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THE PROBLEMS OF “BLACK ARCHAEOLOGY” IN ESTONIA

In recent years, several illegal excavations have taken place on the archaeological sites in Estonia. Yet, only a few cases have resulted in legal solutions and these have not unfortunately been positive from the perspective of the protection of archaeological heritage. This article addresses the issues related to the protection of archaeological finds and “black archaeology” in Estonia, aiming at evaluating, on the basis of three case studies of illegal excavations, the major problems of the protection of archaeological heritage with regard to legal regulation, ethical conflicts and economic interests. Although Estonian laws comply with international principles, applicable administrative capacity is the major concern. Next to regulating the use of metal detectors in Estonia, the measures influencing the market, the raising of public awareness and the enhancement of control mechanisms instead of more severe sanctioning could be considered as additional options.

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Introduction

In recent years Estonian archaeological sites have faced several cases of looting. Unfortunately only a very limited number of these cases have ended up in legal proceedings and yet, the solutions of these cases have not been helpful from the perspective of the protection of archaeological sites. For example, the illegal excavation of medieval coins in the surroundings of Keila in 2004 resulted in the payment of finding fees to the persons who actually had carried out a destruction of an archaeological monument and who, on that basis, should have paid fines to the state instead of receiving any fees. Such precedent allows concluding that laws which should have functioned and state authorities that should have implemented the laws, were at some point unsuccessful. Next to the legal side, it is important to consider ethical, social and economic aspects. The looters of Keila coin hoard have been the key players also in other cases, acting rather self-confidently with their clearly material focus and constantly testing the boundaries of legal and illegal behavior. The self-justification and effrontery of looters have been occasionally increased by the false images created in the media.

Thus, general public does not often perceive the actual contents, extent and legal boundaries of the activity of looters (let us call them “treasure hunters”). All this facilitates looting and makes it more difficult to apply laws efficiently.

This article addresses the protection of archaeological finds and the problems of “black archaeology” in Estonia, seeking to analyze, on the basis of three major looting cases (the hoards of Lauritsamäe, Keila and Ubina), the problems deriving from legal regulation, ethical conflicts and economic interests with regard to the protection of archaeological heritage and its preservation on site. The three cases have been chosen for the analysis because these represent the only considerable case law with regard to “black archaeology” in Estonia. The issue is very topical because the failure in legal proceedings and the favorable attitude of media have contributed to the adventurous reputation of treasure hunters. The awareness of people about who can work on excavation sites, which technologies treasure hunters use and how adequately they operate, remains low. Also, the majority of people often think in material categories, without understanding why the objects in the surface are important in the first place. The article seeks to raise a discussion on whether the respective problems of “black archaeology” could have been avoided and develop ideas on whether and how it would be possible to enhance the protection of archaeological heritage in Estonia.

Definition of a archeological heritage and “black archaeology”

To analyze the issues related to the protection of archaeological heritage, it is important to start by defining “black archaeology”. The activity of treasure hunters is usually called “black archaeology”. Obviously, the term refers to the unlawful (“black”) nature of the business of treasure hunters but this is just one element and does not explain the actual meaning of the activity called “black archaeology”. Providing a suitable all-encompassing definition of “black archaeology” is not an easy task. The key to its definition seems to lie in the term “archaeology” itself. According to the Council of British Archaeology:

Archaeology is the study of the material remains and environmental effects of human behaviour: evidence which can range from buried cities to microscopic organisms and covers all periods from the origins of humans millions of years ago to the remains of 20th and 21st century industry and warfare. It provides us with the only source of information about many aspects of our development. Milestones such as the beginning of agriculture, the origin of towns, or the discovery of metals, can only be understood through the examination of physical evidence. Archaeology also provides essential information for periods of the past for which written records survive.¹

From this definition we see that the activity of archaeology as such is related to the creation of new knowledge and interpretations about the history and therefore the scientific component is a must when calling any activity “archaeology”.

¹ See The Council of British Archaeology, available at <<http://www.britarch.ac.uk/getinvolved/whatisarchaeology>>

The unlawful removal of archaeological heritage (treasure hunting) normally does not include any scientific measuring, documentation and research. The only similarity of “black archaeology” to actual archaeological activities is excavation which is necessary to get the archaeological finds out of surface. However, in case of “black archaeology”, excavation is usually unlawful – i.e. carried out without the legal permission and often using the prohibited means of search (e.g. metal detectors if their use is prohibited by law). The report of the Monitoring Group on Cultural Heritage of the Council of the Baltic Sea States indicates that “black archaeology” covers both illegal excavations and the selling of looted objects (The Monitoring Group on Cultural Heritage 2005, 7). Thus, in addition to illicit field work, the definition of “black archaeology” also includes the marketing of unlawfully excavated objects. Moreover, “black archaeology” does not only relate to the illicit excavations but also official excavations. Respectively, the provisions of Art 10 the Convention of 1992 with regard to the prevention of the illicit circulation of archaeological heritage contain a reference to restricting the circulation of elements of the archaeological heritage suspected of coming from uncontrolled finds or illicit excavations or unlawfully from official excavations. Thus, from the above we see that the definition of “black archaeology” comprises at least three key components: (i) non-scientific purpose, (ii) illegal excavation and removal of finds originating from illicit or official excavations, and (iii) selling of unlawfully excavated and removed finds. In addition to the above, I think that “black archaeology” has an even broader scope than unlawful excavation and selling of looted items. I suggest that it also contains the preliminary activities (such as search in archives, interviews with local people, acquisition of search equipment, etc.) which are necessary to determine the location and search objectives, and all the preliminary, recurring and post-removal logistical arrangements and networking (e.g. communication with antiquity stores, etc. in order to secure the marketing of looted objects). Also, it is necessary to keep in mind the geographic dimension as “black archaeology” is a cross-border business which should be reflected in its definition.

Thus, I suggest the adequate definition of “black archaeology” should reflect the whole chain of activities because its actual meaning is much wider than the treasure hunting normally addressed as the simple unlawful excavation of archaeological items. In order to open its meaning and differentiate between archaeology and “black archaeology”, I suggest that “black archaeology” can be defined as follows: “Black archaeology” means all the single or group-based activities which are related to the illegal non-scientific excavation, removal and selling of archaeological heritage originating from illicit or official excavations, including but not limited to the preliminary research and communication activities, search and excavation works, removal and cleansing of finds, any support activities, networking and contracting, and the offering for sale and selling of finds to the previously identified or non-identified buyers in the country of origin and abroad.

The legal protection of archaeological heritage in Estonia

International legal acts are part of Estonian legal fabric. Estonia has ratified the UNESCO Convention of 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the UNESCO Convention of 1972 on the Protection of Global Cultural and Natural Heritage². Also, Estonia has joined the European Convention of 1992 on the Protection of the Archaeological Heritage³ but has not yet ratified the UNIDROIT Convention of 1995 on Stolen or Illegally Exported Cultural Objects⁴. From among EU-level acts, the Directive of 1993 on the return of cultural objects unlawfully removed from the territory of a member state⁵ has been implemented in Estonia with effect since 1st May 2004⁶.

The protection of archaeological finds in Estonia is regulated by the Heritage Conservation Act (HCA)⁷ which became effective on 01.04.2002. It is supplemented by the Law of Property Act (LPA)⁸, the punishment regulation and implementation acts. The HCA provides for the definition of monument and classifies monuments, incl. archaeological monuments, into different categories. In accordance with the law, the main function of the National Heritage Board (NHB) in the prevention of “black archaeology” is to exercise state supervision over monuments and heritage conservation areas (Art 7 of the HCA) while certain supervisory functions and assistance to state supervision are also assigned to rural and city municipalities (e.g. Art 9 of the HCA).

Art 5 of the HCA directly prohibits destroying or damaging monuments. In the context of “black archaeology” and the regulation of relations between the state and treasure hunters, the most important provision of the HCA is its Art 30, which stipulates that a finding of cultural value is a movable found in the ground or on the surface of the ground, inside a construction, under water or in the sediment of a body of water, which is either a natural feature or has historical, archaeological, scientific, artistic or other cultural value and which has no owner

² The conventions were ratified by Estonia on 5 April 1995 (see *Riigi Teataja (RT) II* (1995) No. 10, 53).

³ European Convention on the Protection of the Archaeological Heritage, 16 January 1992, Valetta, available at <<http://conventions.coe.int/Treaty/en/Treaties/Html/143.htm>>. The convention has been ratified by Estonia on 23 October 1996 (see *Riigi Teataja (RT) II* (1996) No. 36/37, 134).

⁴ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, Rome, available at <<http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>>

⁵ Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, *Official Journal (OJ) L 74* (1993), 74–79.

⁶ “Euroopa Liidu liikmesriigist ebaseaduslikult väljaviidud kultuuriväärtuste tagastamise seadus”, signed 11 June 2003, *Riigi Teataja (RT) I* (2003) No. 51, 351; (2009) No. 62, 405.

⁷ “Muinsuskaitse seadus”, signed 27 February 2002, *Riigi Teataja (RT) I* (2002) No. 27, 153; (2009) No. 63, 408 (hereinafter “Heritage Conservation Act”).

⁸ “Asjaõigusseadus”, signed 9 June 1993, *Riigi Teataja (RT) I* (1993) No. 39, 590; (2009) No. 68, 463 (hereinafter “Law of Property Act”).

or the owner of which cannot be ascertained. A finding of cultural value is an ownerless object pursuant to Art 105 (1) of the LPA and it belongs to the state regardless of on whose immovable it was found. Both the LPA and the HCA stipulate the finder’s entitlement to fee. According to Art 33 of the HCA, the finder of an object of cultural value is entitled to receive a fee equal to one-half of the value of the thing. The value of a thing is determined by the NHB.

Art 32 of the HCA sets forth concrete duties of the finder of an archaeological object. The finder is required to preserve the place of the finding in an unaltered condition and to notify the NHB or the municipality promptly of the finding. A found thing must be left in the place it is found until it is delivered to the NHB. A found thing may be removed only if its preservation is endangered. It must not be damaged by cleaning, refurbishing, breaking or in any other manner, or by severing parts from the whole.

Any excavation work on immovable monuments and in heritage conservation areas is prohibited without the permission of the NHB (Art 24 (1) 11 and Art 25 (2) 1 of the HCA). Yet, the use of metal detectors in general is not prohibited or regulated in Estonia. In different countries the use of metal detectors in archaeological sites without the permission of authorities has different legal treatment. While in Sweden, for example, the use of metal detectors is legally prohibited (Lundén 2004, 216), the situation in Estonia is such that theoretically it is possible to stay on the site carrying a metal detector. This means that a person can not be subject to legal sanctions, unless directly found damaging or destroying a monument because the ownership and carrying a detector are currently not legally prohibited.

When it comes to legal sanctions with regard to unlawful excavation and the destruction of sites, intentional acts are punishable and the sanctions vary between misdemeanors and criminal offences⁹. The liability is stipulated both in the Penal Code¹⁰ and the HCA. Damage to the findings of cultural value which are not monuments is considered misdemeanor and Art 46 of the HCA stipulates that knowingly removing a finding of cultural value from the place it is found and for damage thereto by a natural person is punishable by a fine of up to 200 fine units¹¹. The same act by a legal person is punishable by a fine of up to 20 000 kroons. Damage to or destruction of a monument may qualify as misdemeanor or criminal offence depending on whether it was committed in a manner which caused significant damage. Art 48 of the HCA provides sanctions for damaging or destroying a monument by a natural person as misdemeanor which is punishable by a fine of up to 300 fine units. The same act by a legal person is punishable by

⁹ Classifying an act as misdemeanor or criminal offence depends on the punishment provided in law. In case an act is punishable by a fine (measured in fine units) or detention (up to 30 days), it is qualified as misdemeanour. In case an act is punishable by pecuniary punishment (measured in daily rates) or imprisonment (more than 30 days), it is qualified as criminal offence.

¹⁰ “Karistusseadustik”, signed 6 June 2001, *Riigi Teataja (RT) I* (2001) No. 61, 364; (2009) No. 68, 463 (hereinafter “Penal Code”).

¹¹ 1 fine unit = 60 kroons.

a fine of up to 50 000 kroons. Art 204 of the Penal Code stipulates that injuring or destroying a cultural monument, museum object or collection by a natural person in a manner which causes significant damage is punishable by 1 to 5 years' imprisonment. The same act by a legal person is punishable by a pecuniary punishment. This means that in case the destruction of a monument causes significant damage¹², the act qualifies as criminal offence and the provisions of the Penal Code are applied.

The problems of “black archaeology” in Estonia: case studies

Lauritsamäe Hoard

Since 2004 the activeness of treasure hunters has increased in Estonia. The first important case with regard to identifying the problems of “black archaeology” in Estonia is the case of Lauritsamäe which took place in the summer of 2004 and which was eventually solved in Harju County Court only in the beginning of 2007. Three persons were suspected to have excavated close to the burial site of Simmu in the village of Koemetsa area, at Lauritsamäe which itself is not registered as a monument. The persons found 10 coins dated to the period from the first half of the 14th century to the first half of the 18th century. They were suspected to have cleaned the coins and separated them from each other. Respectively, the NHB started misdemeanor proceedings in December 2005. The location of coins was unknown. Since the removal of coins supposedly damaged the site and the completeness of the complex, the NHB assumed the violation of Art 30 (2) and Art 32 (1) and (2) of the HCA.¹³

All three persons subject to the proceedings contested the misdemeanor decisions of the NHB. Although all three supposedly participated in committing the misdemeanor together, their applications were processed in two different courts: two of them together in one court and one separately in another court. In the latter case, the NHB agreed with the annulment of its misdemeanor decision while in the first case the NHB continued claiming the punishment of the two persons. In their contestation, the persons subject to proceedings first and foremost based themselves on the lack of evidence and the violation of procedural rules by the NHB. With regard to the latter, their key points were the application of expiration and reference to the different treatment of persons who had supposedly committed the same misdemeanor together. The court ruled for the persons subject to proceedings on the basis of expiration because the misdemeanor had been committed more than 2 years ago from the day of making the court decision.

¹² The definition of significant damage is based on Art 8 of the Penal Code Implementation Act (“Karistusseadustiku rakendamise seadus”, signed 12 June 2002, *Riigi Teataja (RT) I* (2002) No. 56, 350; (2007) No. 13, 69) according to which damage is considered significant when it exceeds 10 times the established minimum monthly wage.

¹³ Harju County Court decision of 31 January 2007 in misdemeanor case 4-06-407.

I suggest that one of the problems in the case of Lauritsamäe was the lack of important evidence because the coins were not found and no one was caught in action. When it comes to the major reasons for the failure to sanction the likely treasure hunters, I suggest that the uneven treatment of the case and non-consideration of expiration dates by the NHB were other important points beside the problem of proof. Although the court ruled for the persons subject to proceedings on the basis on expiration, the court decision would have probably been to their favor even in case of non-application of expiration because earlier the NHB had annulled the proceeding against one of the participants of the same misdemeanor. Different treatment of persons that participate in the same misdemeanor allows highlighting the contradiction to the principle of uniform application of law¹⁴. This indicates that proper “homework” of the NHB and the understanding of its role as the processor of misdemeanors are very important to ensure the uniform treatment of cases and set some principles which can be clearly and continuously followed during the processing of cases and potential disputes.

Keila Hoard

The problems of “black archaeology” can be looked at from another perspective in case of Keila hoard which brought into focus the payment of finding fees. Looting was committed by the same persons who were subject to proceeding in case of Lauritsamäe hoard. In spring 2004 they found a coin hoard which is the largest one found in the recent years – it consisted of 446 silver coins of 14th century and some potsherds. The treasure hunters removed the coins, cleaned them and took them only some three weeks later to Estonian History Museum. Respectively, on the basis of Art 33 of the HCA and Art 105 (3) of the LPA the treasure hunters requested a finding fee from the state. The NHB did not initially pay the fee and the treasure hunters brought an action to the court. The initial position of the NHB was based on the argument that the precondition for paying a finding fee is that finders have followed the provisions of Art 32 of the HCA¹⁵. Regardless of this initial position, the NHB surprisingly made a decision in the course of later court proceedings to pay the treasure hunters a finding fee in the amount of 53 400 kroons. One of the reasons was that the find consisted of 2 very rare coins. This completely surprising change of positions ended the proceedings in court and enabled the treasure hunters once again to get away with an advantageous solution.

¹⁴ This principle assumes a thorough analysis of court practice and should also be assumed in misdemeanour proceedings, provided that the earlier application of law in similar situations has been carried out without major errors.

¹⁵ According to Art 32 of the HCA the finder is required to preserve the place of the finding in an unaltered condition and immediately notify of it. A found thing, if removed from the place where it was found, must not be damaged by cleaning, refurbishing, breaking or in any other manner, or by severing parts from the whole.

In the context of Keila hoard the problem with the size of finding fees arose. The value of a hoard is usually determined by respective specialists and the Archaeological Heritage Expert Panel. In addition to antiquity value its treatment by the finder is also taken into account. This means that the more complete the antiquity and the more accurate the information about its context, the higher the value of the hoard and the finding fee (Kiudsoo 2008, 14 f.). The coins of Keila hoard were initially evaluated by one of the leading Estonian numismatists whose expert evaluation indicated that the total value of the hoard is 96 000 kroons. Since the hoard had been removed from its primary context, the expert found that its value had decreased by half and therefore the finding fee in the case of proper handover to authorities would have been 24 000 kroons. However, later in the proceedings the NHB decided to pay a fee in the amount of 53 400 kroons, reasoning that according to auction prices the total value of the hoard would be some 300 000 kroons and moreover, 2 of the coins were very rare because there are only 2 such exemplars in the world (Kärmas 2005). The whole story is particularly cynical because eventually the treasure hunters considered the finding fee of 53 400 kroons too small since it apparently did not cover even their direct costs of searching (Eesti Ekspress 2005).

The law clearly defines the basis for a finding fee but it is possible to contest the determination of the value on which the size of the fee depends (Pärna 2004, 213). I believe that half of the value as a basis for the determination of a finding fee is sufficient. It is important to take into account the fact that the fee is designed to be an incentive for an honest finder to hand the find over to the state. The size of the fee should be therefore reasonable: on the one hand, it should not be too small in order to maintain the motivation of the finder and on the other hand, it should not be too big in order to avoid the hunting of treasures becoming a separate source of income. I suggest that the issue of finding fees might be accompanied by emotional aspect: it is the question of how much exactly is culture worth and whether a finding fee which is too small would imply lower cultural value. Since the fee reflects both the informative value of the find as well as material considerations, the existing regulation of the HCA on finding fees is optimal from the practical perspective. However, in order to avoid disputes one could suggest more clarification with regard to the methods for defining the price of an item. First and foremost, it would be necessary to clarify the impact of informative value on the evaluation of total value and the determination of the finding fee. At the same time it is also necessary to maintain sufficient space of interpretation for specialized items.

Besides the issue of finding fees, another major problem with Keila hoard is that the NHB excluded potential misdemeanor proceedings by its decision to pay a finding fee to the treasure hunters and thereby accepted the lawfulness of the find. Upon becoming informed about the find the NHB should have immediately started misdemeanor proceedings against the treasure hunters. The coins existed and the persons who had excavated them had eventually brought them to the museum. Thus, it would have been possible to objectively prove the violation of

legal provisions which prohibit the excavation and removal of a find. Even the fact that the coins were handed over 3 weeks later would not have excused the violation because the find was in any case removed without the permission and 3 weeks clearly is not a reasonable period for “immediate” notification.

When it comes to ethical aspects, the first point to highlight is that both the hoards of Lauritsamäe and Keila were unlawfully excavated and removed by the same persons. This certainly reflects the sense of impunity and lack of respect to laws on behalf of treasure hunters. Additionally, I find it very problematic that the media was involved in the case of Keila hoard. For example, the treasure hunters explained in several media coverages how they excavated in the area which is not under protection. They knew about the site because some farmers had earlier found a few coins from the same place. So they collected additional information from the archives and using a metal detector just found the hoard from the field. Simultaneously, they highlighted that the NHB was trying to evade the payment of finding fees to them as hobby archaeologists who had all the time been willing to cooperate and handed over the hoard (Kärmas 2005). Although from the legal perspective these persons committed the violation of the HCA, the focus of the case was shifted to finding fees and no sanctions were eventually applied. The various media coverages positively supported the “image creation” on behalf of the treasure hunters.

Ubina Hoard

In spring 2005 official archaeological excavations took place in the historical settlement of Ubina in the territory of Salu village which is located some 29 km from Tallinn. The excavations resulted in finding a silver hoard from the remains of a Viking Age building. The hoard contained 277 coins, 5 silver adornments, 4 silver lumps and 5 silver plates. Since the find represented very rare silver hoard both in Estonian and European context, the archaeologists kept information about the site in secret from the first day.¹⁶ Regardless, a number of black holes were discovered on the same site just one day after the start of the official excavations. Although no treasure hunters were caught in action, there were many footprints left on the site. Official excavations continued after this incident and within a couple of weeks the Viking-Age coin hoard was found. It consisted of German, English, Danish, Arabic, Hungarian, Byzantine and Swedish coins. It was a very unique find.¹⁷ The Republic of Estonia currently has a total of 291 exemplars belonging to this hoard with the oldest coins dated to 1100.¹⁸

¹⁶ Application of the National Heritage Board of 7 July 2005 for the commencement of criminal proceedings.

¹⁷ There are only 7 such finds known in the whole world. Moreover, 4 of such treasures have been found from Harju County, 1 from Viru County and only 2 outside of Estonia (*see* Tamla et al. 2006).

¹⁸ *See* note 16.

In summer 2005, however, the rumors spread that the officially excavated Ubina hoard is not complete and one part of the hoard has been already sold. Indeed, some time later the scientists of Estonian History Museum received information from their German colleagues¹⁹ that one part of Ubina silver hoard is to be sold in the coin auction of Dortmund. Thanks to the German police 42 coins out of 108 were confiscated from the German auction. Their price is 8175 euros (127 906 kroons) (Põld 2008). Since Ubina hoard is a very unique find which was unlawfully excavated and removed from the officially protected site, criminal proceedings on the basis of Art 204 (1) and Art 199 (2) 3 and 7 of the Penal Code were initiated against the Estonian citizen who had arranged the auctioning of the coins. Charges were brought against the person with regard to the destruction of a monument and theft of the objects of great scientific, cultural and historical significance belonging to the Republic of Estonia. Thus, unlike the misdemeanor cases of Lauritsamäe and Keila hoards, criminal offences were identified in the case of Ubina hoard. Respectively, these offences are processed by court in criminal proceedings.

The case of Ubina Hoard is the first serious success story of the state in combating looting. The case has gone through the appeals in all the court instances in Estonia and has been taken to the Supreme Court which made a decision in spring 2010 to sentence the accused person to 3 years of imprisonment. Evidence existed in the given case although the situation was somewhat complicated. Since the accused person was reached through the confiscation of coins and the person was not caught in action, there was mostly indirect evidence. His direct linkage to Ubina hoard was the fact that he was the person who arranged the auctioning of the coins in Germany. The Supreme Court found that a person can be also accused based on indirect evidence because direct and indirect evidence differ from each other only by their way of reflecting the circumstances of a particular crime and not their value of truth. The Court found the accused person guilty of destroying a cultural monument in a manner which causes significant damage (Art 204 (1) of the Penal Code) and embezzlement²⁰ by a group or a criminal organization (Art 201 (2) p 4 of the Penal Code).²¹ The reason for qualifying the case as embezzlement and not as theft (as was the initial qualification by lower court instances) is that according to the Supreme Court the coins situated inside the land do not belong to anyone and the ownership of the state only commences upon their excavation. In the given case, the coins went directly into the possession of the accused person upon the excavation. Since it is not possible to steal something which is already in your possession, the act was legally qualified as

¹⁹ Such info exchange is usual when some important items originating from the Baltics or Scandinavia are auctioned in Germany.

²⁰ Embezzlement is an act of illegal conversion whereby a person converts into his or her use or the use of a third person movable property which is in the possession of another person or other assets belonging to another person which have been entrusted to that person.

²¹ See the Supreme Court 12 April 2010 decision in criminal case 3-1-1-15-10, *Riigi Teataja (RT) III* (2010) No. 17, 122, Sec 8, 12.

embezzlement (or illegal conversion). The difference in qualification is, however, only important in terms of legal procedure. In terms of combating looting in its essence, such solution nevertheless acknowledges the illegal content of this act and presents a good step forward regarding the legal protection of archaeological heritage in Estonia.

Enhancing the protection of archaeological heritage

In the light of all three cases, one of the possibilities for improving the protection of archaeological heritage would be the regulation of the use of metal detectors. Mauri Kiudsoo suggests that there are probably a few hundred treasure hunters using metal detectors in Estonia (Kiudsoo 2008, 14 f.). However, in addition to treasure hunters there is certainly a considerable number of active “hobby detectorists” who search objects not for monetary reasons but because of personal enthusiasm and excitement. For example, on the basis of the research which was carried out among detectorists, Nele Kangert suggests that there are some 500–1000 people practicing metal detecting in Estonia (Kangert 2009, 18). Naturally there are many law-obedient people among them, but the general view is that the activities of the detectorists have resulted in the loss of very important and valuable historic sources of Estonian history in the auctions of Western Europe. I agree with Valter Lang who found in relation to Keila hoard that everything was in order until the moment the coins were found. Things became problematic only when the hoard was taken out and cleaned. Although the coins were eventually handed over to the state, the fact that the site was not disclosed for quite some time decreased the reliability and adequacy of the find. Although the coins of Keila hoard were recovered, this case could facilitate the regulation of the use of metal detectors (Lang 2005, 3).

Unlike some other countries, such as for example Sweden where the use of detectors is prohibited or the UK where the carrying of metal detectors in monuments or their surrounding areas is subject to big fines (Kiudsoo 2008, 14 f.), the use of metal detectors is currently not prohibited in Estonia. However, if a detectorist violates the provisions of the HCA which regulate the notification and prohibit the removal and damaging of finds, he/she automatically becomes a lawbreaker. Since these provisions have not prevented looting, the use of detectors should be regulated more strictly. Respectively, there is a draft law in the process of adoption which prohibits seeking an object of cultural value and the use of searching device without the permission of the NHB. A searching device is any technical solution which enables the identification of objects and things in the surface or on the ground, inside a construction or building, in water or the bottom layers of a water body. This draft regulation, foreseen to take effect on 1 March 2011, would be applied to all objects of cultural value and respectively the use of metal detectors is restricted both on the sites which have been registered as monuments, their protective zones and in other areas which are not

monuments outside towns and hamlets.²² In my opinion, the limiting of the use of metal detectors in seeking the objects of cultural value is reasonable although it may create further disputes. The main problem rests in the definition of a find as an object of cultural value. The question is how the finder would know that the object he/she has found is of cultural value, especially without specialized education and knowledge. Also, if cultural value is confirmed in the course of later expertise, it would be important to ask to what extent the liability of the finder is reasonable, assuming that he/she indeed did not know about the cultural value. It goes without saying that these questions will be asked by treasure hunters too when contesting their liability in future disputes.

In the context of the cases of Lauritsamäe and Keila hoards, the improvement of the protection of archaeological heritage could be achieved by making the work of the NHB more efficient. Estonian laws, which are in accordance with international principles, clearly disapprove of the looting of cultural heritage and removal from its context. Regardless of the laws, their application does not seem efficient in order to prevent looting. Therefore it is important to increase the applied administrative capacity. Next to the NHB there is a need for increasing the activeness of local governments in the supervision of cultural heritage because local issues should in fact first and foremost be the matter of local authorities. On the basis of the analyzed cases one can conclude that today it is the NHB that takes care of the protection of archaeological heritage at all levels while the activeness of local governments is very low.

Clearly, one of the core conditions for the activities of treasure hunters is a functioning market. The estimated volume of illicit trade of antiquities globally varies between USD 150 million and USD 2 billion per annum. Although it is difficult to have a full overview and reliable data on the total volume of looting, the estimated figures clearly indicate that the illicit trade of antiquities is a very large-scale business, especially in Europe and North America (Brodie et al. 2000, 23). Next to drug traffic, the looting and trade of antiquities are nowadays considered by the police and experts of cultural values everywhere in the world the second biggest field of activity in international crime (Renfrew & Bahn 2008, 567). There is a lot of archaeological material of unclear origin circulating in the international market of antiquities. The information leaks about the backstage of the market indicate a very clear relation between the lootings and the trade of antiquities. For example, the leak of internal documents of the famous international auction house Sotheby's showed that Sotheby's regularly sold items which originated from recently looted archaeological sites although its employees should have had good reasons for suspecting the unlawful origin of the items (Lundén 2004, 198). Also, the research based on the interviews with Swedish auctioneers and antiquities traders proved that officially there are talks of high ethics and

²² Explanatory note to the amending act of the Heritage Conservation Act and other related acts (806 SE), 13 September 2010, 11, available at <http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=1147456&u=20100922184316>

indications to items originating from “old collections” or known dealers. However, the picture gained off the record (and by simply pretending purchase interest) was completely different and proved that even the well-known auctioneers do not limit the sale of unlawful objects and their employees are very well aware of the fact that many sold objects have been gained as a result of looting (Lundén 2004, 200 ff.). In any case all the items of unidentified origin offered on the market should be treated as the result of possible looting, unless proved otherwise (Renfrew 2000, 11).

What to do in order to directly hinder the market for looted archaeological material? In trying to influence looting through the market it is essential to highlight one particular aspect – the avoidance by archaeologists and museum staff of everything which might facilitate illicit trade. For example, it can be the cancellation of borrowing or purchasing for exhibitions of such items which are of suspicious origin and indicate the results of looting. However, one needs to consider that in practical terms such measures may not have any significant impact in the countries such as Estonia which have quite limited public financial resources. On the other hand, such non-involvement of public sector in the repurchases of looted items may cause the problematic situation of losing some important piece of cultural heritage. Another way is to take measures which make illicit trade more complex and reduce its economic benefits. In Estonia there is a clear need for better regulation with regard to identification and documentation of the origin and former owner of cultural objects by antiquity traders and auction houses. The solving of this problem would significantly decrease the illicit market (i.e. the circle of purchasers in good faith) and the legalization of illicit objects through antiquity traders.

The cases addressed above bring forth the use of the advantages of mass media as an important information channel²³ and the raising of public awareness. Official archaeological excavations as such always pose certain threat to antiquities because they may facilitate looting when the information about excavations reaches general public and may activate treasure hunters (Hollowell 2006, 86). Especially in the context of Ubina hoard it is important to note that, among others, the protection of archaeological heritage could be improved by the increased awareness of people. Treasure hunters usually introduce themselves to local people as archaeologists or museum staff. If people accept such explanation without questioning, it often results in the destruction of sites (Kiudsoo 2008, 14 f.). Greater awareness about the problems of “black archaeology” would help local people distinguish between official excavations and treasure hunting and notify the NHB accordingly.

Additionally, some media coverages suggest increasing the finding fees as one of the options. I do not think that this would actually contribute to the improvement of the protection of archaeological heritage. On the basis of the analysis of Keila hoard I believe that advocating for bigger finding fees intensifies the use of metal

²³ The case of Keila treasure showed media contribution to the image creation of treasure hunters: the significance of damage was not mentioned although it was one of the biggest looted treasures but with the help of media the size of finding fees became an issue of dispute.

detectors and looting on archaeological sites rather than prevents them. A finding fee should be of reasonable size because treasure hunting becoming a means of income is not acceptable and the resources for paying the fee are limited. Also, one could advise the establishment of common best practices with regard to determining what the remaining value of unlawfully excavated archaeological objects actually is. Surely their economic value remains to certain extent but the cultural-historical value may significantly decrease, influencing the total value of the objects. The principles of the HCA with regard to finding fees are optimal although a clarification about the methods for value determination would help avoiding disputes.

When it comes to the possibilities with regard to sanctions, a positive influence of stricter punishments could be assumed at first glance. M. Kiudsoo suggests stricter punishments, the enhancement of control mechanisms and “the policy of hard hand”. He suggests taking the UK as an example: the general use of metal detectors is allowed in the UK but the persons carrying metal detectors in monuments or their surrounding areas are subject to accelerated procedure and very big fines (Kiudsoo 2008, 14 f.). I believe that instead of stricter punishments the focus should be on the efficient control mechanisms. Also, in the context of Estonia it is necessary to consider that a common law tradition such as the UK normally has less codification and respective procedural rules than a continental law system such as Estonia. Thus, the “policy of hard hand” requires a very correct procedural application and competent administrative processing in order to avoid disputes. In other words – even the stricter punishments would not influence treasure hunters if in practical terms there is no sufficient applied administrative capacity to implement the punishments.

Conclusion

The analysis of the cases of “black archaeology” in Estonia indicates the following major problems. The case of Lauritsamäe hoard faced the lack of important evidentiary support. Additionally, the NHB treated the case inconsistently and did not consider the expiration dates. In the given case, three persons participated in the same act but the NHB had a different position with regard to one of them. This is not in accordance with the principle of uniform application of law. Thus, the full understanding of its role as an extrajudicial processor, proper intra-board cooperation and enhanced competence with regard to punishment regulation on behalf of the NHB are important factors in order to ensure the consistency of cases and set the common principles which are followed throughout the processing of cases.

With regard to Keila hoard, the NHB made contradicting decisions in different stages. By granting treasure hunters a finding fee, the NHB accepted the lawfulness of the find although it was illegally removed from the site. The same treasure hunters are in the center of both cases which reflects their lack of respect

to the law. In the case of the Keila hoard, it is notable that with the help of media the focus of the case was shifted to the issue of finding fees. When it comes to the economic aspect of “black archaeology” deriving from the case of Keila hoard, the size of finding fees should be reasonable: it should not decrease the finder’s motivation to hand over the find, but it should not intensify the treasure hunt as a separate source of income either. Current regulation is practical enough but to avoid debates, it would be reasonable to specify the methods for determining the value of a find.

The court decision regarding the case of Ubina hoard presents the first serious legal result in the attempts of protecting archaeological heritage in Estonia. The state has been successful in protecting its positions with regard to the destruction of the site and also with regard to illegal export of the object (embezzlement). There was material evidence and the person who arranged the auction of coins was identified. Although in respect of illegal excavations of the hoard and removal from its context, there was mostly indirect evidence, the linkage between the accused person and the looting act proved to be sufficient enough for making a guilty verdict in the aspect of destruction of the site.

It is the market that ensures the continuity of treasure hunting. Looting could be hindered by the measures which complicate the trade and decrease its economic benefits in certain situations. The identification, documentation and proving of the origin and former owner of archaeological objects by antiquity traders and auction houses would need to be regulated in Estonia.

One of the possibilities to enhance the protection of archaeological material is the regulation of metal detectors, e.g. prohibiting the use of detectors in seeking the objects of cultural value or prohibiting detectors on a monument and its surroundings. When it comes to punishment regulation, one would assume that stricter punishments have bigger positive impact. However, I rather support the enhancement of control mechanisms because more severe punishments would not stop treasure hunters if it can be foreseen that there is not enough competence to implement the punishment regulation. Estonian laws are in accordance with international principles, but it is necessary to increase the applied administrative capacity. Also, one would expect more active involvement of local governments in detecting the situation in their territories.

The use of the advantages of mass media and the raising of public awareness could also contribute to the enhanced protection of archaeological heritage in Estonia. Better knowledge would help people differentiate between official archaeologists and treasure hunters and boldly react in case of doubt.

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Ingrid Ulst

“MUSTA ARHEOLOOGIA” PROBLEEMID EESTIS

Resüme

Analüüsitud “musta arheoloogia” juhtumid toovad esile mitmeid probleeme. Lauritsamäe juhtumi puhul oli probleemiks tõendite puudumine. Lisaks käsitles Muinsuskaitseamet juhtumit ebaühtlaselt, arvestamata aegumistähtaegadega ja õiguse ühetaolise kohaldamise printsiibiga. Siit tulenevalt võib järeldada, et oma kohtuvälise menetleja rolli mõistmine, korralik ametisise koostöö ja karistusõiguslike sätete erisuste põhjalik tundmine on Muinsuskaitseameti poolt väga olulised, et tagada juhtumite ühetaolisus ning seada põhimõtted, mida läbivalt juhtumi menetlemisel järgitakse.

Keila aarde juhtumi puhul välistas Muinsuskaitseamet väärtemenetluse aardeküttide suhtes sellega, et võttis kohtuprotsessi käigus vastu otsuse neile leiutasu määrata ja aktsepteeris sellega leiu seaduslikkust. Keila ja Lauritsamäe juhtumite keskmes olid samad isikud, mis peegeldab aardeküttidel respekti puudumist seaduste vastu. Keila aarde puhul on märkimisväärne ka see, et meedia kaasabil nihkus fookus rikkumiselt hoopis leiutasule. “Musta arheoloogia” majanduslikke aspekte kajastab Keila aarde juhtum, mille põhjal võib järeldada, et leiutasu suurus peaks olema mõistlik: see ei tohiks vähendada leidja motivatsiooni leiu loovuta-

miseks ega ka süvendada aarete otsimist eraldi sissetulekuallikana. Tänapäevane regulatsioon leiutasude suuruse osas on praktiline, kuid vaidluste vältimiseks võiks täpsustada leiu väärtuse määramise meetodeid.

Ubina aarde juhtum on esimene tõsisem samm õiguslike tagajärgede osas arheoloogiapärandi rüüstamise eest. Selle juhtumi puhul oli riigi positsiooni kaitsmine edukas kõigis kolmes kohtuastmes ja Riigikohtu lahend tähistab positiivset pretsedenti muinsuskaitsejate jaoks. Riigikohus mõistis müntide oksjonile paneku korraldanud isiku süüdi Ubina aarde leiukonteksti rikkumises ja müntide omastamises, mõistes talle karistuseks liitkaristusena kolm aastat vangistust. Kuigi tõendid leiukonteksti rikkumise osas olid üldiselt kaudsed, peeti seost rüüstete ja kahtlusaluse isiku vahel piisavaks selleks, et väita, et just kahtlusalune isik pani need teod toime, ning vastavalt leiukoha rikkumise osas otsus teha.

Turg tagab aardeküttide tegevuse jätkumise. Rüüsteid saaks pärssida meetmete kaudu, mis teevad kaubitsemise keerukamaks ja vähendavad teatud olukordades majanduslikku kasu, näiteks riiklike muuseumide loobumine kahtlastest ostudest. Samas peab arvestama, et Eesti tingimustes võib riigi mittesekkumine tagasiostudesse kaasa tuua hoopis meile olulise kultuuripärandi kaotamise. Lisaks vajaks Eestis oluliselt paremat reguleerimist esemete tooja ja päritolu tuvastamine, dokumenteerimine ning vajadusel tõestamine antiigipoe omanike ja oksjonipidajate poolt. Selle probleemi lahendamine aitaks kahandada nn heausksete ostjate ringi ja ebaseaduslikult saadud esemete legaliseerimist antiigipoodide kaudu.

Muististe kaitse tõhustamisel võiks üheks võimaluseks olla metallidetektorite regulatsioon, näiteks detektorite kasutamise keelamine kultuuriväärtusega leiu otsimiseks või mälestisel ja selle ümbruses detektoriga viibimise keelamine. Rääkides karistusõiguslikest võimalustest võiks esmapilgul eeldada suuremate karistuste paremat mõju. Mina pooldan aga kontrollimehhanismi tõhustamist, sest karistuste karmistamine ei mõjutaks aardekütte, kui on ette teada, et karistuste rakendamiseks ei jätku kompetentsi. Eesti seadused vastavad üldiselt rahvusvahelistele printsiipidele, aga oleks vaja tõsta rakenduslikku haldussuutlikkust. Muinsuskaitseameti kõrval võiks suureneda kohaliku omavalitsuse kui kohaliku elu juhtija aktiivsus oma territooriumil asuva arheoloogiapärandi kaitsmisele kaasaaitamisel.

Eestis aitaks arheoloogiapärandi kaitset tõhustada ka massimeedia eeliste ära kasutamine ja avalikkuse teadlikkuse tõstmine. Suurem teadlikkus võimaldaks ametlikul arheoloogil ja aardeküttil paremini vahet teha ning kahtluse korral julgelt reageerida.