The Freedom of Archaeological Research

Archaeological Heritage Protection and Civil Rights in Austria (and beyond)

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Archaeologists like to think that heritage protection laws serve the purpose to protect all archaeology from damage. Thus, provisions like that of § 11 (1) Austrian Denkmalschutzgesetz or Art. 3 i-ii of the Valetta convention are interpreted as a blanket ban on archaeological fieldwork ‘unauthorised’ by national heritage agencies, and a general prohibition against archaeological field research by non-professionals. The Austrian National Heritage Agency, the Bundesdenkmalamt, interprets the Austrian law in this way. Using the Austrian example as a case study, this paper demonstrates that this interpretation must be wrong, since if it were true, it would revoke a fundamental civil right enshrined both in the Austrian constitution and the Charter of Fundamental Rights of the European Union: the unconditional freedom of research, which applies to archaeological field research as to any other kind of academic research, and extends equally to every citizen.

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Introduction

Austria’s constitution is the basis of the Austrian legal and social order as a liberal democracy. An aspect of the constitution is the *Staatsgrundgesetz 1867* (StGG), which defines the fundamental civil rights of all citizens. As a civil liberty, academic freedom is established by Article 17 of the StGG: ‘Academic research and teaching are free.’¹

Walter Berka (1999: 343-345) paraphrases from a decision of the Austrian Supreme Constitutional Court (VfGH) that academic freedom ‘is an absolute freedom, which cannot be restricted by either ordinary law or administrative act’.² It extends to everyone who conducts academic research, regardless of whether they are formally qualified or not. Academic research, in this context, is defined as ‘any systematic and methodical attempt to discover objective knowledge, which subjects itself to inter-subjective scrutiny’ (Berka, 1999: 343).³ Of course, this freedom extends not only to Austrian citizens, but to every human on its territory. The same fundamental liberty is also enshrined in Article 13 of the Charter of Fundamental Rights of the European Union: ‘The arts and scientific research shall be free of constraint. Academic freedom shall be respected’ (European Union, 2012: 398).

While this does not mean that academic freedom cannot be restricted at all, according to the VfGH, it can only be restricted to the extent that is both necessary for and proportionate with the need to protect other justified legal interests of equal standing. Therefore, any restrictions with the intent or effect of restricting academic freedom are illegal in Austria unless the unrestricted exercise of this particular liberty threatens other constitutionally protected (civil) rights or liberties (Berka, 1999: 345-346). To restrict the freedom of research in any way, the state needs very good reasons: it cannot do so arbitrarily.

Archaeological Heritage Protection and Civil Rights in Austria

Austria's national heritage protection law is the *Denkmalschutzgesetz* (DMSG). This law includes many provisions, for instance on scheduling monuments, buildings or artworks whose preservation is in the public interest; how that public interest is to be established; the penalties for damaging a protected monument, etc. It also contains specifically archaeological provisions in §§ 8-11, which include such things as a general duty to report archaeological finds, provisions on the ownership of finds made (normally to be shared equally between finder and landowner), and also on the requirement for 'research excavations' of archaeology to be formally permitted by the National Heritage Agency, the *Bundesdenkmalamt* (BDA).

It is particularly the last provision which concerns me. Its first sentence defines the circumstances under which such a permit is required:

Research by changing the surface of the soil or the ground under water (excavation) and other research in situ for the purpose of discovering and examining moveable and immobile monuments beneath the surface of the earth or water may only be undertaken with permission by the Bundesdenkmalamt ... (research excavation)

(DMSG: § 11 (1))⁴

This sentence can be interpreted in two ways.

Either, it could mean that archaeological field research in situ by excavation or any other means is prohibited without a permit by the BDA if it *affects* a *scheduled* monument. From a constitutional perspective, this would be fine, at least where invasive archaeological measures like excavations are concerned. The freedom of research would be restricted in this case because its exercise would endanger another justified legal interest; the legally effective public interest in the preservation of this particular monument. And since, according to the Austrian constitution (Art. 10 Abs. 1 Z 13 *Bundes-Verfassungsgesetz*), the protection of monuments is a duty of the state, the state can restrict the freedom of academic research on *scheduled* monuments. However, whether this restriction could also apply to non-invasive archaeological research, like a Ground Penetrating Radar survey, and still be constitutional, is already much more debateable. If the research is unlikely to damage the monument, there is no constitutional basis for making it subject to a permit by the BDA. After all, the public interest in the preservation of the monument is not threatened by this exercise of the freedom of research; and thus there is no necessity to protect the monument from it.

Alternatively, it could mean that any archaeological field research in situ, whether by excavation or any other means, is prohibited without a permit from the BDA, provided it aims at the discovery and examination of any archaeological monument, regardless of whether that monument is scheduled or not. This is the interpretation favoured by the BDA: in its *Guidelines for Archaeological Measures*, it states explicitly that any archaeological research in situ requires a permit from the BDA:

It is a precondition for conducting any excavation »and other research in situ for the purpose of discovering and examining moveable and immobile archaeological monuments« to have been granted a permit by the Bundesdenkmalamt according to § 11 Abs. 1 DMSG...

(BDA, 2016: 6)⁵

In this context, it is particularly noteworthy that the apparently verbatim quote from § 11 Abs. 1 DMSG (see note 5) is using ever so slightly different wording at the end; that is, the BDA in its official 'Guidelines' misquotes the law it is legally obliged to uphold.

From a constitutional perspective, this situation is highly problematic. If this interpretation by the BDA of the law were correct, § 11 (1) DMSG would prohibit any archaeological fieldwork without a permit from the BDA, and thus significantly restrict academic freedom. It would be restricted even where no public interest in the preservation of anything, let alone the archaeology targeted by the research, has become legally effective. Permits are meaningful only if there can be circumstances where they can be refused, and if the state or its agencies can refuse the permit, then academic research no longer is free. The law would aim specifically at restricting the freedom of research, for no particular (legal) reason, and that is definitely unconstitutional (Berka, 1999: 345-346).

Matters only get worse if one considers that the second sentence of § 11 (1) DMSG restricts the right to be issued with a permit exclusively to individuals who have successfully completed a degree in archaeology.⁶ Of the Austrian population, only c. 0.015% (Aitchison, et al., 2014: 19) are archaeology graduates. Thus, if the BDA's preferred interpretation of § 11 (1) DMSG were correct, the constitutionally guaranteed freedom of research of 99.985% of Austrian citizens would be completely revoked where archaeological field research is concerned. This would apply not just to invasive archaeological research on scheduled monuments, that is, where a legally effective public interest in their preservation actually exists, but any archaeology. In fact, it would even apply to any archaeological field research carried out in situ, even if there is no archaeology whatsoever on the site that is targeted. This would clearly make the provisions of § 11 (1) DMSG a law specifically aimed at removing the freedom of research and thus unconstitutional (Berka, 1999: 345-6).

Remarkably, this law has not yet been tested before the VfGH in this regard, so at the moment one cannot say with absolute certainty that it would not hold. However, from the discussion above, it should be clear that the interpretation preferred by the BDA – the government agency tasked with upholding this law – would certainly not.

Necessary and proportionate heritage protection laws?

But is the interpretation preferred by the BDA not both necessary for and proportionate with the need of protecting archaeology from wanton damage and destruction, and therefore constitutional after all? To answer this question, let us examine a few case studies:

8th Century AD Barrows in the Zirkenauer Wald

Until recently, the remains of 18 barrows dating to the 8th century AD were preserved in a forest in Upper Austria called the Zirkenauer Wald. Known since at least 1918, they were first surveyed and assessed by Georg Kyrle (Brückler & Nimeth, 2001: 149), the first archaeology graduate employed by the Austrian Heritage Agency (the *Staatsdenkmalamt*). Kyrle (1919: 76) published the results of this survey in volume 1 of the *Mitteilungen des Staatsdenkmalamtes*, the official journal of the Heritage Agency. Between 2000 and 2002, professors Otto Urban and Erwin Ruprechtsberger excavated some of the barrows (Ruprechtsberger, 2003) with permission of the BDA. The barrows, however, had never been and were not scheduled even

after these excavations. In summer 2015, an interested citizen, who visits them reasonably regularly, observed that 16 had apparently been bulldozed by the landowner (Krieglsteiner, 2015; see figure 1).

Fig. 1: Barrows in the Zirkenauser Wald before (left) and after their destruction (right) in Summer 2015 (images reproduced with kind permission of C. Steingruber).

Everything in this example was legal, with perhaps one (albeit minor) exception. Kyrle legally surveyed and reported the barrows; Urban and Ruprechtsberger legally excavated some of the barrows; and the landowner legally bulldozed them. Since they were not scheduled, even the landowner was acting perfectly within his rights when destroying them: there was, after all, no legally effective public interest in their preservation, so he could do with his property (another of those constitutionally guaranteed civil rights) as he liked, regardless of whether there was archaeology there.

The only one who might have broken any laws was the interested citizen, who visited the barrows and – by researching in situ with the purpose of discovering and examining them – realised that they had, mostly, been destroyed. Since he did so without a permit from the BDA, which he – not being an archaeology graduate – could not even have legally been issued, he may well have violated the BDA's interpretation of that particular law.

Yet, I find it difficult to understand how it would benefit the archaeology if we punished that interested citizen for monitoring (examining them to discover whether they have been damaged) this monument. I also severely doubt that it is both necessary for and proportionate with the need to protect the archaeological heritage of Austria that any interested citizen is prohibited by law to conduct archaeological field research; particularly if the very archaeology researched can be bulldozed with impunity by its owner. And I also struggle to fathom why it should have been necessary for and proportionate with the public interest in the preservation of those particular monuments (of which there was, quite obviously, none) that two professors of archaeology with 50 years of professional experience between them could not be trusted to excavate them properly without having to be granted a permit by the BDA.

Cleaning rubbish from popular Austrian lakes

The Attersee, also in Upper Austria, is an alpine lake. It is owned by the *Österreichische Bundesforste AG* (ÖBf, the company managing the Austrian national forests and lakes), which itself is wholly owned by the state. It contains remains of prehistoric pile dwellings, (some of) which are part of the 'Prehistoric Pile Dwellings around the Alps' World Heritage site since 2011 (UNESCO, 2011). In September 2015, the *Kuratorium Pfahlbau*, the organisation managing the Austrian parts of this multinational World Heritage site, conducted an underwater research excavation in the pit underneath the diving platform in the lakeside resort of Seewalchen am Attersee. They needed a permit from the BDA for this research excavation, which they duly got. That part of the Attersee, incidentally, is also not scheduled; apparently, there is no compelling reason to do so.

Shortly before these excavations, the landowner called on the public to participate in a week of 'cleaning the lakes of unwanted rubbish' (Bundesforste, 2015). For this purpose, as its press releases before and during the weekend event make clear, volunteer divers were searching the lake floor with metal detectors and nets to discover and remove 'old rubbish'. There is no indication that these volunteers received any training or instruction regarding potential archaeological finds, nor that any archaeologist was involved in it, nor the *Kuratorium Pfahlbau* consulted or even only informed of this in advance.

When I came across this on the internet the day after the cleaning had finished, I immediately informed the BDA that I suspected that this activity might have breached the provisions of § 11 (1) DMSG. After all, searches for the purpose of discovering man-made objects of indeterminate significance under the surface of water had been conducted; and § 1 (1) DMSG defines as 'monuments' all man-made objects of historical, artistic or other cultural significance. According to Supreme Administrative Court (VwGH) decisions relating to this subject matter, the absolute age, preservation condition, financial value, or indeed the frequency of the occurrence of a man-made object is no material consideration in determining whether it is a monument, the only relevant criterion is its significance (Bazil, et al., 2004: 36-42). This significance, however, can only be established by due legal process by the BDA, which thus has to have knowledge of the objects in question. Since the BDA could not have any actual knowledge of the objects in question before they were discovered, it thus appeared to me that this lake cleaning would have come under the provisions of § 11 (1) DMSG as interpreted by the BDA. The volunteer divers of the ÖBf were searching for man-made objects of indeterminate significance, which might have been of such significance that their preservation would be in the public interest. To my great surprise, the BDA responded just three days later that it did not consider the activities of the ÖBf a breach of the provisions of the DMSG.⁷ A further enquiry to the BDA for an explanation of why this was the case was not answered constructively.

I can only presume that in this particular case, the BDA interpreted the provisions of § 11 (1) DMSG rather literally: the ÖBf (or rather, its volunteers) had not conducted *research* in situ for the purpose of discovering *and examining monuments* beneath the surface of the water, but had conducted *searches* in situ for the purpose of discovering *and removing old objects*. However, since § 11 (1) DMSG only prohibits unpermitted research, not unpermitted destruction or removal of (potential) monuments, the activities of the ÖBf were not prohibited

by the DMSG. Or perhaps, it might be that § 11 (1) DMSG prohibits research in situ to discover monuments, but not research in situ to discover 'old rubbish'.

Thus, apparently, it is perfectly legal in Austria to metal detect in and remove finds from a World Heritage site just days before a permitted archaeological excavation is to start in the very same spot. Presumably, it is both necessary for and proportionate with the need to protect archaeological heritage from unpermitted research, but not from unpermitted looting by metal detectorist. To me, this does not sound quite right as an interpretation of a heritage protection law.

Metal detecting and equality before the law

In 2011, a man was seen metal detecting on the slopes below the ruins of Sichtenberg Castle in Lower Austria by two archaeology students, who duly reported him to the BDA. Sichtenberg Castle is not scheduled, nor part of a World Heritage site. The BDA had this metal detectorist charged for breaching §§ 8 (1) (compulsory reporting of archaeological finds) and 11 (1) DMSG. When interviewed by the prosecuting authority more than a year after he had been reported, the metal detectorist claimed to not have searched for archaeology, but either a key lost by a friend or, as he usually does, for meteorites; and that he hadn't found anything anyway. The BDA argued against these claims, which it thought not to be credible, since there normally were many metal finds to be made on the slopes beneath a medieval castle ruin and metal detectorists are usually aware of this fact. Since there was no other evidence than the interview of the detectorist, the witness statement of the students, and the expert opinion by the BDA, nothing else was considered by the prosecuting authority.

Based on this, it fined the metal detectorist for breaking § 11 (1) DMSG, but not § 8 (1) DMSG. It explained this as follows: since it could not be established whether the metal detectorist had found anything, no breach of § 8 (1) DMSG was proven. However, he was guilty of having broken § 11 (1) DMSG: disregarding its provisions could endanger significant archaeological monuments. § 5 (1) *Verwaltungsstrafgesetz* (administrative penal code) establishes that an offence is also punishable if committed by negligence. Negligence could be presumed when the disregarded legal prohibition does not require actual damage to occur to be punishable, which is the case with § 11 (1) DMSG. In such cases, the burden of proof would rest on the accused, who had, in this particular case, not successfully proven his innocence (see case file BH Melk 23.9.2013, MES2-V-12 10139/5).

This case seems rather remarkable, particularly in comparison with the previous one. The two cases seem to be almost perfectly identical, with the only difference that the 'lake cleaning' involved many divers metal detecting in a World Heritage site, while in the Sichtenberg case, it was just one metal detectorist searching 'near' a site neither scheduled nor of World Heritage designation. It cannot be argued that the ÖBf could have been unaware that searching the lake floor in a World Heritage site could damage significant archaeology, or that searching for archaeology there required a permit by the BDA. The ÖBf, as landowner of the Attersee, is perfectly well aware that there is a World Heritage site on their land. And it must also have been perfectly aware that just days after its 'rubbish cleaning', an archaeological excavation with a permit from the BDA was to take place in the very same spot; if only because the BDA sends copies of excavation permits to the affected landowners.

Of course, the metal detectorist at Sichtenberg Castle might have lied when he claimed that he was neither searching for archaeology nor had found any. But it seems much more credible

that he could have been unaware that he was prohibited from searching for whatever he may have been (including archaeology) without a permit by the BDA near a site which isn't scheduled; or indeed was unaware that by searching for something entirely different than archaeology, he was 'negligently' risking damaging archaeology and thus was prohibited from conducting his otherwise perfectly legal search. And that leaves aside the infinitesimally small probability that the individual metal detectorist at Sichtenberg Castle caused more damage to significant archaeology – which may not even exist there and which he, even if it does, may not have 'discovered' at all – than the many divers metal detecting on the lake floor of the Attersee on behalf of the ÖBf – where significant archaeology certainly exists.

To me, this all seems rather strange. If the ÖBf sends plenty of divers to metal detect for 'old rubbish' in a World Heritage site, just days before a permitted excavation is to take place there, this is, apparently, perfectly legal. Yet, if a metal detectorist searches for something or other – we don't really know what – somewhere near an unscheduled medieval ruin, a presumption of guilt by negligence applies that he has broken a legal prohibition which may not actually prohibit what he was doing in the first place. This seems to blatantly violate the principle of equality before the law: for virtually identical activities, private citizens are punished while a large state-owned company is not.

The Will of the Legislator

Before I come to conclusions, one last, purely legalistic point: let us try to determine what kind of heritage protection the Austrian legislator (= parliament) wanted when it passed the latest revision of the DMSG in 1999. This is important, because the preferred interpretation of the BDA of § 11 (1) DMSG rests on its interpretation of the 'will of the legislator'. This 'will', in many administrative and a number of court cases, has been described rather simplistically as 'protecting (archaeological) heritage'; including in a landmark decision by the VwGH. In it, the court upheld the legal opinion of lower authorities (including the BDA) that any intrusion into the ground, even if only very shallow and without using tools, would constitute an 'excavation' if it aimed at discovering archaeology (VwGH 21/6/1985, 84/12/0213, 3-5). It also upheld the reasoning of the lower authorities that:

The spirit of the particular legal provisions could only be to subject, if necessary, excavations with the purpose of discovering and examining moveable and immovable monuments to professional supervision and counter the destruction of, change to, or removal of cultural heritage.'

(VwGH21/6/1985, 84/12/0213, 3)⁸

Yet, this analysis is not only just stating the plainly obvious – that a Heritage Protection Law intends to protect heritage and prohibitions against 'unauthorised' excavations intend to prevent them – but also is overly simplistic, since it sidesteps the question of what 'significant archaeology', whose preservation is in the public interest, actually is.

What the legislator considers to be 'significant' monuments can be gathered from a particular significant change made to the DMSG in its latest revision in 1999. Since 1923, the DMSG had contained a provision (§ 2 DMSG) automatically protecting all 'monuments' (that is, all man-made objects of *any* historical, artistic or other cultural significance) in public ownership 'by force of legal presumption'.⁹ Effectively, all public buildings and all public land

were 'scheduled' by default; unless the BDA had decided explicitly (on application by an affected party) that it was not. The 1999 revision introduced a sunset clause for this 'presumptive scheduling' of property in public ownership: the new § 2 (4) revoked 'scheduling by force of legal presumption', effective from 01/01/2010.

This is a massive change: the ÖBf alone, a fully state-owned company, owns c.10% of the Austrian landmass. Almost all publicly owned land was 'scheduled by force of legal presumption', as were most public buildings, until 31/12/2009. Now, only about 35,000 buildings and c.1,100 archaeological sites in Austria are 'scheduled monuments' protected by the provisions of the DMSG. In the explanatory comments to the government draft of the revision (RV, 1999), this change was explained both in general terms and more specifically. Generally, the comments stated that:

From the outset, the Denkmalschutzgesetz assumed a clear limitation [RK: of what could be considered a 'significant monument'] by means of selection by scholarly reasoning. Only in this limitation, heritage protection can operate with the necessary efficiency, which would be lost if too large a number of monuments were to be scheduled. For this reason, it is one of the most difficult tasks of the Bundesdenkmalamt to select that amount for scheduling, which is necessary from an academic perspective, and can be managed from an administrative one.

(RV, 1999: 39)¹⁰

More specifically, it explained that an analysis of earlier decisions by the BDA whether property 'scheduled by force of legal presumption' actually merited protection had found that only in c. 15% of cases, the 'legal presumption' had been justified by the actual 'significance' of the object in question (RV, 1999: 33). This ratio of c. 1:6 of the legal presumption turning out to be correct seemed insufficient to the legislator to retain 'scheduling by force of legal presumption' as part of the law.

The ratio of 'scheduled' to known archaeological sites in Austria is c.1:25; there are c. 30,000 known archaeological sites in Austria, of which c.1,100 are 'scheduled'. Assuming the same ratio, only c.3.9% (Ployer, 2014: 34) of as yet unknown archaeological sites in Austria would be of sufficient significance to merit public interest in their preservation. Where small finds are concerned, that ratio is considerably smaller: the *Fundberichte aus Österreich*, the annual finds reports compiled by the BDA (1934-2014), indicate that at least several million small finds have been made on permitted excavations or by chance since 1930. Of those, since scheduling was first introduced in 1923, at most a handful has been 'scheduled', whether individually or as assemblages, by the BDA. At the very most, 0.01% of all small finds made have been deemed to be sufficiently significant to merit public interest in their preservation.

It should also be considered that at the 2016 'archaeology round table' of the BDA, the head of its archaeology department informed those present that the BDA was struggling to find funding to maintain the staffing of its central finds storage facilities at the *Kartause Mauerbach* near, and the *Arsenal* in, Vienna. This might lead to the facility being closed to the public – including any academic archaeologist – until further notice. The BDA stores an unknown number of finds there (estimated to be in excess of 1 million objects), most gathered on (often developer-funded) permitted, professional archaeological excavations. One has to wonder whether there truly can be a public interest in keeping them locked away from prying eyes, including those of professional archaeologists who need them for their research. It seems to be

protection for protection's sake, not for ensuring that significant archaeology remains preserved for professional archaeological research.

That the Austrian legislator, who removed a legal presumption true in about 1 of 6 cases, seriously wanted a similar but much more all-encompassing presumption for protecting all archaeology to remain on the statute book, seems rather unlikely. It is even less likely that the legislator wanted to remove one of their fundamental rights from 99.985% and severely restrict it for the remaining 0.015% of its citizens, if the 'legal presumption' used to justify this is true in only 1 of 25 sites and in less than 1 of 1000 small finds affected. To enable what the legislator stated explicitly it wanted, a much less intrusive provision would entirely have sufficed: a general duty for finders of archaeology to report it to the BDA, to enable it to select those elements whose preservation is actually in the public interest. And that provision is in the law since 1923 in form of § 8 DMSG.

It also is virtually unimaginable that the VfGH would consider the interpretation of § 11 (1) DMSG preferred by the BDA to be both necessary for and proportionate with the public interest in protecting 'significant' archaeology. Removing a fundamental civil liberty from almost all Austrians, just because its unrestricted exercise might, in a tiny minority of cases, endanger as yet unknown archaeology, is certainly not constitutionally justified. It would be a massive restriction of a fundamental civil right, without any lawful cause justifying such a restriction; which is certainly entirely disproportionate. And that's not even considering that the public interest in heritage preservation is constitutionally much less protected than the freedom of research, an 'absolute freedom' according to the VfGH (Berka, 1999: 345). Unless it were purposefully misled, it is practically impossible that, if it ever had to decide in this matter, the VfGH would find in favour of 'total heritage protection' rather than freedom of research.

Conclusions

On closer examination, it becomes exceedingly clear that the preferred interpretation of the BDA of § 11 (1) DMSG cannot be correct. If, as the BDA maintains in its official 'guidelines' (BDA, 2016: 6), a permit were required for *any* archaeological fieldwork in situ, the law would certainly be unconstitutional. It would be a law specifically aimed at restricting the freedom of research of all but c.15 Austrian citizens, that is, everyone but the archaeologists employed by the BDA. Yet, such intentional restrictions of this freedom are definitely constitutionally prohibited by Art. 17 StGG (Berka, 1999: 345-6). The BDA's preferred interpretation must be wrong for several reasons:

- 1) Archaeology which is known, but not scheduled, may wilfully be destroyed with impunity by its owner, as demonstrated by the case study of the barrows in the Zirkenauer Wald. If it is not scheduled, there is no legally effective public interest in the preservation of archaeology, therefore its owner can do with it as he wills. Thus, for the very same reason, it cannot be legal to prohibit researching such archaeology by means of fieldwork in situ: if it may legally be destroyed for any other reason, prohibiting its unpermitted research does not protect it from destruction; it only protects it from being researched.
- 2) Archaeology which may exist, but is also unknown, and therefore not scheduled, cannot be protected from its destruction by means of in situ archaeological research either.

There is no legally effective public interest in its preservation either, and therefore, the state has no justification for and thus no right to restrict the freedom to research it in any way.

- 3) The law also does not protect archaeological sites or small finds, whether known or unknown, from 'looting' by metal detectorists, as demonstrated by the case study concerning the 'lake cleaning' conducted by the ÖBf. If 'searches' in situ aim only at discovering, but not at examining (but rather at discarding or also, quite possibly, at selling) potentially significant archaeology, they apparently are perfectly legal and not prohibited by § 11 (1) DMSG; only archaeological research is. However, it is unconstitutional, and thus illegal, to specifically prohibit research.
- 4) The actual need of the BDA to know archaeology before it is destroyed (to be able to select those parts which are significant for protection) is insufficient to justify a complete removal of the freedom of (archaeological) research from 99.985% of all Austrian citizens. This is neither necessary for nor proportionate with a legal presumption of a public preservation interest in unknown archaeology. Sites and small finds are not normally completely destroyed by archaeological research, not even by archaeological excavations, let alone by non-invasive surveys or the activities of 'lone wolf' researchers. The BDA's 'need to know' can sufficiently be satisfied with the much less intrusive provision of § 8 DMSG, the compulsory duty to report finds.

The only correct interpretation of § 11 (1) DMSG – that is, the only one that does not violate the constitution – thus must be that its provisions apply, exclusively, to archaeology that is already scheduled. Only if a site is scheduled (by which all small finds on and within it are also scheduled), a public interest in its preservation becomes legally effective; and that, and only that, allows the state by law and its agencies by administrative acts to restrict the freedom of archaeological field research.

In Austria, therefore, it may well be that it is not the metal detectorists or other citizens with an active interest in archaeology, who we always like to remind that 'they, like everyone, have to obey the law', who are breaking it. Even blatant 'looting' for financial gains of archaeological sites, provided they are not scheduled, may well be perfectly legal in Austria, as is the wilful destruction of unscheduled archaeology. Quite to the contrary, it seems as if it is the BDA which acts (or rather, has to act) unconstitutionally and, thus, illegally, when it tries to ensure that unscheduled archaeology is protected from wanton looting and destruction.

Lessons to be Learned

There are, of course, a few lessons to be learned.

The most obvious, but not particularly important one, is that Austrian archaeological heritage protection legislation is simply not fit for what we archaeologists would want it to do. It does not protect unscheduled archaeology from anything but being researched. Yet only a woefully inadequate number of archaeological sites are scheduled in Austria, and therefore protected by law.

It should be noted that in the last paragraph I have studiously avoided saying that Austria's DMSG is unfit for purpose; since whether one considers it to be depends mostly on what one considers that purpose to be. One can approach this consideration from an archaeological perspective, and assume – as we archaeologists always like to do – that its purpose is to protect *all* archaeology from *any* damage. Taking that point of view, the DMSG, obviously, is almost entirely unfit for purpose.

However, one can also approach it from the viewpoint much more likely to be taken by members of parliament and constitutional lawyers. These cannot just (and quite rightly do not) prioritise archaeological interests over all others, but try to balance the interests of archaeologists with those of all other citizens. From this perspective, the DMSG does not appear nearly as unfit for purpose as it does from a purely archaeological one, but actually looks quite sensible (even if, perhaps, nowhere near perfect). If seen in the context of the protection of fundamental civil rights and liberties enshrined in the Austrian constitution, and international law of even higher legal status, it seems like a quite 'successful' attempt at protecting truly 'significant' archaeology for academic research, while restricting, as little as possible, fundamentally important civil liberties. And remember, those civil liberties are the very foundations upon which our liberal democracies are built.

In this particular case, most archaeologists may not like such a heritage protection law that they deem entirely unfit for purpose; because the need to balance our professional and private interests against those fundamental civil liberties means that we will never get the heritage protection laws we would like to have. And that I find, quite frankly, outrageous; at least as long as I think about this as, first and foremost, an archaeologist. Yet, if I think about it as a citizen of a liberal democracy; I actually find myself agreeing with this balancing act, however archaeologically unsatisfactory it may be: I would rather have parliament protect my civil liberties than squash them because some special interest group would prefer that. But if I want my civil rights to be protected, I also have to accept that parliament also and equally protects the civil liberties of others, even if this is to the detriment of my special interest group.

There are two wider and more important lessons to be learned from this, though. Firstly, if we interpret our respective heritage protection laws, whatever they may specifically say, or international treaties like the Valetta convention (CoE, 1992), we must interpret them within the wider legal (and especially constitutional) framework within which they are set. For example, many archaeologists like to interpret the provisions of Art. 3 i-ii of the Valetta convention as a blanket ban on 'unauthorised' excavations and on any invasive archaeological fieldwork by non-professionals (aka 'citizens'), much like the BDA in Austria interprets § 11 (1) DMSG. Yet, we don't consider that Art. 2 of the Valetta Convention states that parties to the convention commit to institute a legal system for the protection of the archaeological heritage that is appropriate to them. That, of course, means that in states which have written constitutions, the Valetta Convention must be implemented within national constitutional limits.

Nor do we consider that European conventions have to be interpreted in the context of the wider European legal framework. And as stated in the beginning, this wider framework includes, as a much more fundamental and binding document than the Valetta Convention, the Charter of Fundamental Rights of the European Union. And that, in Art. 13, enshrines the freedom of research (EU, 2012: 398) exactly as the Austrian constitution does: as an unrestricted civil right.

And note, this is not mere legal theory that may, at most, only be applicable to Austria. Rather, there is already a ruling on an exactly parallel matter by the *Verwaltungsgericht* (VG, administrative court) *Wiesbaden* (3/5/2000, 7 E 81800 (V)) in Germany, which follows pretty much exactly the same reasoning as established above for Austria. While the legal situation in Hesse, to which this ruling applies, is somewhat different to that in Austria, the fundamental civil liberties are the same in Germany as in Austria, and the heritage legislation and its application are sufficiently similar to make this decision relevant. In this case, a German metal detectorist successfully challenged the refusal by the *Landesamt für Denkmalpflege* (LAD, state office for heritage protection) of Hesse to issue him with an archaeological field research permit. Not only were the arguments raised by the LAD crushed decisively by the court, but specifically so because the LAD's blanket refusal to issue such permits to private citizens, including metal detectorists, was ruled by the court to both be violating the applicant's freedom of research, and as neither necessary for nor proportionate with the protection of the public interest in the preservation of significant archaeological heritage. Rather, the VG Wiesbaden maintained that a requirement to report potentially significant archaeological finds to the LAD (which would be exactly parallel to the duty imposed on any finder of archaeology in Austria by § 8 DMSG) would be entirely sufficient for and proportionate with that public interest (VG Wiesbaden 3/5/2000, 7 E 81800 (V), 10-1).

Thus, like § 11 (1) DMSG, Art. 3 i-ii of the Valetta convention (CoE, 1992) cannot be interpreted as a blanket ban on 'unauthorised' archaeological excavations or indeed on any invasive archaeological fieldwork by non-professionals. In fact, it is not - in the UK, for instance, permits are only required for research on scheduled monuments. However, if it is interpreted as a blanket ban regardless, that breaches the fundamental civil liberty of these citizens to engage, unrestricted by arbitrary interventions by the state, its laws, or the administrative acts of its heritage protection agencies, in their own, independent and self-determined, that is, *free*, archaeological research.

Only if and when there is a legally effective public interest in the preservation of some particular element of the archaeology, can freedom of research be lawfully restricted. Thus, if the law in your country, or at least the interpretation of it applied by its archaeological authorities, go beyond the limitations set by your country's constitution or the Charter of the Fundamental Rights of European Union, you better consider well whether you, too, want to apply them in that way. Because if you do, it may well be you, rather than those you lambast as 'heritage criminals', who may be breaking the law.

Secondly, and perhaps even more importantly, we all better reconsider what we are wishing for: do we really want to remove academic freedom to enable us to better protect archaeology, or would we rather keep it as a fundamental right and risk that some archaeology is damaged? And make no mistake, the only way to get the 'total archaeological heritage protection' so many of us seem to want and be arguing for, is to abolish the civil right of freedom of research.

As the Austrian case study demonstrates, 'total archaeological heritage protection' is impossible as long as we retain this civil right. Because even if we were able to convince our respective legislator to institute a legally effective public interest in the protection of *all* archaeology, whether known or unknown, significant or not, and scheduled or not, that public interest would still have to be balanced against the – societally and legally much more important – civil liberty of freedom of research. It will never be both necessary to and proportionate with the need to protect the public interest in archaeological heritage protection to effectively abolish completely the freedom of research for almost all citizens, whether of your country, the wider European Union, or, indeed, the whole world. While we may be able to

cheat our respective Supreme and the European Court for a while into not noticing such an imbalance, eventually, they will. And once they do, it won't be pretty for us, and the outcome will reflect exceptionally badly on us as both an academic discipline and a profession (see for this *VG Wiesbaden* 3/5/2000, 7 E 81800 (V), 7-11).

We can only overcome this hurdle by abolishing the civil right of freedom of archaeological research (and, at the same time, a few other fundamental rights and freedoms). But if we achieved that, we would either also abolish our own academic freedom; or the principle of equality before the law. Both is equally dreadful: the former would mean that the state could tell us what to research, what methods or theories to use, and even what to write (and publish) and what not. We, in Austria, have been there some 75 years ago, and I'd rather not go back to that regime, even though archaeology benefitted massively from it (e.g. Haßmann, 2000: especially 86-90). The latter, on the other hand, would mean that we accept that at least some special interest groups may have privileges. We, in Austria, have been there already, too, until 1867, when the StGG was passed; and who knows, some of us might even be able to dust off some old patents of nobility, and reclaim some privileges long lost. Though I guess, these days, privileges would be for big business; and unlikely to be particularly beneficial for archaeology.

Of course, as archaeologists in liberal democracies, we not only have the right, but also the duty to speak up for our main interest, the archaeology. But, as I hope to have shown in this article, we cannot and must not lose sight of the limitations imposed on us by the wider social and legal order of the societies we are living in. We may consider archaeology as more important than anything else, but not everyone does; and there are things that are much more important than it. The freedom of archaeological research, and the principle of equality before the law, for instance, may well be a nuisance to us, particularly if they result in an archaeological heritage law as 'bad' (from an archaeological perspective) as the Austrian one. But in the greater scheme of things, these fundamental civil rights and liberties are much more important than preserving not just truly important, but all archaeology. If we fail to consider them, and even help to erode them to benefit our own special interests, it will be to our, and most likely to archaeology's, great detriment.

Recommendations

Based on the arguments put forth above, I would recommend revisiting our heritage laws (especially the Austrian one) and their interpretations and come up with better solutions for aligning archaeological heritage protection with fundamental civil rights. Rather than attempting to prohibit the exercise of academic freedom, we should set legal standards for the treatment of archaeology in the event of its discovery; whether discovered by chance or design. After all, not every hole that rips archaeology out of the ground qualifies as academic archaeological research. Rather, academic research is, at least partly, defined by adhering to academic standards; by ensuring that certain records are being produced during fieldwork and published thereafter (e.g. by submitting them to public archives). Such requirements must be met to consider archaeological fieldwork as an activity covered by the civil liberty of academic freedom in the first place: as the Austrian Supreme Constitutional Court defines it, academic research is 'any systematic and methodical attempt to discover objective knowledge, which subjects itself to inter-subjective scrutiny' (Berka, 1999: 343), not just any 'search' for something for personal pleasure, financial gain, or whatever other reason. Virtually the same

definition is used by the Constitutional Courts in other countries (e.g. for Germany, see Pieroth, et al., 2015: 176).

In fact, academic freedom provides a strong constitutional justification for the state setting legally binding minimum standards for the treatment of previously unrecorded archaeology. After all, if it is destroyed without being properly recorded, the academic freedom of those who wish to research it is removed: the archaeology will be utterly lost and thus, no future research on it will be possible. Thus, any action that might cause irreparable damage to the archaeological record can be subjected to minimum standards of recording by the state; be it development-related, metal detecting, or archaeological fieldwork.

If the non-observance of such minimum standards is threatened by appropriate legal sanctions (e.g. severe fines), the freedom of archaeological research is not restricted: unless scheduled (that is, archaeology so significant that its preservation in situ in perpetuity is in the public interest), anyone who wishes to could freely research it, provided the research is conducted to the set standards. It would not matter who conducts the research, but only how the research is being conducted. And that is what archaeological heritage protection legislation ought to ensure where unscheduled archaeology is concerned: that the archaeological record is properly preserved so that it remains available for future academic research. The responsibility for complying with these standards would lie with those who wish to exercise their freedom of research, as it should be, both from a perspective of civil rights and professional ethics. Rather than excluding Joe Public from exercising his civil right of conducting archaeological fieldwork if he chooses to, anyone, whether Joe Public or Professors of Archaeology like I, can and should be required by law to professionally record any archaeology they discover.

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Notes

¹ „Die Wissenschaft und ihre Lehre ist frei.“ (Art. 17 StGG)

² „...ein absolutes Grundrecht ist, das durch kein einfaches Gesetz und durch keinen Verwaltungsakt eingeschränkt werden kann.“ (Berka, 1999: 345).

³ „...jedes planvolle und methodische Bemühen um die Gewinnung objektiver Erkenntnisse, das sich einer intersubjektiven Überprüfung stellt.“ (Berka, 1999: 343).

⁴ „Die Nachforschung durch Veränderung der Erdoberfläche bzw. des Grundes unter Wasser (Grabung) und sonstige Nachforschungen an Ort und Stelle zum Zwecke der Entdeckung und Untersuchung beweglicher und unbeweglicher Denkmale unter der Erd- bzw. Wasseroberfläche dürfen nur mit Bewilligung des Bundesdenkmalamtes vorgenommen werden ... (Forschungsgrabung).“ (§ 11 Abs. 1 DMSG).

⁵ „Voraussetzung für die Aufnahme jeglicher Grabungstätigkeiten »und sonstiger Nachforschungen an Ort und Stelle zum Zwecke der Entdeckung und Untersuchung beweglicher und unbeweglicher Bodendenkmale« ist das Vorliegen eines bewilligenden Bescheides des Bundesdenkmalamtes gemäß § 11 Abs. 1 DMSG...“ (BDA, 2016: 6).

⁶ „Eine derartige Bewilligung kann nur an Personen erteilt werden, die ein einschlägiges Universitätsstudium absolviert haben...“ (§ 11 Abs. 1 DMSG) ('Such a permit can only be granted to persons who have completed a relevant university degree ...').

⁷ „... dass wir in gegenständlicher Angelegenheit im Vorgehen der Bundesforste keine Übertretung des Denkmalschutzgesetzes sehen“ (BDA 1/10/2015, BDA-00841.sb/0070-ARCHÄO/2015).

⁸ „Sinn der gegenständlichen gesetzlichen Bestimmung könne es nur sein, Ausgrabungen zum Zwecke der Entdeckung und Untersuchung beweglicher und unbeweglicher Denkmale nötigenfalls einer fachmännischen Überwachung zu unterwerfen und einer Zerstörung, Veränderung und Verbringung von Kulturgütern entgegenzuwirken.“ (VwGH 21.6.1985, 84/12/0213, 3).

⁹ „Kraft gesetzlicher Vermutung“ (§ 2 DMSG)

¹⁰ „Das Denkmalschutzgesetz ging von vornherein von einer klaren Beschränkung durch wissenschaftlich überlegte Auswahl aus. Nur in dieser Beschränkung kann der Denkmalschutz auch jene Effizienz entfalten, deren er bei einer zu großen Anzahl von Unterschutzstellungen verlustig gehen würde. Aus diesem Grund ist es einer der schwierigsten Aufgaben des Bundesdenkmalamtes, jene Auswahl in jenem Umfang für die Unterschutzstellungen zu treffen, die vom Fachlichen her erforderlich ist und vom Administrativen her bewältigt werden kann.“ (RV, 1999: 39).