archaeological heritage, with the use of any type of electronic devices, technical devices, and diving gear requires a permit issued by a Provincial Conservation Officer. Under Art. 36.2 of the APGM, such searches conducted on Polish waters require the permission of the Director of the Seafarer's Office. Additionally, under Art. 36.3 of the APGM, search permits may determine the terms and conditions for the pre-

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[32] Decree of the Regency Council on the Care of Art and Cultural Monuments (Journal of Laws 1918, No. 16, item 36).

[33] More in: D. Kostrzewa, *Art. 25. Wszelkie prywatne poszukiwania archeologiczne…*, [in:] K. Zeidler, M. Marcinkowska (eds.), op. cit., pp. 191–201.

[34] K. Zalasińska, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz*, Warsaw 2020, p. 325.

[35] B. Gadecki, *Ustawa o ochronie zabytków i opiece nad zabytkami. Art. 108–120. Przepisy karne. Komentarz*, Warsaw 2014, p. 102; W. Kotowski, B. Kurzępa, *Wykroczenia pozakodeksowe. Komentarz*, Warsaw 2008, p. 840.

[36] M. Duda, *Nielegalne poszukiwania zabytków…*, p. 153; P. Chlebowicz, *Prawnokarne aspekty ochrony dóbr kultury. Refleksje na tle zmiany stanu prawnego*, „Ochrona Zabytków" 2003, No. 3–4, p. 122.

vention of any damage or destruction of the object. The elements of a search permit are listed in § 19 of the Ordinance[37].

According to K. Zalasińska and B. Gadecki, Art. 109c of the APGM penalises only searches conducted with the use of any type of electronic devices, technical devices and diving gear. In the event of a search conducted without the use of specialised equipment, the provision is not applicable[38]. M. Kulik represents a different view, arguing that the penalty applies also to searches conducted without the use of specialised equipment[39] . The former position seems more accurate. It is further supported by the wording of Art. 36.1.12 of the APGM, which does not require permission for searches without the use of specialised equipment. In accordance with the above, such searches are not subject to penalty[40]. Thus, searches for the so-called stray finds (located above the cultural layer), conducted by people walking in the forest without equipment or in similar settings, will not meet the definition of a crime under Art. 109c APGM.

The pool of electronic and technical devices used for treasure hunting includes appliances such as a metal detector, a frame metal detector, sonar, ground-penetrating radar, a neodymium magnet or a thermal imaging camera[41]. Tools such as a shovel, a survival shovel, or a rack do not constitute specialised equipment[42]. It is disputable which elements of the diving gear are specifically used for treasure hunting and which are not. Theoretically, a person in a diving suit and aqualung, particularly in a place of archaeological interest, may be accused of conducting an illicit search for objects of cultural heritage under Art. 109c of the APGM. However, such an interpretation seems far-fetched[43].

An offence under Art. 109c APGM is a formal offence (one that requires no specific criminal result).

B. Gadecki argues that a crime under Art. 109c APGM may be perpetrated by commission or omission[44]. M. Kulik takes the opposite view, assuming

[37] Ordinance of the Minister of Culture and National Heritage of 2 August 2018 on the conduct of conservation works, restoration works and conservation studies on a monument entered in the register of monuments or on the List of Treasures of Heritage and construction works, architectural studies and other activities on a monument entered in the register of monuments, as well as archaeological studies and searches for monuments (Journal of Laws 2018, item 1609).

[38] K. Zalasińska, op. cit., p. 324; B. Gadecki, *Zmiany w zakresie karnoprawnej ochrony…*, p. 85.

[39] M. Kulik, *Komentarz do art. 111 ustawy o ochronie zabytków i opiece nad zabytkami*, 2010, Lex, thesis no. 11.

[40] K. Zalasińska, op. cit., p. 324; B. Kurzępa, E. Kurzępa-Czopek, *Nielegalne poszukiwanie zabytków*, „Prokuratura i Prawo" 2011, No. 9, pp. 144–145.

[41] K. Zalasińska, op. cit., p. 325.

[42] B. Kurzępa, E. Kurzępa-Czopek, op. cit., p. 145.

[43] More in: B. Gadecki, *Ochrona podwodnego dziedzictwa kultury. Aspekty prawnokarne i kryminologiczne*, Warsaw 2014.

[44] B. Gadecki, *Ustawa o ochronie…*, p. 103.

that the crime may be committed only by commission[45]. The latter position seems more accurate.

The action performed pertains to a hidden or abandoned object of cultural heritage. M. Kulik asserts that "a hidden artefact is one that was placed in a location that hinders its discovery, one that was the object of measures taken to hinder its discovery, and one that was the object of measures taken to conceal its very existence or its possession by a given individual"[46]. Conversely, "an abandoned artefact is one that was abandoned with the intention of disposal, and – as it appears – any artefact which used to be in somebody's possession but that is no longer the case (...). Similarly, we may agree that an abandoned artefact is also one that has been lost"[47]. The literature emphasises that the notion of "hidden or abandoned objects" covers all situations in which the object is searched for without the need to determine whether it was originally disposed of, lost, or hidden[48]. In addition, a search is conducted when the exact location remains unknown. B. Gadecki is right to say that even though the legislation uses the term "objects", a search for only one object shall still constitute an offence. B. Kurzępa and E. Kurzępa-Czopek observe that under Art. 180 of the Polish Civil Code[49], in the case of abandoned movable objects of cultural heritage, the original owners have disposed thereof through the act of abandonment, whereas in the case of hidden movable objects, no disposal through abandonment has taken place[50].

The subject

An offence under Art. 109c of the APGM has the nature of a general criminal offence (*delictum commune*). It may be perpetrated by any bearer of criminal liability. According to B. Gadecki, such a situation takes place in the case of illicit hunts without permission. In the case of searches in violation of the terms of the permit, the perpetrator must have previously received the permit[51]. Therefore, such an offence has the nature of a criminal offence that may be committed by certain persons only (*delictum proprium*).

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[45] M. Kulik, op. cit., thesis no. 14.

[46] Ibidem, thesis no. 5.

[47] Ibidem, thesis no. 3.

[48] K. Zalasińska, op. cit., p. 324; B. Gadecki, *Prawnokarna ochrona dziedzictwa kulturowego*, [in:] M. Trzciński (ed.), op. cit., p. 60.

[49] Act of 23 April 1964 Civil Code (consolidated text Journal of Laws 2020, item 1740 with amendments).

[50] B. Kurzępa, E. Kurzępa-Czopek, op. cit., pp. 145–146.

[51] B. Gadecki, *Ustawa o ochronie zabytków*…, p. 107.

Subjective side of the offence

An offence under Art. 109c of the APGM may be committed only with intent[52]. It is the greatest difference between the former petty offence under Art. 111 of the APGM, and the new offence under Art. 109c APGM. In view of the wording of Art. 5 of the Polish Petty Offence Code, a petty offence may be committed with intent or otherwise, whereas Art. 8 of the PC stipulates that a crime must be committed with intent unless stipulated otherwise in the law[53].

Criminal sanctions

An offence under Art. 109c is subject to a penalty of a fine, restriction of liberty or deprivation of liberty for up to two years. Thus, in the light of Art. 7 § 3 of the PC, the offence is a petty offence.

In accordance with Art. 59 of the PC, in the case of such criminal sanctions, and the social consequences of the act are not significant, the court may renounce the imposition of the penalty if at the same time, it decides to impose a penal measure, forfeiture or a compensatory measure, and the purpose of such a penalty is thus served by the measure.

In view of the provisions of Art. 66 § 1 of the PC towards the perpetrator of a crime under Art. 109c of the APGM, the court may conditionally discontinue criminal proceedings. The widespread practice of conditionally discontinuing criminal proceedings in cases of crimes against cultural heritage due to the insignificant social consequences has met with unequivocal criticism in source literature. K. Zeidler and P. Rybiński indicate that the assessment of the social consequences of the offence should also consider the type and character of the violated object, and objects of cultural heritage as a common good should be subject to special protection[54].

Under Art. 101 § 1.4, amenability to a penalty for an offence under 109c of the APGM ceases after five years.

In considering the legal status of architectural objects of cultural property, it is interesting to consider the imposition of forfeiture of objects obtained by means of a prohibited act under Art. 109c of the APGM (*fructa sceleris*). Under Art. 35.2 of the APGM, "the property of the State Treasury also includes the objects that constitute archaeological heritage, acquired in the course of searches referred to in Art. 36.1.12". As correctly observed by B. Gadecki, objects of cultural heritage acquired during hunts with the use of any type of electronic or technical devices and diving gear are already the property of the State Treasury, so their forfeiture cannot be imposed under Art. 44 § 1 of

[52] K. Zalasińska, op. cit., p. 325.

[53] B. Gadecki, *Prawnokarna ochrona dziedzictwa…*, p. 59.

[54] K. Zeidler, P. Rybiński, *Społeczna szkodliwość czynu a przestępstwa przeciwko dziedzictwu kultury*, [in:] M. Trzciński, O. Jakubowski (eds.), op. cit., pp. 261–267.

the PC[55]. It is possible to impose the forfeiture of tools of the offence under Art. 109c of the APGM (*instrumenta sceleris*). However, in view of Art. 44 § 3 of the PC, it is disputable whether the forfeiture of electronic and technical equipment or diving gear, which often have tremendous financial value, would be disproportionate to the gravity of the offence. Furthermore, we should eliminate the possibility of imposing the forfeiture of an aqualung used by a diver in an area of archaeological interest without any other exploration gear (such as a metal detector), or the forfeiture of a computer used by an illicit treasure hunter to search the Internet for topography maps necessary for the hunt[56].

Concurrence of offences

If an object of cultural heritage was damaged or destroyed in the course of the search, this involves the concurrence of offences under Art. 109c of the APGM and Art. 108 of the APGM This situation requires a cumulative qualification: Art. 108 concurrently with Art. 109c of the APGM in conjunction with Art. 11 § 2 of the PC. B. Gadecki and M. Trzciński indicate that this situation occurs during illicit hunts at archaeological sites[57]. However, as aptly observed by K. Zalasińska, such situations may occur also in non-protected areas (where searches for objects of cultural heritage are not prohibited)[58].

Procedural matters

An offence under Art. 109c of the APGM is indictable, i.e. it is prosecuted *ex officio*. Under Art. 325b § 1.1 of the Code of Criminal Procedure[59], preparatory proceedings are conducted as an investigation. Under Art. 24 and 25 of the Code of Criminal Procedure, the case shall be adjudicated in the first instance by a district court.

Evaluation of the proposal to amend the APGM

On 7 June 2023, the Parliament received a deputies' draft amendment to the APGM with regard to the issue of criminalisation of illegal search for monuments[60]. On 18 August, the law passed by the Parliament was sent to

[55] B. Gadecki, *Możliwość orzekania przepadku*…, pp. 97–98.

[56] J. Witt, op. cit., p. 149.

[57] B. Gadecki, *Prawnokarna ochrona dziedzictwa*…, p. 60; M. Trzciński, *Przestępczość przeciwko zabytkom*…, p. 222.

[58] K. Zalasińska, op. cit., p. 325.

[59] Act of 6 June 1997 Code of Criminal Procedure (consolidated text Journal of Laws 2020, item 30 with amendments).

[60] Parliamentary bill on the amendment of the Act on the Protection and Guardianship of Monuments (Draft No. 3383).

the President for signature. At the time of publication of this article, the Act of 13 July 2023 amending the APGM should already be in force. According to amendment, Art. 109c of the APGM will be repealed, and two new provisions, Art. 109d and Art. 109e will be added insted, with the following content:

Article 109d. (1) Whoever, contrary to the provisions of Art. 36c (1), searches for hidden or abandoned movable monuments using an electronic or technical device, in an area which is: 1) a monument entered in the register or included in the provincial register of monuments or at a distance closer than 5 metres from them, 2) a monument recognized as a monument of history, 3) a cultural park, 4) covered by protection under the Convention Concerning the Protection of the World Cultural and Natural Heritage adopted in Paris on 16 November 1972 (Journal of Laws 1976, item 190 and 191) or is its buffer zone, 5) a site awarded the European Heritage Label, as referred to in Decision No 1194/2011/EU of the European Parliament and of the Council of 16 November 2011 establishing a European Union action for the European Heritage Label, 6) a cemetery, former cemetery, grave or war grave, or place of execution included in the relevant register or having a visible form, placed symbols or markings indicating its nature, 7) an extermination monument or its protection zone – shall be subject to a fine, restriction of freedom or imprisonment of up to 2 years. (2) The same punishment shall be imposed on anyone who, in the maritime areas of the Republic of Poland, without permission or contrary to the conditions of the permission, searches for hidden or abandoned monuments, including with the use of an electronic or technical device.

Article 109e. (1) Whoever conducts a search for hidden or abandoned movable monuments with the use of an electronic or technical device without fulfilling the obligation to report the search shall be punished by a fine. (2) If a person is repeatedly punished for the offence referred to in paragraph (1), the court may impose a penal measure prohibiting the search for hidden or abandoned movable monuments with the use of an electronic or technical device for a period of up to 3 years.

The draft amendment provides for moving this type of act from the catalogue of offences to the catalogue of petty offences, thus *de facto* returning to the pre-2018 solution. In the light of the above solutions, searching for hidden or abandoned movable monuments with the use of an electronic or technical device could constitute an offence or a petty offence, depending on where the search would take place.

The offence under Article 109d APGM would be to search for monuments in areas of particular value and therefore particularly protected (registered monuments, historical monuments, cultural parks, UNESCO monuments, monuments with the European Heritage Label, cemeteries, holocaust memorials, maritime areas).

Conducting searches in other areas but without complying with the obligation to report the search would fulfil the offence of Article 109e APGM. In addition, it has been assumed that in case of recidivism for this offence, the court will be able to impose a search ban for up to three years.

Thus, a legal search of monuments would be possible only outside specially protected areas and with notification of the search prior to the start of the search by means of the digital application made available by the minister in charge of culture and national heritage protection.

The justification for these changes is to facilitate the treasure-hunting passion of a social group of some 200,000–250,000 people. So far, obtaining a permit from the conservation office was time-consuming and procedurally difficult and in practice, only around 1% of applicants obtained such a permit. The amendment would enable amateur prospectors to be included in the system of legal search for monuments[61].

According to criminologists, the proposed change is negative to the monument conservation system. The only possibility of punishing the offender for the crime will be to apprehend him or her in the act of committing the offence in a specially protected area. In the situation of illegal extraction of a monument from a specially protected area, such persons will be able to claim that they found it elsewhere and just wanted to report it to the conservation services. Moreover, after the repeal of Art. 109c of the APGM, the previously conducted criminal proceedings for this act will be discontinued. On the other hand, people searching for monuments in other areas (petty offence) will still be able to explain that they are seeking for lost jewellery or meteorites. In addition, the police will not have access to the search report database, which will make it impossible to verify searchers. The provision on recidivism will also be pointless, as APGM petty offences are not recorded in the police KSIP database, which will make it impossible to check for repeat offences[62].

It should be noted that in the course of the legislative proceedings, however, the consideration of illegal treasure hunting only as a criminal offence was returned. Both conducting searches in specially protected areas (Art. 109d APGM) and conducting searches in other areas without fulfilling the obligation to notify the search (Art. 109e APGM) will be subject to a fine, restriction of liberty or imprisonment for up to 2 years.

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[61] *Justification of the bill*, https://sip.lex.pl/#/act-project/105731189/1/zmiana-ustawy-o-ochronie-zabytkow-i-opiece-nad-zabytkami?cm=URELATIONS (accessed: 19.07.2023).

[62] M. Sewastianowicz, *Pan Samochodzik vs. poszukiwacze skarbów? – prawo łagodniejsze dla hobbystów i trudniejsze do egzekwowania*, „Prawo.pl", July 1, 2023, https://www.prawo.pl/prawo/poszukiwanie-skarbow-z-wykrywaczem-metali-a-ochrona-zabytkow,522002.html (accessed: 19.07.2023); B. Gadecki, O. Jakubowski, *Co na to wszystko Indiana Jones?*, „Rzeczpospolita", July 11, 2023, https://www.rp.pl/rzecz-o-prawie/art38714151-gadecki-jakubowski-co-na-to-wszystko-indiana-jones (accessed: 19.07.2023).

In conclusion, it may be said that if the changes made come into force in their present form, they will not bring much positive to the system of legal protection of monuments. As far as criminal responsibility for illegal search for monuments is concerned, the *status quo* will in principle be maintained; such acts will remain criminal offences. On the other hand, the obligation to obtain a permit from the conservation services will be replaced by the obligation to report the search. It is, however, difficult to predict how the enforcement of the new provisions will function in practice, particularly as there are no implementing regulations for the APGM so far (e.g. digital application regulation).

Conclusions

The question asked in the title – regarding the legal and social appraisal of amateur treasure hunting – demands an unequivocal answer. When the hunt is conducted without permission or in violation of the terms of the permit, it constitutes an offence. Only hunts conducted upon permission of a Provincial Conservation Officer (Director of the Seafarer's Office) may be regarded as a legal hobby. At the beginning of 2018, liability for the petty offence defined in Art. 111 has been transformed into a liability for an offence under Art. 109c of the APGM. Source literature contains opinions that such a solution facilitates the pursuit of perpetrators involved in offences against archaeological heritage by the Police[63]. However, an analysis of criminal records does not corroborate this view. Since 2018, not a single person in Poland has been convicted of this crime. Only a review of the later statistical periods may reveal whether Art. 109c of the APGM is a dead letter. The recently proposed amendment to the APGM's regulations on illegal searching for monuments should be assessed negatively as being introduced in a hurry, without consideration or consultation with the scientific community. From a criminological standpoint, the aetiology of illicit treasure hunting may be explained with reference to a range of theories. What seems particularly pertinent is the economic approach, stipulating that a rational perpetrator commits crimes that yield great profits and carry a small risk of criminal liability. In the scope of the phenomenology of the phenomenon, particularly interesting matters include the dark figure of crime (even up to 100%), the M.O. of the perpetrators, the typology of the perpetrators and their lines of defence in the face of criminal liability. We should also note that illicit treasure hunting falls into the category of property crime and its perpetrators often meet the definition of career criminals.

[63] O. Jakubowski, *Zagrożenie dziedzictwa kulturowego przestępczością – analiza wydarzeń w 2018 roku*, „Santander Art and Culture Law Review" 2019, No. 1, p. 164.

Furthermore, it needs to be emphasised that illicit treasure hunting generates many other pathologies related to cultural heritage (theft, destruction, acquisition by means of a prohibited act, forgery, smuggling). Counteracting this phenomenon should rely on legal, administrative and financial solutions. Above all, society, law enforcement authorities, and the judicature need to understand that illicit treasure hunting poses a grave threat to the cultural heritage and cannot be regarded as a hobby with insignificant social consequences.

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Summary

Treasure hunting – a hobby or a crime? Legal and criminological perspective

Keywords: criminology, penal law, illicit excavations, metal detector, treasure hunting, cultural heritage.

The paper is devoted to the problem of amateur search for monuments with the use of a metal detector. The aim of the article is to introduce the principles of criminal responsibility for this offence under on the Protection and Guardianship of Monuments (2003) and to discuss criminological aspects of this phenomenon (etiology, phenomenology, prevention). The conditions of lawful search for monuments and the conditions of illegal search are indicated. The reasons for undertaking illegal searches, the manifestations of this phenomenon and the possibilities of counteracting this social pathology are discussed. The relations between illegal search and other criminal phenomena aimed at cultural heritage, including archaeological heritage, are also described. The principles of criminal responsibility for the offence of illegal search for monuments under Art. 109c of the APGM are characterised. An analysis is also made of the latest draft of the amendment to the APGM with regard to the legal regulation of monument exploration. The scale of the phenomenon of amateur search for monuments is constantly growing. The vast majority of explorers carry out searches illegally. However, enforcement of the rules of criminal liability for illegal searching is ineffective. However, the solutions proposed in the latest amendment will not improve this situation. It is therefore necessary to regulate this issue comprehensively, taking into account the proposals raised in the doctrine.

Streszczenie

Poszukiwanie skarbów – hobby czy przestępstwo? Perspektywa prawna i kryminologiczna

Słowa kluczowe: kryminologia, prawo karne, nielegalne wykopaliska, wykrywacz metali, poszukiwanie skarbów, dziedzictwo kulturowe.

Artykuł poświęcono problematyce amatorskich poszukiwań zabytków za pomocą detektora metalu. Celem opracowania jest przybliżenie zasad odpowiedzialności karnej za to przestępstwo z ustawy o ochronie zabytków i opiece nad zabytkami (2003) oraz analiza kryminologicznych aspektów tego zjawiska (etiologia, fenomenologia, profilaktyka). W tekście wskazano warunki prowadzenia zgodnych z prawem poszukiwań zabytków oraz uwarunkowania poszukiwań nielegalnych. Podano zostały przyczyny podejmowania nielegalnych poszukiwań, przejawy tego zjawiska oraz możliwości przeciwdziałania tej patologii społecznej. Opisano również relacje pomiędzy nielegalnym poszukiwaniem zabytków a innymi zjawiskami kryminalnymi wymierzonymi w dziedzictwo kulturowe, w tym dziedzictwo archeologiczne. Scharakteryzowane zostały zasady odpowiedzialności karnej za przestępstwo prowadzenia nielegalnych poszukiwań zabytków z art. 109c ustawy o ochronie zabytków i opiece na zabytkami. Dokonano również analizy najnowszego projektu nowelizacji ustawy w zakresie prawnych uregulowań poszukiwań zabytków. Skala zjawiska amatorskich poszukiwań zabytków nieustannie rośnie. Zdecydowana większość eksploratorów dokonuje poszukiwań niezgodnie z prawem. Tymczasem egzekwowanie zasad odpowiedzialności karnej za nielegalne poszukiwania jest nieskuteczne. Zaproponowane w ostatniej nowelizacji rozwiązania nie poprawią jednak tej sytuacji. Konieczne jest zatem kompleksowe uregulowanie tej kwestii, z uwzględnieniem postulatów podnoszonych w doktrynie.