

On the Highway to Hell: Thoughts on the Unintended Consequences for Portable Antiquities of § 11(1) Austrian *Denkmalschutzgesetz*

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At first glance, Austrian laws for the protection of archaeological heritage appear to be almost perfect: licenses for archaeological fieldwork, including metal detector surveys, can only be awarded to archaeology graduates. Yet, this had unintended consequences: the number of finds reported by members of the public has declined dramatically. Also, conditions issued by the Bundesdenkmalamt on excavation licenses only affect archaeologists, who have no means to fulfil them, rather than owners of finds and documentation, who would have. Thus, the good intentions behind a theoretically perfect law turn out to be the pavement for a highway to archaeological heritage hell.

KEYWORDS Austria, excavation licences, heritage law, portable antiquities, Portable Antiquities Scheme

There is an old proverb that the road to hell is paved with good intentions. This contribution looks at a particular archaeological heritage hell caused by the good intentions behind, in particular, §§ 8 and 11(1) of the Austrian National Heritage Law, the *Denkmalschutzgesetz* (DMSG).¹ This law, and more generally Austrian heritage management, are topics which have received insufficient attention in the national, but also the international, heritage management debate.

Austrian archaeological heritage protection legislation

Since most readers will not be aware of the provisions of this law, a short explanation is necessary.

§ 8 DMSG determines that all archaeological finds must be reported. It defines archaeological finds as ‘things which apparently could be subject to the provisions

of this law because of their location, form or nature',² all of which are considered to be treasure.³ If archaeological treasure is properly reported to the National Heritage Agency Bundesdenkmalamt (BDA),⁴ the finder and the owner of the land where it was discovered become shared legal owners of it according to § 399 Austrian Common Law, the Allgemeines bürgerliches Gesetzbuch (ABGB). An archaeological treasure is considered to have been properly reported if the finder reports it to the BDA immediately or on the day following its discovery.⁵

According to § 400 ABGB, the only finders who are excepted from this rule are those who have committed an offence during the activity that led to the find, have searched without the knowledge and permission of the landowner, or have concealed the find. If any of these conditions apply, the share of the finder falls to the person who made the report to the authorities, or in the absence of such a person, to the state.⁶ According to the answers of the BDA to frequently asked questions posted on its website, such a disqualifying offence includes digging for archaeological finds without the express permission of the BDA.⁷

If a find was made on private property by a private finder and properly reported, the state or its institutions (e.g. national or regional public museums) can acquire it by normal purchase on the licit antiquities market. Compulsory purchase orders can be issued according to § 10(1) DMSG only if the state owns a share in the find, i.e. if the find was made on state-owned land,⁸ during a publicly funded survey or excavation by agents of a public institution (e.g. BDA staff),⁹ or if the find was not properly reported and the state acquired a share in the find according to the stipulations of § 400 ABGB.¹⁰ If a compulsory purchase order is issued, the party legally owning the other share in the find (whether as finder or landowner according to § 399 ABGB) has to be compensated by the state with a payment equal to 50 per cent of the full market value of the find.¹¹

§ 11(1) DMSG is the statute dealing with the licensing of archaeological excavations by the BDA. In it, an excavation is defined as any search *in situ* with the purpose of discovering and examining portable or immovable archaeological objects buried underneath the surface of earth or water, whether that surface is broken or not.¹² Any such excavation requires a licence by the BDA, which can however, according to § 11(1) DMSG, only be granted to individuals¹³ who have completed a degree in a relevant academic subject.¹⁴ This means that persons who have not graduated in an archaeology degree are explicitly prohibited by law to dig any hole with the intent to discover archaeological finds unless they participate in a formal excavation run by a properly trained archaeologist. At first glance, this looks like an almost perfect law.

This legal situation is certainly the result of the best intentions of those archaeologists who were involved in drawing it up. § 8 DMSG generates, in combination with §§ 399 and 400 ABGB, a strong motivation for finders to report finds quickly and properly, so as to not lose their monetary share in finds they have made. The good intention is clearly to ensure that as many finds as possible, preferably all, are reported to the relevant authorities — to ensure that the historical knowledge implicit in the chance archaeological finds made by the public are not lost to scholarship.

§ 11(1) DMSG, on the other hand, follows the regulations of the 1969 London Convention to the letter, especially Article 3. This article states:

To give full scientific significance to archaeological excavations in the sites, areas and zones designated in accordance with Article 2 of this Convention, each Contracting Party undertakes, as far as possible, to:

- a. prohibit and restrain illicit excavations;
- b. take the necessary measures to ensure that excavations are, by special authorisation, entrusted only to qualified persons;
- c. ensure the control and conservation of the results obtained.¹⁵

Austria has ratified¹⁶ only this and not the 1992 revised version of the European Convention for the Protection of the Archaeological Heritage. To fulfil the obligations set out in this Convention, the regulation of § 11(1) DMSG, that all archaeological excavations must be licensed by the BDA, already present in Austrian Law since the original publication of the DMSG,¹⁷ was increasingly tightened and made more restrictive in the 1990 and 1999 revisions of the DMSG.¹⁸ In 1990, excavation licences were restricted to persons who had completed either a degree in archaeology or an examination of their competency by an official Commission.¹⁹ Finally in 1999, in the current revision of the DMSG, excavation licences were restricted exclusively to archaeology graduates.²⁰

The good intentions which motivated both the increased restrictiveness of Austrian law, and also of Article 3(b) of the 1969 London Convention,²¹ are clearly apparent: excavations should only be carried out by qualified persons. It seems obvious that such persons are unquestionably those who have graduated in an archaeological discipline. That this has the additional benefit that the archaeology labour market is thereby restricted to archaeology graduates could be seen as a welcome side effect. And in the wonderful world of legal theory, it might seem a good idea to ban everyone but archaeology graduates from carrying out archaeological excavations. The only problem with this is that in ugly reality, things are not quite like what the wonderful theory would like them to be.

As this author has repeatedly pointed out, Austrian archaeology likes to be proud of its achievements and dislikes any kind of criticism, particularly public criticism.²² This has led to a pronounced lack of self-reflection on its own (scholarly and administrative) practices: the current status quo is perceived to be the best of all possible worlds; any alternatives are necessarily perceived to threaten it, to be necessarily inferior, and thus to be necessarily bad. This has led to a complete lack of critical self-assessment and evaluation of current archaeological heritage management practices since the first publication of the DMSG. Rather, the pretence has been maintained for a long time that the best that can be done is already being done, that there is no need, perhaps even no room, for any further improvements.²³ Yet, what has not been done is to assess whether the (alleged) solutions that have been found for archaeological heritage management are actually effective: that is, whether they achieve what we want them to achieve. And clearly, what we want these solutions to achieve cannot be that just archaeology graduates are allowed to dig, but rather that the archaeological heritage is afforded the best possible protection, regardless of who is doing the protecting.

The public and the prohibition against digging for finds

What was entirely forgotten was to consider how the public would react to a complete prohibition on searching for and finding (by digging for) archaeological objects, particularly that part of the public that actually finds most of them: those amateur historians or amateur archaeologists²⁴ who have, over the past forty years, increasingly started to use modern technology — metal detectors — in the search for archaeological objects. Of course, these members of the public continue not just to search for but also to find and dig up archaeological objects, even if they are legally prohibited from doing so. The increasing restrictiveness of the law and of international legal conventions²⁵ on the subject proves as much: after all, the first rule of legal history is that the best way of finding out what really happened in a society is to find out what legislators repeatedly tried to prevent by increasingly tightening the law.

Yet such prohibitions are clearly bound to have consequences: those who do something that is (or has now become) prohibited by law lose any motivation to report to the authorities their own legally prohibited activities (including any finds made). This is as obvious as it is smart: since reporting such activities is an (at least implicit) admission of having broken the law, volunteering any information about them to the authorities responsible for prosecuting such offences is unattractive to the finders. This is especially so since these prohibitions can only be enforced if the offender admits guilt. In such circumstances, the majority of offenders will not necessarily stop their (now) outlawed activities just because they have been forbidden, but may rather choose to continue with them and simply keep them concealed from the authorities.

The motivation for members of the public to report archaeological finds created by § 8 DMSG is clearly based on the recognition of the fact that archaeology, and especially archaeological heritage management, needs the public to report any archaeological finds they make. In opposition to the solution chosen in § 8 DMSG, treasure trove,²⁶ quite obviously, creates a strong motivation for finders not to report finds of treasure, since if they successfully conceal them from the authorities, they can keep (and possibly illicitly sell) them; while if they report them, the finds are lost to them (and unless the state compensates them financially, any potential financial benefits are lost to them too). The ‘trick’ of § 8 DMSG in conjunction with § 400 ABGB is to reward ‘honest finders’, that is those who do not conceal their finds, with a share in what they have discovered. At the same time, it punishes ‘dishonest finders’ by awarding the 50 per cent share in ownership due to the ‘honest finder’ to whoever notified the authorities of this illegal activity. In general terms, therefore, the ‘honest’ reporting (even that of the ‘dishonest finder’) is rewarded by the authorities, while the intentional concealment of finds leads to punishment. The intentions of the legislator could not be clearer: it wants the public to report all finds. That conclusion is immensely important: after all, if the BDA is to know what archaeological heritage needs to be protected, it first needs to know where it exists. And for that, it needs the information that only the public can provide. Even Georg Dehio, the father of ‘German’ heritage protection, stated as early as 1905 that truly effective protection for heritage can only be provided by ‘the people’.²⁷

Yet, the literal adherence of § 11(1) DMSG to the provisions of Article 3(b) of the 1969 London Convention destroys the motivation for ‘the people’ to report their finds: in today’s reality, the overwhelming majority of amateur archaeologists walk the fields, meadows and forests of Austria with a metal detector in their hands. Thus, as a result of the complete outlawing of metal detecting, the ‘honest finder’ of § 8 DMSG in combination with §§ 399 and 400 ABGB is turned into a ‘dishonest looter’²⁸ by § 11(1) DMSG in combination with § 400 ABGB. The legal share in the ownership of the find according to § 399 ABGB and any motivation the finder might have had to report it is thus removed and is instead replaced by a strong motivation for the finder to conceal it.

Thus, in the grey theory of law and heritage management, it has been ensured that only qualified authorized persons are allowed to carry out excavations. But in the ugly reality of practice, what has actually been achieved is that the heritage managers are simply not informed of the unauthorized excavations that happen regardless of the legislation, promoting the concealment, rather than the reporting, of archaeological finds.

That is certainly an unintended consequence: the last thing that was wanted is not to know what is being found in Austria. Rather, what was wanted was to achieve the best possible protection of the archaeological heritage. And where portable antiquities are concerned, part of that best possible protection is surely to learn of their existence; and certainly not that they secretly collect dust in a private collection, whether logged into an equally private database known only to its producer or not, and are hence essentially lost to archaeological scholarship.

And who are we kidding? Let us not fall for an archaeological fantasy: a find which has already been made, which has already been dug up, can no longer be protected from its removal from its subsoil context, whether that removal is legal or not. From the point of view of scholarship or heritage management, once it has been removed it is entirely irrelevant whether it would have been better not removed; whatever damage its removal may have caused, it has been done and cannot be reversed, however much we would like that. Yet, what certainly is not irrelevant in such circumstances is whether we learn of the existence of a find or not. If we do, it remains available to scholarship, even if perhaps with somewhat reduced potential for gaining scholarly knowledge from it. If we do not, however, we lose not just the information that we could have learnt from its context (from both the finder and an investigation of the find’s spot), but also whatever information remains in the find itself. It is as if the object had never been made, deposited and excavated. And that cannot be desirable.

Finds reporting and metal detectorists in Austria

To demonstrate that this is not just more grey theory, the author has conducted several partially related studies into finds reporting and metal detectorist practices in Austria, some of which are still in progress. However, sufficient data have been collected to discuss the preliminary results of the surveys.

Initially, awareness of the fact that there might be a problem only came through a very rough comparison of reporting numbers of finds by members of the public in

England and Wales (with figures kindly provided by the Portable Antiquities Scheme, PAS), Scotland (figures also kindly provided by the PAS²⁹) and Austria (with figures kindly provided by the BDA). In the area of the PAS, that is, England and Wales, finds reporting is mostly voluntary.³⁰ By contrast, Scotland has universal treasure trove for all archaeological finds (in that all archaeological finds are deemed to be treasure and must be reported), while in Austria the situation is as described already in detail above. The basic comparisons are shown in Figures 1 and 2.

Since the figures available for Austria are rather rough (for instance, they include reports of almost all archaeological excavations, including those conducted by the BDA itself), the author is currently in the process of carrying out a systematic assessment of the *Fundberichte aus Österreich* (FÖ).³¹ The FÖ is the annual publication of all finds reports according to §§ 8, 9 and 11 DMSG received by the BDA. It is required to publish these by § 11(7) DMSG. While this assessment is still ongoing, preliminary results already allow some conclusions to be drawn. In addition, the author is currently carrying out a questionnaire survey among metal detectorists in Austria. While this work is also still ongoing, the preliminary results enable some tentative conclusions to be drawn, which will now be discussed.

As Figures 1 and 2 clearly demonstrate, the willingness of the public to report archaeological finds has dramatically increased in England and Wales since the inception of the PAS: in the past fifteen years or so, the number of reports received has

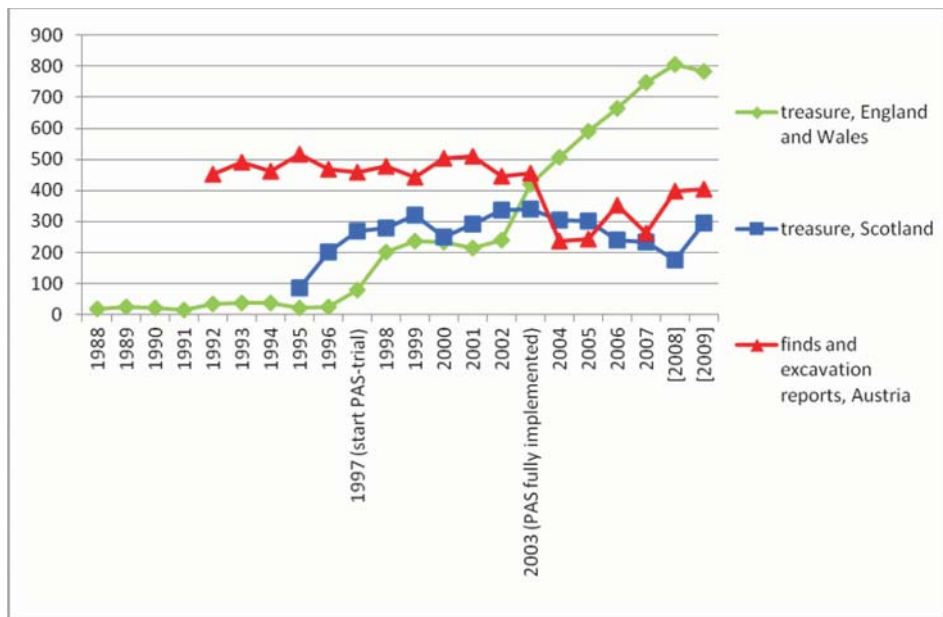


FIGURE 1 Comparison of numbers of compulsory finds reports in England and Wales (only treasure finds have to be reported but only c. 2 per cent of all archaeological finds are considered treasure), Scotland (all finds are treasure trove) and Austria (all finds have to be reported). Figures kindly provided by PAS and BDA.

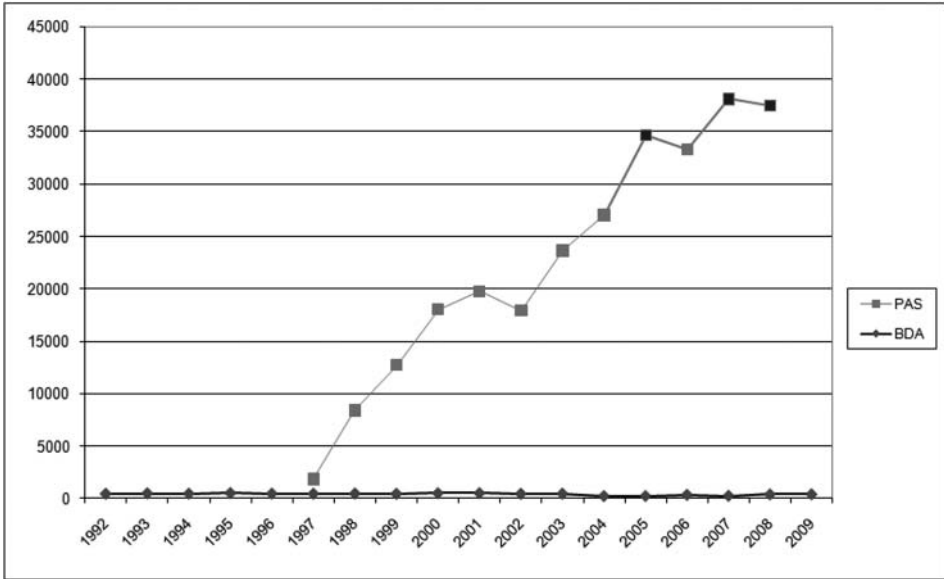


FIGURE 2 Comparison of total number of finds reports (including compulsorily and voluntarily reportable finds) in England and Wales and Austria. Figures for Austria kindly provided by the BDA; figures for England and Wales statistically extrapolated from PAS annual reports (values for 2005 and 2007 highlighted as darker symbols are figures actually reported in PAS annual reports).

multiplied by a factor of about 20 — and that for both compulsorily and voluntarily reportable finds. In Austria and Scotland, on the other hand, where all finds must be reported, the willingness of the public to report finds seems to have stagnated or even considerably declined.

If one takes a closer look at the Austrian figures based on a detailed analysis of the reports in the FÖ, the picture emerging is even more dramatic. For instance, in 2008, only 107 finds reports were received by the BDA, some of which were co-authored by members of the public.³² The remaining 289 reports (the difference between these and the total number of 396 received reports) were authored by professional archaeologists and, in the majority, were reports of properly planned excavations (see Figure 3). Where absolute numbers of finders are concerned, in 2008 only 31 amateur archaeologists reported finds in total. Of those reports, only 17 were sole authored, with the remaining 14 being co-authored with professional archaeologists. In contrast, 195 professional archaeologists have reported finds (mostly in the context of proper excavations), with an additional 11 professional archaeologists who only reported excavations where no or at least no significant archaeology was discovered.

For comparison, in England and Wales (an area about 1.8 times the total size of Austria), in 2007, 38,115 records were entered into the PAS database, of a total 66,311 finds.³³ The number of individuals (with England and Wales having about 6.5 times the population of Austria) who offered finds for recording was 6870, of which 4328

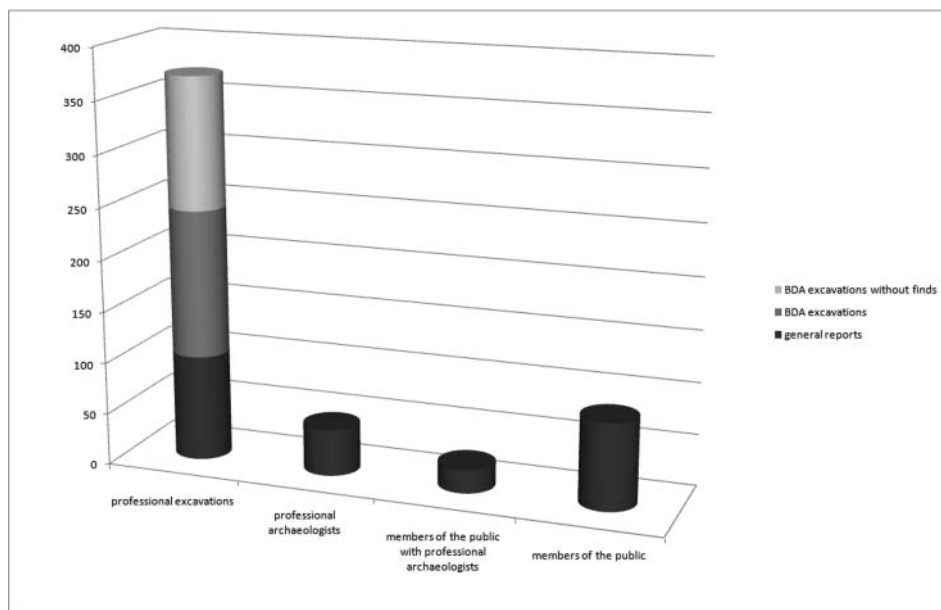


FIGURE 3 Finds reports received by the BDA in 2008 based on the data in FÖ 47 by type of report.

(or 63.83 per cent) were metal detectorists and virtually all were members of the public rather than professional archaeologists.³⁴ In other words, assuming a roughly equal density of archaeological finds in Austria and the PAS area, almost 200 times as many finds reports per square kilometre were logged in England and Wales compared to Austria, and per head of population, 35 times as many individuals reported in England and Wales compared to Austria.

Yet, the situation has not always been as bad as it is today in Austria. As a historical comparison, the figures from FÖ 1987 might serve as an example.³⁵ These are useful because they highlight the situation immediately before the introduction of the revision of § 11(1) DMSG in *Bundesgesetzblatt* 473/1990, which for the first time prohibited any digging for archaeological finds by the public and thus effectively removed any motivation for metal detectorists to report their finds. In 1987, 481 finds reports were included in the FÖ, of which 371 came from amateur archaeologists, while only 110 came from professional archaeologists (Figure 4). In total, 131 amateur archaeologists reported finds, of which 48 reported on their own and 83 reported together with professional archaeologists, and only 48 professional archaeologists submitted reports, which include 49 reports of excavations and 61 reports of chance finds.

It is impossible to give accurate or even reasonably extrapolated figures for voluntary finds reporting in England and Wales before the introduction of the PAS, since this information was not consistently recorded. What can be said with certainty is that in the late 1980s, the annual numbers of reported treasure in England and Wales hovered around 20 per year, and have since multiplied by a factor of around 40,

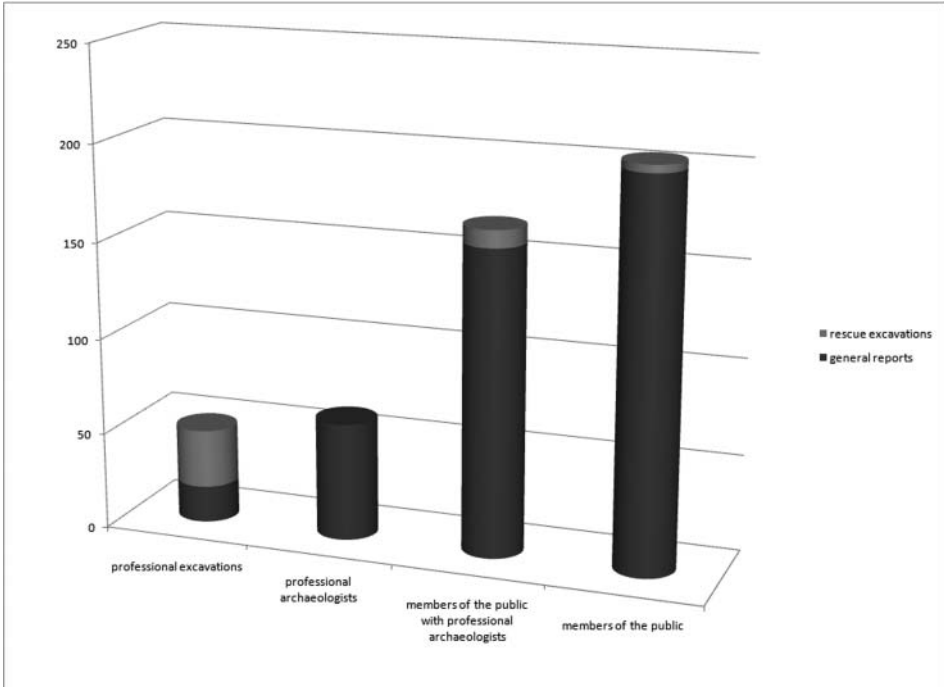


FIGURE 4 Finds reports received by the BDA in 1987 based on the data in FÖ 26 by type of report.

while early annual reports indicate that on average, numbers of voluntarily reported finds multiplied by a factor of about 10 in the early years of the PAS,³⁶ and have increased by a factor of around 20 until now. This allows us to estimate that on average between 1000 and 2000 voluntary reports of finds were made in the late 1980s in England and Wales, though in reality, the numbers of finds reported varied considerably: where local initiatives to record detector finds existed, considerable numbers of finds were reported, but very little elsewhere.³⁷

In other words, the historical development of finds reporting in Austria and the PAS area shows roughly inverse trends: while in the PAS area, finds reporting by members of the public has significantly increased since the inception of the PAS, in Austria, it has significantly decreased since the late 1980s. And while in England and Wales, the starting point of the upward trend seems to be the introduction of the PAS, in Austria, the starting point of the decline seems to be the introduction of the restrictive prohibitions against digging for archaeological finds set out in § 11(1) DMSG in the versions of *Bundesgesetzblatt* 473/1990 and 170/1999.

In fact, the more prohibitive regulations introduced by the revised versions of § 11(1) DMSG seem to be the only reason that could successfully explain the decline in finds reporting in Austria. After all, there is no reason to assume that the number of amateur archaeologists or other members of the public making chance finds of archaeological objects has decreased in Austria since 1987, or that the actual number of finds has declined too. On the contrary, the number of members of the public searching for (and certainly also finding) archaeological finds, particularly those

searching for and finding them with the aid of a metal detector, has almost certainly increased, perhaps quite considerably, since the 1970s.

It is, of course, impossible to provide a precise number of metal detectorists operating in Austria. After all, they are not required to register; nor do the vast majority report their finds to the BDA, and hence they cannot be traced via the reports in the FÖ. At best, what one can give is a rough estimate of possible numbers both past and present.

What is relatively certain is that metal detectors have only started to be used in significant numbers by members of the public in Austria and Europe since the 1970s. Thus, those who drew up the 1969 London Convention and the version of the Austrian DMSG of *Bundesgesetzblatt* 167/1978 seem to have seen no need to include regulations on metal detecting on archaeological sites. The preliminary results of the author's questionnaire survey among metal detectorists, on the other hand, make it clear that at least 1000 but probably more likely somewhere between 2000 and 3000 individuals in Austria practise the hobby today, possibly even more. Even if some individuals may only exclusively look for more recent items like World War II memorabilia, which perhaps are not covered by the provisions of §§ 8 and 11(1) DMSG, this is a significant number compared to, at the very most, a few hundred individuals in the late 1970s. The estimate of at least 1000 and possibly more than twice that number of metal detectorists in Austria is also supported by the figures of the membership of the most frequented internet platform for Austrian metal detectorists, which has around 550 members.³⁸ The metal detectorists who responded to the questionnaire survey as yet also seem to agree — even though individual estimates differ considerably in detail — that the numbers of those practising the hobby have been steadily and considerably rising since *c.* 1975 (see Figure 5).

Also, these metal detectorists seem to be quite active. As far as can be gathered from the responses already received, the majority seem to be searching between 25 and 49 days per year, with a considerable percentage searching even more frequently (Figure 6), on average about four hours per day (Figure 7). This means that

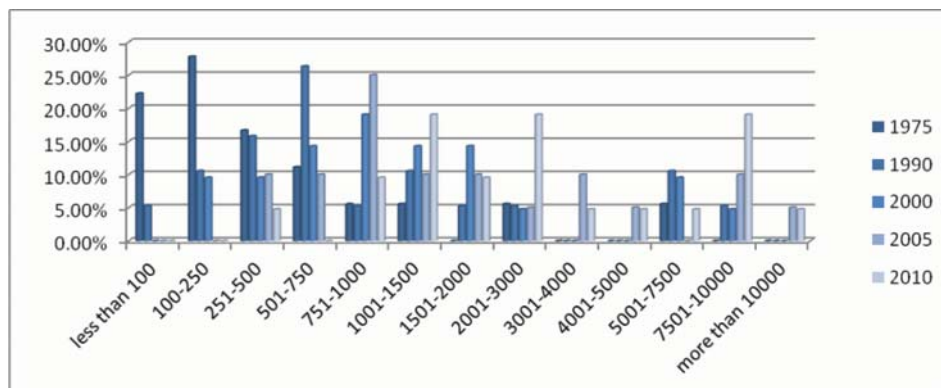


FIGURE 5 Estimated numbers for the historical development of the numbers of metal detectorists in Austria given by practitioners of the hobby ($n=22$). All respondents agreed that there has been a steady and considerable rise in numbers since the mid 1970s.

an estimated 2000 metal detectorists are currently operating in Austria, who search on average 4 hours per day, 35 days per year. Thus metal detectorists in Austria spend an estimated 280,000 hours actively searching for archaeological finds every year. It seems incredibly unlikely that these hours go to waste without anyone finding anything worthy of reporting. Even if one assumes that the average metal detectorist makes only one noteworthy discovery per 10–20 hours of searching,³⁹ this should result in numbers of finds comparable to those reported to the PAS (taking the difference in size between Austria and the PAS area into account). Yet, these finds in Austria seem to go mostly unreported.

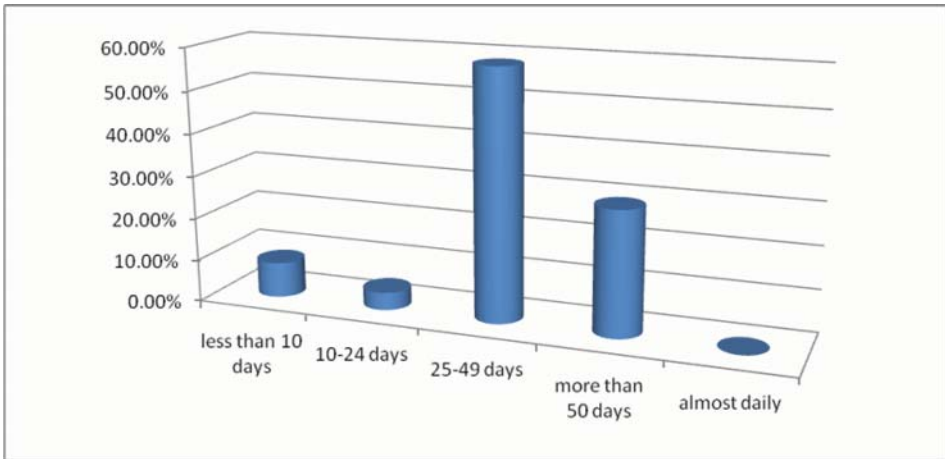


FIGURE 6 Days of searching for archaeological finds per year ($n=24$) by selected metal detectorists and amateur archaeologists.

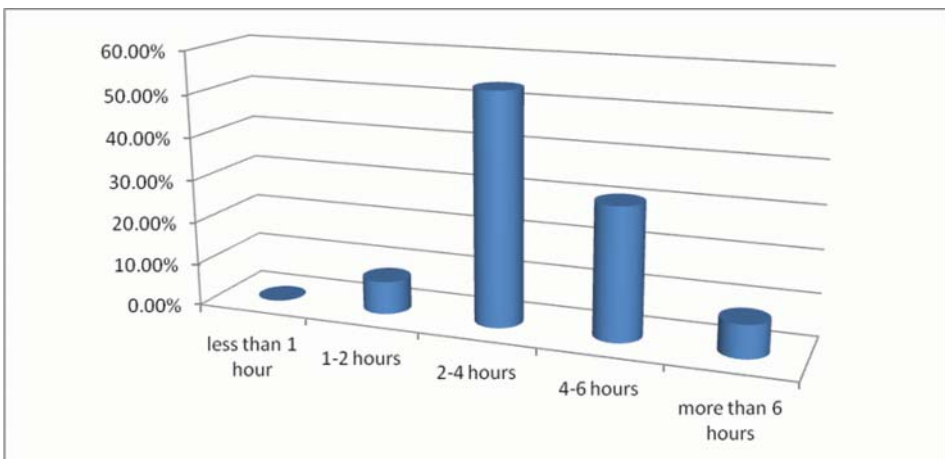


FIGURE 7 Number of hours spent searching per search day ($n=24$) by selected metal detectorists and amateur archaeologists.

What are the reasons for this pattern? It could easily be assumed that Austrian metal detectorists are motivated for financial reasons, concealing their finds so that they can sell them on the illicit antiquities market. Quite to the contrary, however, all those involved in the survey appear to be primarily motivated through historical interest (Figure 8). Hardly any of the respondents indicated they were making any money with their hobby, or indeed, would ever seek to. Rather, all seem to be expending quite a lot of time and effort, while making no money whatsoever and never selling any of their finds.

Most of the respondents even seem to be recording the locational and contextual information of the finds rather well, and on a number of occasions have produced spectacularly good records of their finds and those of others. Two respondents,⁴⁰ for instance, have been spending several hours per day for several years producing a database of brooches collected by several metal detectorists in one part of Austria. This database, which currently contains *c.* 600 brooches from an area of *c.* 10 by 15 km, contains many data. Aside from solid locational and contextual data (where possible), it also contains a proper typological description of each find, including all required measurements and relevant references to secondary literature; a photograph of each brooch; and a high-quality technical drawing showing at least front, top and side view of each brooch (Figure 9). The quality of this documentation is clearly of a standard equal to any professional archaeological finds catalogue; and in its sheer numbers it clearly exceeds anything comparable produced by professional archaeologists for the same or comparable regions of Austria.

And where the actual issue of finds reporting is concerned, the answer by the respondents to the survey is very clear: those who did give reasons why they did not report finds mentioned the law as the first main reason, and the negative attitude towards them by professional archaeologists and BDA officials as the second main reason. Respondents were not simply aware that they were carrying out illegal search-

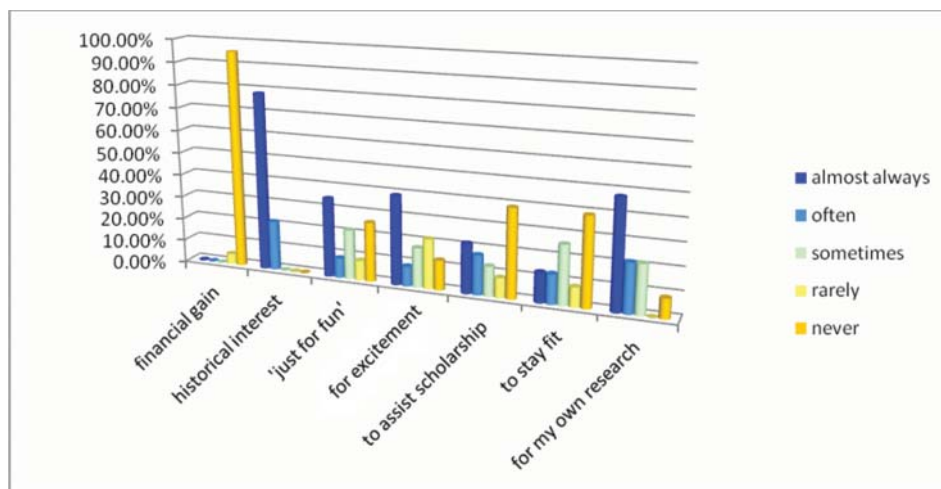
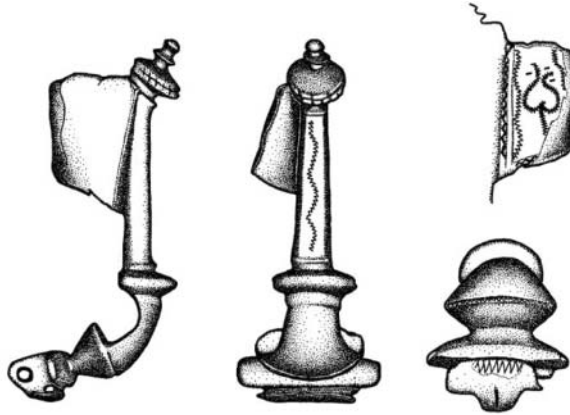


FIGURE 8 Motivation of metal detectorists for searching for archaeological finds ($n = 23$) in the ground.



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	Maße:	
	Länge: 7,1 cm Breite Kopfplatte: 2,8 cm	Breite Kopf: 2,27 cm Gewicht: 42g
Beschreibung: Zweigliedrige Bronzefibel in guter Erhaltung. Obersehniges Federwerk samt Nadel fehlt, hülsenförmig erweiterter, zur Stützplatte aufgebogenen Sehnenhaken mit Wolfszahnverzierung. Der geschwungene, im Querschnitt D-förmige Bügelkopf besitzt eine Wolfszahnverzehrte Einkerbung. Die kräftige, hohe Profilierung ist beidseitig durch einen kleinen Wulst abgesetzt. Der im Querschnitt annähernd rechteckige, leicht abgerundete, an der Oberseite Wolfszahnverzehrte Bügel endet mit einer großen, gerillten Fußprofilierung und einem doppelt profilierten Fußknopf und einem langezogenen, zur Seite verbogenen, verstärkten Nadelhalter dessen Rückseite ebenfalls reichlich Wolfszahnmuster ziert. Datierung: 2. Jhdt.n.Chr.		
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FIGURE 9 Sample page from the finds database created by the Austrian metal detectorists Christoph Baumgartner and Norbert Achleitner. The database currently contains descriptions of c. 800 brooches, mostly of finds recovered by now retired metal detectorists. Of these, c. 600 are from the main research area of Baumgartner and Achleitner, an area of c. 10 by 15 km. Locational data (FO) is being suppressed (only shown as code number) to prevent night-hawks identifying the location of sites.

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es; they also clearly expressed the wish that their hobby should be decriminalized (96 per cent, $n=23$). Most also mentioned that they would like to collaborate with the BDA (65 per cent, $n=23$) and archaeologists in general (83 per cent, $n=23$); and that they would like to receive scholarly advice (91 per cent, $n=23$), training in proper excavation and recording techniques (100 per cent, $n=23$) and in finds recovery practice (87 per cent, $n=23$), and information on how they could best contribute to scholarly research (87 per cent, $n=23$). A majority even asked for more archaeological heritage managers to be employed by the BDA to advise and

assist them with their work (70 per cent, $n=23$); and even for harsher penalties for irresponsible metal detectorists to be imposed (61 per cent, $n=23$).

Thus, it is not that they would not want to collaborate with the archaeological sector, and to report finds. They just — and quite understandably — cannot report finds if that essentially means reporting that they have broken a law which prohibits them from searching for such finds in the first place.

And that means that if ever a law written with the best of intentions has backfired spectacularly, this must be it. Rather than achieving what it set out to, rather than offering the best possible protection for the archaeological heritage, it has achieved the precise opposite: it does not prevent members of the public searching for archaeological finds, but it is exceptionally successful in preventing members of the public from reporting them, and from collaborating with the archaeologists who essentially need exactly the information that people are in practice forced to conceal by a *useless* law.

Metal detecting practice and archaeological excavations

There is yet another point worth considering. § 11(1) DMSG and Article 3 of the European Convention for the Protection of the Archaeological Heritage were clearly written with one goal in mind: to prevent archaeological contexts being inadvertently destroyed by excavators lacking the proper skills to document those contexts. Excavations are, after all, not necessarily a bad thing. On the contrary, they are sometimes unavoidable, and quite generally are still the main means to collect data for studying the past — if they are properly conducted and recorded. Any restrictions imposed on metal detecting have to be seen in the same light. It is not that metal detecting is bad in itself; it is only if and when metal detectorists dig up finds without properly recording them that we have to be concerned.

But what are Austrian metal detectorists really digging up? Do they typically dig sizeable trenches, and do they dig down into stratified contexts? As far as can be ascertained from the results of my survey, they normally do neither.⁴¹ Rather, the overwhelming majority restrict their activities mostly to digging just the topsoil (Figure 10) and to digging pits of less than one-quarter of a square metre (Figure 11).

Yet, the topsoil is that part of an archaeological stratigraphy that is usually removed by a mechanical digger on the vast majority of Austrian excavations. This is true for pretty much all rescue excavations, and even for many, if not most, research digs. Manual removal of the topsoil is the rare exception to the rule, and even where this happens, the topsoil is rarely thoroughly searched for finds (least of all using a metal detector), if at all.

Thus, most of the activity of metal detectorists seems to be limited to those parts of archaeological stratigraphies neither observed nor documented in systematic archaeological excavations. It thus seems rather peculiar that we accuse these amateur archaeologists of intentionally destroying the archaeological contexts of their finds. After all, professional archaeologists rarely even bother attempting to recover the finds that derive from topsoil contexts; rather, they run them over with a large digger or remove them rapidly and with little regard for implementing intensive recovery strategies.

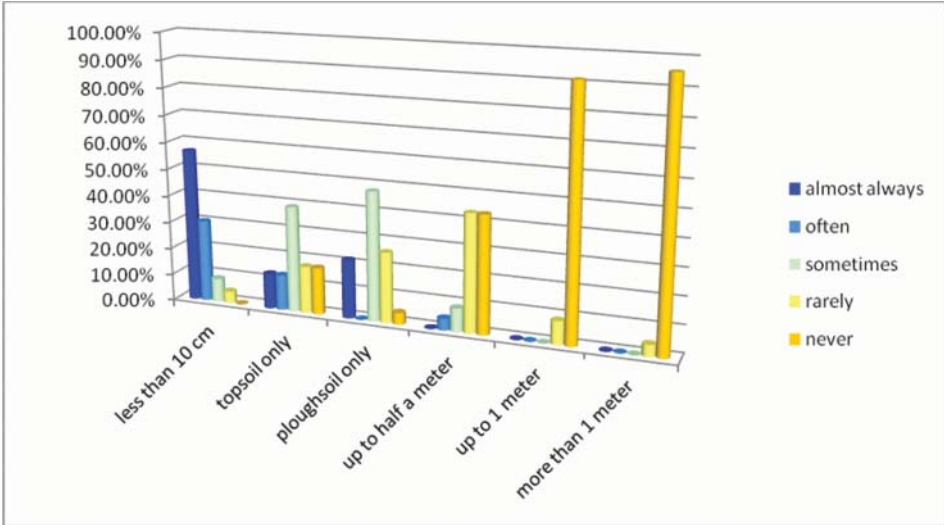


FIGURE 10 Recorded depth of excavations by selected metal detectorists ($n = 23$).

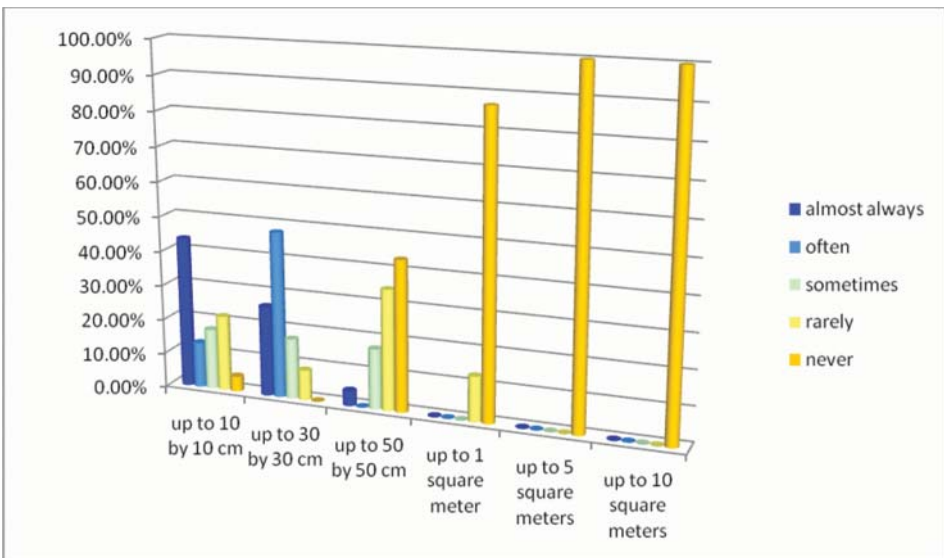


FIGURE 11 Recorded size of excavations by selected metal detectorists ($n = 23$).

Archaeologists are, of course, well aware that the distribution of small finds in topsoil contexts is certainly not irrelevant. Admittedly, the topsoil is usually disturbed by the activity of the plough, roots, and various small animals. Thus, it does not contain contexts in the traditional sense (i.e. preserved undisturbed original stratification). Yet, concentrations of small finds in the topsoil, even if partially disturbed and damaged by modern activities, can indicate different activity zones in a given area.

Topsoil contexts can even partially preserve ‘traditional’ archaeological contexts (such as shallow graves or hoards). Thus, simply ignoring the finds (and contexts) in the topsoil, if anything, is bad archaeological practice. If we usually remove such contexts with a digger, yet subject metal detectorists to the blanket accusation of destroying archaeological contexts, this starts to smack of hypocrisy and misplaced academic arrogance.

In fact, it seems as if metal detectorists are protecting quite a lot of the archaeological heritage that we usually destroy during systematic archaeological excavations, whether by intent or at least by our unthinking actions. It is high time to stop preaching against the evils of the uneducated and uncooperative public, and start coming up with solutions that actually protect the archaeological heritage not in theory but in actual practice.

Considering this, it would seem proper to invite metal detectorist volunteers to planned excavation sites before the topsoil is machine stripped — much as we now almost universally expect a proper geophysical survey to be carried out before we start digging holes. And believe it or not, the majority of metal detectorists seem very willing to volunteer their time and skills to such projects: 96 per cent of respondents to my survey ($n=23$) indicated that they would like to participate as volunteers in archaeological excavations. They seem seriously interested in helping archaeologists to protect the archaeological heritage — quite in contrast to many archaeologists, who mainly seem to have been interested in condemning metal detectorists and amateur archaeologists, at least until now. So, honestly, can we blame them for this current situation, and for not wanting to report their activities and finds?

One could argue that it is naive to believe the metal detectorists; or that those who bothered to respond to my survey so far are the few ‘white sheep’ in a large herd of ‘black’ ones;⁴² or that the preliminary results of my admittedly still very limited survey are hardly representative. But at least as far as the author is aware, there is no evidence, not even obvious hints, that either of these objections carries any weight — at least where the majority of the metal detectorists are concerned. One can, of course, continue to insist that the popular archaeological prejudice that all metal detectorists are evil is true (with the exception of the few one happens to personally know, trust, and occasionally work with in secret, so as not to upset the BDA and one’s colleagues). But that is hardly a proper scholarly reaction if one is provided with reasonably solid evidence to the contrary — particularly if that evidence to the contrary seems also to be supported by the experiences of those involved with the PAS.

This is of course not to say that there are no ‘black sheep’, no ‘nighthawks’ among Austrian metal detectorists. Of course there will be some that do search for archaeological objects for material gains; and who will dig as deep as necessary to get at the golden treasures that they are seeking, destroying undisturbed stratigraphy in the process.⁴³ The assumption, however, that those ‘black sheep’ can be prevented from doing what they do by prohibitive but unenforceable laws is as naive as it is ridiculous. Such individuals will continue with their activities long after our theoretically perfect but practically useless laws have driven all responsible amateur archaeologists away. What we need to be concerned about is thus, not so much how to prevent those who do not care for the archaeology from damaging or destroying it, but rather

how to positively engage with those who do care, who are willing to collaborate with and even help us, and who can do a lot of good towards protecting the Austrian archaeological heritage.

Archaeologists with responsibilities, but without rights

As if that were not already enough, there are yet further unintended consequences of § 11(1) DMSG that damage archaeology — and possibly even archaeologists themselves. This even more insidious consequence affects the very core of archaeological practice, systematic archaeological excavations and the finds made on them.

As already explained above, § 11(1) DMSG restricts the issuing of licences for archaeological excavations to individuals holding a degree in archaeology.⁴⁴ But that is not all: § 11(1) DMSG also stipulates that conditions concerning area, depth and method of excavation, reporting duties, inspections or anything else related to the excavation, can be set by the BDA as part of the licence.⁴⁵ Thus, any conditions to the licence can only legally affect the person holding it, but not any third party: the licence is issued to a specific individual, and thus only that particular person is bound by it.

As one of my recent research projects established, licences are always issued with several conditions.⁴⁶ Most of these are irrelevant here, as they either concern the requirement of the licence holder to be actually present on the excavation or are reminders of reporting and other duties as already stipulated by various sections of the DMSG. However, there is one condition that is relevant here and is part of every excavation licence issued in Austria. This is the requirement for the licence holder to ensure that the collection of finds is kept together, that finds are adequately conserved and stored, and that their location is reported to the BDA. Depending on how one interprets this condition, this requirement either applies until the licence expires (which is usually a few days or weeks after the planned end of the excavation), in which case it is entirely pointless; or it applies in perpetuity. This condition is included because it is the only way the BDA can legally compel anyone to ensure that appropriate steps are taken to ensure this.

But this condition in each case compels the wrong person: it binds the archaeologist, not his/her employer or the owner of the land on which the excavations are taking place. Yet, except in the extremely rare case that an archaeologist is digging on his/her own land, paying staff with his/her own money, the archaeologist has no legal ownership of either the finds or the documentation: § 399 ABGB clearly stipulates that finds become the shared property of finder and landowner; and § 401 ABGB equally clearly states that individuals hired by someone to find treasure (and as explained, all archaeological finds legally are treasure) are to receive only their due salary, and no share in the ownership of any finds made.⁴⁷ And since archaeologists are normally hired (whether for an individual excavation or on a more permanent contract), in legal terms, to ‘find treasure’ (by means of archaeological excavations), they gain no share in the ownership of any finds they make. Equally, they are hired to produce archaeological records, and so that documentation is owned by their employer, too.

It does not matter in this context whether the archaeologist is an employee of a public museum, a university or an archaeological company, or is a private archaeological contractor hired directly by whoever wants or needs an archaeological excavation to be carried out (e.g. a landowner or a developer). Whoever pays for the excavation is, according to § 401 ABGB, the legal finder of any finds made; it is never the archaeologist who has applied for and been granted the licence, and who was the only one who could be granted a licence since it can only be issued to individuals holding a degree in archaeology.

Yet, it is only ownership which confers complete legal control. However, in order to fulfil the condition on the licence to ensure (in perpetuity, if that interpretation applies) that the collection of finds is kept together and adequately conserved and stored, and its location reported to the BDA, complete legal control is required. Possession — which the archaeologist holding the licence might actually have — is simply not sufficient for this. It is only the owner who is ultimately entitled to decide how the property is being kept. The rights of the owner — unless restricted by law or a condition that can legally affect them — naturally include the right to split up any collection of items that are owned, to not adequately conserve and store them, and even to dispose of or destroy them on a whim. This law is potentially extremely damaging to archaeological assemblages. Since the excavation licence — the only legal means of the BDA to impose conditions to prevent the owner from doing with property as they please⁴⁸ — can only be issued to archaeologists, the owner can never be bound by it (except in the extremely rare case where the archaeologist excavates on his/her own land with his/her own money and thus also becomes the sole owner of the finds). That the BDA nonetheless included this condition in licences just shows two things: how emasculated it is by this silly law, and how desperate it is to hide its utter impotence to properly protect archaeological finds uncovered during systematic excavations.

Perversely, this leads to a system where it is the archaeologist who would end up in the dock if the owner of finds chooses to exercise their rights to, for example, destroy the property, and the BDA chooses to prosecute the archaeologist. Of course, this has never happened as of yet, and almost certainly never will. But it remains absurd nonetheless: the archaeologist is burdened with responsibilities without having the necessary rights to fulfil them.

As such, the BDA cannot properly protect the archaeological heritage discovered during systematic archaeological fieldwork, because it can only affect archaeologists holding excavation licences, rather than the owners of the finds found on these excavations. And all this because § 11(1) DMSG restricts the issuing of excavation licences to individuals holding a degree in archaeology. Though unquestionably written with the best of intentions, the law is utterly useless.

Conclusions

§§ 8 and 11(1) DMSG, the two main passages in Austrian law regulating portable antiquities and archaeological excavations, have certainly been written with the best of intentions. Yet, by making it illegal through § 11(1) DMSG to carry out any excavation, defined as ‘*any search in situ with the intent to discover archaeological finds*’,

without a licence from the National Heritage Agency BDA; and by restricting the possibility to be awarded a licence to, exclusively, archaeology graduates; the very opposite of what was intended has been achieved.

By effectively outlawing the use of metal detectors by members of the public to search for archaeological finds through § 11(1) DMSG, the many responsible amateur archaeologists who would be both willing to assist and interested in assisting with the protection of the archaeological heritage have been criminalized. This has completely removed many people's motivation to report finds, intended to be strengthened by § 8 DMSG awarding a half share in the ownership of legally found and reported finds to the finder. As a result, most have practically stopped reporting any of their finds: this would, after all, be an at least implicit admission of having broken the law, resulting in the loss of any ownership rights to the finds according to § 400 ABGB, and possibly even inviting prosecution. With a mere 107 finds reports received from 31 members of the public in 2008 (that is one report per *c.* 800 km² or *c.* 275,000 inhabitants), the BDA is clearly not being informed of many unknown archaeological sites, including those which may be threatened by development or natural events. Its ability to proactively manage the archaeological heritage of Austria is thus seriously damaged.

Even worse: § 11(1) DMSG restricts the possibility of an award of an excavation licence to archaeology graduates. It also restricts the possibility of the BDA to set conditions regarding finds made during the excavation to the licence. Thus, conditions set by the BDA can legally only bind the licence holders, i.e. the archaeologists. However, the archaeologists, as hired personnel, gain no ownership share in the finds they make according to § 401 ABGB. Rather, according to § 399 ABGB, shared ownership of finds made during systematic excavations rests exclusively with the owner(s) of the land on which the excavation took place and the person(s), whether *natural* or *legal*, who funded the excavation. Yet, it is only the owner(s) of the finds who have the legal right to decide whether to properly conserve and store — a condition always set by the BDA in the excavation licence — or on the other hand, to neglect, sell or destroy. Thus, any conditions imposed by the BDA on excavation licence holders cannot actually protect the finds made during the excavations. Through the licence, the conditions legally bind the wrong person: not the owner who has legal control, but the archaeologist who has no legal rights whatsoever regarding the finds. Thus, the BDA cannot effectively protect any finds made during a systematic excavation either; in fact, it cannot protect them at all.

As a consequence of the heavy-handed, inconsiderate application of a well intended but badly phrased law, the Austrian National Heritage Agency BDA has virtually lost the ability to manage and to properly protect the archaeological heritage in Austria. And if that were just Austrian legislative heritage management incompetence, that would be bad enough. But in fact, the Austrian example provides a more general lesson too, since the situation discussed in this article has arisen not just from such Austrian legislative incompetence. Rather, it has arisen because the Austrian legislators tried to implement, more or less to the letter, the provisions of Article 3 of the European Convention for the Protection of the Archaeological Heritage (whether in its 1969 London Convention version or its revised 1992 Valletta version). The Austrian example thus serves to demonstrate that if these provisions are applied

heavy-handedly, instead of achieving the best possible protection of the archaeological heritage, they have the potential to seriously damage archaeological heritage protection.

While it is certainly an admirable intention, and certainly desirable, to ensure professional standards for the recording of archaeological heritage unearthed during professional excavations, as well as the unearthing of artefacts by metal detectorists, no harsh and restrictive legislation can actually achieve that goal. Rather, a collaborative approach which engages the wider public, which allows for interested members of the public to be involved in the management of the archaeological heritage without having to overcome so much red tape, is more likely to achieve what we ultimately wish to achieve. And this ‘we’ includes both professional archaeologists and responsible metal detectorists alike.

As the old proverb says, the road to hell is paved with good intentions. This is very much the case in the current situation in Austria. The intentions which led to the current legislation, particularly § 11(1) DMSG, were certainly of the best kind. Yet, the reality it has created is utterly unsustainable and seriously damaging to archaeology and archaeologists alike. The Austrian situation thus only deviates from the predictions of the proverb in one regard: we are less on a road than a highway⁴⁹ to archaeological heritage management hell.

Notes

- ¹ Christoph Bazil, Reinhard Binder-Kriegelstein, and Nikolaus Kraft, *Das österreichische Denkmalschutzrecht* (Wien: Manz, 2004), pp. 86–8, 94–100.
- ² ‘... Gegenstände, die infolge ihrer Lage, Form oder Beschaffenheit offenkundig den Beschränkungen dieses Bundesgesetzes unterliegen könnten ...’ (§ 8(1) Denkmalschutzgesetz, DMSG). Whether an object is ‘apparently’ (*offensichtlich*) treasure is to be judged objectively and thus does not depend on the subjective knowledge of the finder, i.e. the requirement to report treasure does not depend on whether the finder does know, or could know at all, that a find could apparently be treasure (cf. Bazil et al., *Das österreichische Denkmalschutzrecht*, p. 87).
- ³ According to § 398 Allgemeines bürgerliches Gesetzbuch (ABGB), treasure is defined as all finds of money, jewellery or other valuable items which have lain hidden for so long that their legal owner can no longer be identified (‘Bestehen die entdeckten Sachen in Geld, Schmuck oder anderen Kostbarkeiten, die so lange im Verborgenen gelegen haben, daß man ihren vorigen Eigenthümer nicht mehr erfahren kann, dann heißen sie ein Schatz. Die Entdeckung eines Schatzes ist von der Obrigkeit der Landesstelle anzuzeigen’). § 10(1) DMSG defines all archaeological finds explicitly as such treasure.
- ⁴ Or one of several other reporting bodies explicitly listed in § 8(1) DMSG.
- ⁵ ‘... sofort, spätestens aber an dem der Auffindung folgenden Werktag ...’ (§ 8(1) DMSG).
- ⁶ ‘Wer sich dabey einer unerlaubten Handlung schuldig gemacht; wer ohne Wissen und Willen des Nutzungseigenthümers den Schatz aufgesucht; oder den Fund verheimlicht hat; dessen Antheil soll dem Angeber; oder, wenn kein Angeber vorhanden ist, dem Staate zufallen’ (§ 400 ABGB).
- ⁷ ‘Eine strafbare Handlung ist es etwa, ohne Genehmigung des Bundesdenkmalamtes nach Bodendenkmalen zu graben’ (http://www.bda.at/faq/0/1122/32#id_32, accessed 13 December 2010).
- ⁸ In such a case the state (or one of its institutions, e.g. a local council) is the landowner and thus automatically owns a 50 per cent share in the find according to § 399 ABGB.
- ⁹ In such a case the state is considered to be the finder according to § 399 ABGB and thus also automatically owns a 50 per cent share in the find.
- ¹⁰ In such a case, if the state or its authorities became aware of the find by means other than a third party reporting the find, the state also automatically owns a 50 per cent share in the find according to § 400 ABGB.
- ¹¹ The full market value of a find in such a case is established by a court-registered expert for portable antiquities valuation.
- ¹² ‘... 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 ...' (§ 11(1) DMSG).
- ¹³ The legal technical term used in Austrian law is 'natural person'. Natural (or physical) person in law refers to an individual, that is a real human being, as opposed to a legal person (e.g. any kind of institution like a company etc.).
- ¹⁴ 'Eine derartige Bewilligung kann nur an Personen erteilt werden, die ein einschlägiges Universitätsstudium absolviert haben' (§ 11(1) DMSG).
- ¹⁵ <http://conventions.coe.int/Treaty/en/treaties/html/066.htm>, accessed 13 December 2010.
- ¹⁶ Austria ratified the London Convention on 27 February 1974 (cf. *Bundesgesetzblatt* no. 239/1974, <http://www.ris.bka.gv.at/Bgbl-Pdf/>, search field 'Gesetzblatt Nr.', search term '239/1974').
- ¹⁷ This first version of the DMSG dates back to 1923 and was published in *Bundesgesetzblatt* 533/1923 (cf. <http://www.ris.bka.gv.at/Bgbl-Alt/>, search field 'Gesetzblatt Nr.', search term '533/1923').
- ¹⁸ The 1990 revision was published in *Bundesgesetzblatt* 473/1990 (cf. <http://www.ris.bka.gv.at/Bgbl-Pdf/>, search field 'Gesetzblatt Nr.', search term '473/1990'), the 1999 revision in *Bundesgesetzblatt* I 170/1999 (cf. <http://www.ris.bka.gv.at/Bgbl-Pdf/>, search field 'Gesetzblatt Nr.', search term '170/1999'). It is noteworthy that in the 1978 revision of the DMSG, such tightening of the provisions of the law was seemingly not yet considered to be required, because in this revision, the much more open and generous regulations of the original version of § 11(1) DMSG 1923 remained unchanged (cf. *Bundesgesetzblatt* 167/1978, <http://www.ris.bka.gv.at/Bgbl-Pdf/>, search field 'Gesetzblatt Nr.', search term '167/1978').
- ¹⁹ § 11(1) DMSG in the revision published in *Bundesgesetzblatt* 473/1990 (cf. <http://www.ris.bka.gv.at/Bgbl-Pdf/>, search field 'Gesetzblatt Nr.', search term '473/1990').
- ²⁰ § 11(1) DMSG in the revision published in *Bundesgesetzblatt* I 170/1999 (cf. <http://www.ris.bka.gv.at/Bgbl-Pdf/>, search field 'Gesetzblatt Nr.', search term '170/1999').
- ²¹ Incidentally, this regulation has survived largely unchanged in Article 3(ii) of the 1992 revised European Convention on the Protection of the Archaeological Heritage (cf. <http://conventions.coe.int/Treaty/en/treaties/html/066.htm>, accessed 16 December 2010), which apart from minor changes in phrasing maintains the same principle as Article 3(b) of the 1969 London Convention.
- ²² Raimund Karl, *Macht und Ohnmacht des positivistischen Denkens* (Beiträge zur Ur- und Frühgeschichte Mitteleuropas 58, Langenweissbach: Beier & Beran, 2010), pp. 124–29.
- ²³ This is even quite clearly expressed by a parliamentary answer (to a question by the opposition) by the Minister of Education, the Arts and Culture, who is responsible for Heritage Management in Austria, that there is no need for Austria to ratify the 1992 revised European Convention for the Protection of the Archaeological Heritage since Austria (allegedly) already complies with most of its provisions anyway (cf. http://www.parlament.gv.at/PG/DE/XXIII/AB/AB_04171/pmh.shtml, accessed 15 December 2010; specifically the response to question 1 ['Zu Frage 1: Österreich hat das Europäische Übereinkommen zum Schutz des archäologischen Erbes ratifiziert (BGBl. Nr. 239/1974). Im Zuge der Novelle des Denkmalschutzgesetzes 1990 wurden zahlreiche Bestimmungen betreffend Bodendenkmale eingefügt. Österreich erfüllt daher bereits weitgehend die in der revidierten Fassung des Übereinkommens ("Valletta-Übereinkommen") festgelegten Verpflichtungen ...']). Of course, the question remains why Austria has not ratified it, if its laws already mostly comply with the provisions of the Valletta Convention anyway; since if that were the case, there would be no reason why Austria should not ratify it.
- ²⁴ The German term traditionally used for historically and/or archaeologically interested members of the public, who do not hold a degree in archaeology, is *Heimatsforscher*.
- ²⁵ Note the inclusion of an explicit prohibition against unauthorized use of metal detectors in Article 3(iii) of the 1992 revised European Convention on the Protection of the Archaeological Heritage (cf. <http://conventions.coe.int/Treaty/en/treaties/html/143.htm>, accessed 16 December 2010), a prohibition that was not present in the 1969 London Convention (cf. <http://conventions.coe.int/Treaty/en/treaties/html/066.htm>, accessed 16 December 2010).
- ²⁶ In German, this principle that all treasure found automatically becomes legal property of the state is called *Schatzregal*.
- ²⁷ Georg Dehio, 'Denkmalschutz und Denkmalpflege im neunzehnten Jahrhundert. Festrede an der Kaiser-Wilhelms-Universität zu Straßburg, den 27. Januar 1905', in *Kunsthistorische Aufsätze*, ed. by Georg Dehio (München/Berlin, 1914), p. 273 (http://www.dehio.org/dehio/denkmalschutz_19jhd.pdf).
- ²⁸ The German term usually used for them is *Raubgräber*, literally 'robbery digger'.
- ²⁹ I am grateful to Michael Lewis for providing me with the Scottish figures for the reporting of treasure.
- ³⁰ With the exception of specifically defined finds of treasure as outlined in the Treasure Act 1996 (with later revisions: cf. <http://www.legislation.gov.uk/ukpga/1996/24/contents>).
- ³¹ *Fundberichte aus Österreich* (Band 1–47, Wien: Bundesdenkmalamt, 1933–2008).
- ³² *Fundberichte aus Österreich* 47 (Wien: Bundesdenkmalamt, 2008).
- ³³ 2007 was the last year in which detailed data from the PAS were available to me; cf. *Portable Antiquities and Treasure: Annual Report 2007* (London: The British Museum), p. 267.

- ³⁴ *Portable Antiquities and Treasure: Annual Report 2007* (London: The British Museum), p. 274.
- ³⁵ *Fundberichte aus Österreich 26* (Wien: Bundesdenkmalamt, 1987).
- ³⁶ *Portable Antiquities Annual Report 1998–99* (London: DCMS), p. 25; *Portable Antiquities Annual Report 1999–2000* (London: DCMS), p. 39.
- ³⁷ Colin Dobinson and Simon Denison, *Metal Detecting and Archaeology in England* (York: English Heritage/Council for British Archaeology, 1995; <http://old.britarch.ac.uk/detecting/cont.html>).
- ³⁸ <http://www.sondengaenger.at/forum/forum.php>, accessed 16 December 2010.
- ³⁹ Such a ratio is roughly borne out by casual ‘annual finds statistics’ given by some such detectorists on the most frequented Austrian metal detectorist discussion board: cf. <http://www.sondengaenger.at/forum/forum.php>, accessed 16 December 2010.
- ⁴⁰ I am grateful to Christoph Baumgartner and Norbert Achleitner for making their database known to me and for allowing me to discuss their results in this article.
- ⁴¹ A complementary survey among Austrian archaeologists about how much damage they had witnessed in their respective careers as a result of illegal excavations was attempted by me, but resulted in only five returns, of which four indicated that the respondents had hardly ever witnessed serious damage to archaeology resulting from recent illegal excavations, and only one indicated that the respondent had occasionally witnessed damage resulting from recent illegal excavations — but none seemed to indicate that this was actually a very serious problem. The remainder of the Austrian archaeologists directly contacted during this survey (c. 70), as well as the many others who had access to the survey questionnaire through archaeology internet discussion boards, chose not to respond. While this may not be an overly significant result, it does not indicate that the problem of illegal excavations damaging archaeological sites in Austria is very serious; or at least, it shows that the problem is one that the vast majority of professional archaeologists is not sufficiently concerned about to bother responding to a relatively simple questionnaire. Similarly, neither the BDA nor the Austrian police nor the Office of Public Prosecutions was able to provide any data on how many cases of such damage were reported per year (or in any other timeframe), other than the BDA indicating that such cases would ‘occasionally’ be prosecuted with variable success.
- ⁴² There is admittedly a distinct possibility that the group of respondents was self-selecting in that mainly, if perhaps not exclusively, ‘responsible’ metal detectorists were responding to my survey, while ‘irresponsible’ ones or those who could be described as ‘grey sheep’ (willing to report some, but not all of their finds) were disinclined to respond. This possibility, however, appears rather

small to me, for the reason that hardly any of the respondents answered the question as to whether they were reporting their finds in the positive, and none indicated that they had recently reported finds, though all respondents indicated that they had used their metal detector and made finds (and quite frequently) within the last 12 months. As such, the respondents may represent that segment of the Austrian metal detecting community who would be willing to report under different conditions, but certainly not those who are currently already adhering to the letter of the law.

- ⁴³ Cf. the 2009 survey of illegal metal detecting in the UK, which indicates that incidences of nighthawking have fallen compared to 1995; Oxford Archaeology, *Nighthawks & Nighthawking* (Oxford, 2009), pp. 70–73 (<http://www.helm.org.uk/upload/pdf/NIGHTHAWKS2.pdf?1307713357>). This indicates that there remains a hard core of nighthawks who will continue with illegal metal detecting even if there are perfectly legal alternatives available. The same can be assumed to be true for Austria.
- ⁴⁴ As quite clearly only real human beings, i.e. *natural* persons (see note 13), can actually study for and thus complete an academic degree; *legal* persons quite obviously cannot do so since they are a purely artificial entity whose human representatives can and do frequently change.
- ⁴⁵ ‘Bewilligungen gemäß diesem Absatz können mit Einschränkungen, Auflagen und Sonderregelungen verbunden sein (hinsichtlich Fläche und Tiefe, Art der Durchführung, Meldepflichten, Kontrollen usw.)’ (§ 11(1) DMSG).
- ⁴⁶ I am grateful to a number of colleagues for making available to me licences issued to them, as well as to the BDA for making their old and new proforma for licences available to me.
- ⁴⁷ ‘Finden Arbeitsleute zufälliger Weise einen Schatz, so gebührt ihnen als Findern [die Hälfte] davon. Sind sie aber von dem Eigentümer ausdrücklich zur Aufsuchung eines Schatzes gedungen worden, so müssen sie sich mit ihrem ordentlichen Lohne begnügen’ (§ 401 ABGB).
- ⁴⁸ At least the only possibility short of fully scheduling the collection of finds as a scheduled monument, which would, however, require a complete unique and unequivocal description of each individual find (to allow its accurate identification in case of a legal dispute of whether the find is or is not part of a scheduled collection). Since the possibility of full scheduling of a collection is, for most excavation assemblages, extremely labour intensive, it is practically impossible to achieve, particularly given that the BDA currently employs only 10 professional archaeologists for the protection of the archaeological heritage of all of Austria.
- ⁴⁹ Or to use the proper German term for it, on an *Autobahn*, with no speed limits applying.

Notes on contributor

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