Fighting against the archaeological looting and the illicit trade of antiquities in Spain

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Abstract: During the seventies, archaeological looting, of both land and underwater sites, not only was widespread in Spain, but also went unpunished. This situation stemmed from a lack of effective administrative and criminal legislation, human resources to combat the plague, and educational policies warning of how harmful such practices were, in spite of damning reports in the media and the social alarm raised in certain professional and political fields. The new political and social phase that began with the Constitution of 1978 has enabled the country to overcome this situation in three ways: first, by passing new, more appropriate administrative and criminal laws to help combat looting and illicit trade; second, through the creation of new regional governments (the autonomous communities) able to enforce these laws, and which have hired archaeologists specializing in cultural heritage management. The fight against the criminal aspect of looting and the illicit trade of antiquities has also been intensified by the creation of police and prosecuting bodies dedicated to the area of cultural heritage, among others. Last, educational policies have been put in place to help increase social awareness of the importance of our cultural heritage and the global loss its destruction represents. In this article we will present the first two points that have improved the initial situation as regards archaeological looting and the illicit trade of looted goods.

1. INTRODUCTION

The European Convention on the Protection of the Archaeological Heritage (Revised) (Valletta 1992)\(^1\) defines archaeological heritage as the entity composed

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by “[a]ll remains and objects and any other traces of humankind from past times,” including structures, constructions, groups of buildings, developed sites, movable objects, monuments of other kinds as well as their context, whether situated on land or under water (art.1). It is probably not the best definition of archaeological heritage, but it is important to highlight that the Valletta Convention deals directly with the protection of archaeological heritage threatened by illicit excavation. The signatory countries are required to set up procedures for authorizing and supervising excavations and other archaeological activities and to avoid illicit excavations and any kind of removal of elements from the archaeological sites.

This treaty considers archaeological heritage as a finite resource suffering from what may be called a “tragedy of commons”: the depletion of a shared resource by individuals, acting independently and rationally according to each one's self-interest, despite their understanding that their depleting of the common resource is contrary to the group’s long-term interest. Of course, there is a loss of archaeological heritage resulting directly from the continuous human occupation of a particular place for thousands of years, and this loss of archaeological record increases as population growth and economic development take a rising toll. But the loss of archaeological heritage due to looting is something else entirely. In non-legal terms, this kind of looting is defined as the loss of archaeological goods and their associated information, caused by art theft and removal of soil for artifacts to supply the illicit market in antiquities. This concept of looting always has a sense of a desired damage done to a site or other any archaeological entity. This is the meaning of the term “looting” as it is used in this paper, although by Spanish administrative legislation, “looting” has a broader meaning (according to Article 4 of the Ley de Patrimonio Histórico Español [Spanish Historical Heritage Act], hereinafter “LPHE,” according to its Spanish acronym) relating to any act or omission that prevents or disrupts the social function of cultural property.²

It is important to highlight that in this paper we are dealing with the term “looting” as defined above; we are not referring to other kinds of damage (intentional or otherwise) inflicted on archaeological goods. Further, in Italy and neighboring countries, significant archaeological sites have been destroyed using heavy equipment, while in Spain, the most common type of looting on land involves the illicit use of metal detectors.

Underwater archaeological devastation has improved in recent years through technological development that enables access by remote control to mesopelagic depth. This new technology has been used by treasure hunting companies to reach shipwrecks of the so-called Carrera de Indias, a route used by Spanish sailors to reach Latin American colonies, and its sunken treasures. To the issue of underwater archaeological devastation, we will apply, in this article, the same principles exposed above, and for that reason, attention will be focused on shipwrecks, although the range of material entities covered by the definition of “underwater cultural heritage” held by the Convention on the Protection of the Underwater Cultural Heritage, adopted by UNESCO in 2001, covers a wider range of goods.
Obviously these conventions are only a drop in the ocean of the protection of the archaeological heritage, but having said this, there should be an agreement that they have a paramount role in the fight against archaeological looting, at least in Spain.

In this article, we examine the handling of archaeological looting, including the illicit trade of looted goods, in Spain. To do this, we analyze several issues: first, the nature and characteristics of archaeological looting, on land and under water, and the profiles of those who carry out this kind of action against the archaeological heritage and their modus operandi; Secondly, the Spanish legal framework will be described with a focus on the juridical tools that can be used to combat the looting and smuggling of archaeological items. Finally, some information will be offered about the enforcement of this legal framework.

2. THE LOOTING OF ARCHAEOLOGICAL SITES AND THE USE OF METAL DETECTORS

As previously explained, metal detectors are a key factor in the looting of land archaeological sites. They are used to locate not only items close to the surface, but also burial structures containing metal grave goods that are later dug up without the use of archaeological methodology of any kind. In these cases looters select only whole objects that can be added to a collection or sold.

These devices used for searching for metal archaeological objects were introduced into Spain in the 1960s by American metal-detecting enthusiasts who worked on the joint-use Spanish-American military bases in Rota (Cadiz) and Morón de la Frontera (Seville). Their use soon extended to erudite local experts who sought to develop their individual collections. Somewhat later, they were employed professionally in the search for artifacts and the extraction of grave goods destined for sale as part of the illicit domestic and foreign trade in antiquities. Archaeologists showed little interest in them as instruments for improving archaeological work, and their use was frequently rejected. Instead, they become have the symbol of the search for coins and other metallic objects, disassociated with archaeological methodology and outside the law, even though there are many archaeologists who do use them in the course of their field work today.

At present, it is certainly true that the ability of metal detectors to locate archaeological remains is not generally exploited in archaeological research projects carried out by academic archaeologists in Spain; rather, it chiefly is used to search for coins and other collectors’ items. This represents a transfer of public goods into private hands that is unacceptable within the Spanish legal framework. However, even if the items recovered in this way, in the absence of any scientific archaeological intervention, were handed over to museums or other public institutions, this kind of search reflects a concept of heritage where object takes priority over context; beauty or rarity over historical significance; economic value over use; private acquisition over public enjoyment. In short, it is a concept of archaeology, or more fittingly an archaeography, which is not far removed from antiquarianism,
thankfully banished from academic and professional archaeology some time ago. Moreover, the above process refers to the very best of cases because, in the worst-case scenario we would be talking about looting, about the merciless and planned devastation of the cultural wealth of a country in order to bolster the illicit antiquities market, all for the benefit of a few.

Today, metal detection is still the most common form of archaeological looting on land. According to studies conducted by specialized units of the Guardia Civil (Spanish Civil Guard), and based on the number of cases reported, the unauthorized use of metal detectors is involved in more than 75 percent of all police interventions relating to the protection of archaeological heritage.5

This figure is supported by other independent analyses performed by the Instituto Andaluz de Patrimonio Histórico (the Heritage Institute of Andalusia) on the preservation of archaeological heritage in Andalusia, as part of the project Modelo Andaluz de Predicción Arqueológica (Andalusian Model for Archaeological Prediction, or MAPA from its Spanish name). The rate of surface looting, which is normally associated with the use of metal detectors, is 16.2 percent for all the known archaeological sites in Andalusia, exceeded only by the effects of surface ploughing (38.1%).6 Looting involving major earthworks barely reaches 2.4 percent, although we should hardly dismiss this, as it represents an open flouting of current law.

Several studies have been performed in Spain on the profile of metal-detector users in an effort to establish their modus operandi.7 With some slight variations (in line with surrounding countries), we can generally divide them into two main groups: amateurs and professionals.

The first of these groups uses these devices primarily to search for metal objects in the upper strata of the ground and usually have their own collections, although they would not rule out occasionally selling a find if it were valuable. They are aware that their activity is illicit, but they easily justify it by arguing that these are lost objects without an owner. In the 1980s, when the phenomenon of looting began, there were many local-history experts among these enthusiasts. Today, the percentage of local-history experts has waned considerably. They generally belong to metal-detecting clubs and are enormously suspicious of professional archaeologists, to a lesser extent if the archaeologist belongs to a university, but to a far greater extent if they are employed by the cultural administrative authorities. They make sporadic trips into the field and, today, in some regions of Spain, such as Andalusia, where they are under greater pressure from the authorities, they tend to use their devices more frequently in areas of low archaeological interest, such as beaches. This group is far from cohesive and is divided between those who prefer to continue to look for archaeological objects and try to avoid being caught by the Guardia Civil, and a minority that seeks an alternative to their hobby, becoming involved in archaeological research projects, especially those studying battle fields or mass graves of persons shot during the civil war, where their activities are protected under the historical memory project remit.8
The second group comprises professional looters. They make regular trips into the field that they plan carefully, choosing where exactly to go and gathering information about the place. The chosen sites may be hundreds of kilometers from their homes. They use mid- to top-of-the-line metal detectors, occasionally modified to achieve greater detection depth. As their priority is not coins or other metal objects churned up in the surface strata, but rather structures, especially burial sites where they may find grave goods, they also use pulse-induction metal detectors and double-coil metal detectors. Once they have detected a possible tomb, they drive a metal pole into the ground to determine its depth and area, then return at night to raise, if possible, not only the detected tomb, but the contents of the whole burial site.

Professional looters may work in small groups of three or four people, though they generally work alone, like the person arrested as part of Operation Helmet, who pillaged the site of the Celtiberian city *Aratikos* (Zaragoza) for 15 years and was responsible for the export and illicit sale of a collection of Celtiberian helmets that the Spanish government is trying to prevent being auctioned by Hermann Historica and Christie’s. \(^9\) Those who act alone use online auction portals such as eBay to contact possible buyers. Nevertheless, flexible networks are also common, where members communicate via the Internet and mobile phone. The aim of these organizations is to bring together different specialists: on the one hand, the looters themselves, and on the other, intermediaries and traders. Occasionally, organized groups appear that add looting and the illicit trade of antiquities to other criminal activities, using the purchase of archaeological objects as a way of laundering money.

### 3. UNDERWATER LOOTING

Although archaeological maps of the Spanish coast are providing us with the first inventories of underwater sites, we are still largely unaware of the scale of underwater looting. All looting is done clandestinely, but the location of underwater archaeological heritage sites (in places hidden from sight and difficult to monitor) makes the damage inflicted especially subtle. It generally passes unnoticed, making it difficult to detect and assess the effects of it. \(^10\) Nevertheless, according to estimates of the number of shipwrecks affected by occasional or systematic underwater looting, eight out of ten shipwrecks have been looted on the Spanish coast. \(^11\)

The first type comprises increasing numbers of seaside tourists and leisure divers, who threaten any shipwrecks or loose archaeological materials from sunken ships that are close to the coast. Among looters of this type, the looting is not premeditated, but when someone happens upon an item, or a collection of items, by chance, the person does not hesitate to take a souvenir in the belief that because it is in the sea, it belongs to the finder. \(^12\)

The second type refers to those who dive alone or in small groups in places where they know there are wrecks or have heard they may find one. They are searching
for the cargo the ship was carrying and are usually aware of its historical value. They are often collectors and, on occasion, sellers or intermediaries in a purchase agreement. As opposed to the previous type of looter, this type generally uses special underwater metal detectors.

Chance finders (who keep items) and systematic looters do not generally cause major destruction with a single dive. However, over a long period of time, the destruction accumulates and becomes devastating, and these looters become responsible for the complete obliteration of wrecks and collections of archaeological materials located close to the coast.

Yet these coastal wrecks are not the only ones to suffer the consequences of looting, as underwater depths no longer ensure the safety of shipwreck remains. Deep-sea wrecks that avoided natural destruction and remained untouched by human avarice until a few decades ago are now within reach of a third type of underwater looter: treasure hunters. As a result, Spanish and Caribbean waters now share the honour of being considered a kind of underwater Potosí (i.e., treasure trove) in need of an owner.

In the beginning, treasure hunters were no different from the amateurs diving for pleasure, but stories told of early discoveries of wrecks fed a legend that drew many adventurers to underwater looting. The birthplace of the phenomenon was the Caribbean and the coasts of Virginia and Florida, but between the 1960s and the 1980s, shipwreck looting spread to all the seas on the planet. From the 1990s onward, technological advances made ever-more-daring ventures possible, for which the system for obtaining funding had to change, with some organizations even opting for stock-market participation.¹³

One characteristic common to all treasure hunters is the scant regard they show for the scientific protocols of archaeology, in spite of the fact that they often boast of having many more resources than archaeologists and that, as noted by T. Villegas Zamora, they present themselves as the only option for exploring one wreck or another.¹⁴

F. Castro has also analyzed the profiles of people described as treasure hunters and reached the conclusion that, with certain exceptions, this category includes very different types of people (and associated companies) with different modus operandi.¹⁵

The first type comprises highly efficient professionals, who carry out their work with extreme discretion and are heard about only when the looted items have reached the auction houses. They leave no traces behind them, destroying all evidence of the original remains from which the items sent to auction were extracted.

The second type is the largest and most visible. It is composed of small companies with their own small boats. Their radius of activity is limited, and they generally loot well-known wrecks, where looting is commonplace, on weekends. The objects they bring up do not typically cover the expenses incurred.

The third type is no better prepared, scientifically, than the second, but it does give the appearance of being concerned with the field of science. It comprises those companies that have been floated on the stock market, receive much media
attention, and are viewed favorably by an insufficiently informed public. Without a doubt, this type poses the greatest threat to underwater archaeological heritage. Unlike the first type, this group openly flaunts its activity and generally tries to give it the appearance of a historical research project, making the most of the unique opportunity afforded by the discovery of a shipwreck with valuable cargo. However, the tone of this group’s speeches, and the way in which it tries to sell the need to make the most of the unique opportunity, is overwhelmingly irresponsible and inaccurate.

These looters’ way of working has also been closely studied. They generally begin by commissioning archives experts and scholars to carry out research in order to establish the precise location of the wrecks. It is well known Mel Fisher’s search for the Atocha in 1985 changed course as a result of the involvement of Eugene Lyon, a specialist in shipwrecks and the Archivo General de Indias (General Archive of the Indies), in carrying out research that led to the discovery of the bulk of the wreck. Recently, in 2005, Odyssey Marine Exploration, Inc. (NASDAQ: OMEX) hired an American expert to identify specific wrecks that they had found in the Strait of Gibraltar and the surrounding area. This person’s involvement enabled them to loot the frigate Nuestra Señora de las Mercedes.16

In Operation Bahía I, the Guardia Civil seized a considerable amount of documentation, a large part of which had been copied from the Archivo General de Indias.17 The professional services of experts in these documents were contracted in order to obtain the copies.18

Once a wreck has been definitively, or even only tentatively, located, the effort to obtain funds from investors who have nothing to do with underwater salvage begins. This is the time for advertising and exaggeration. As a rule, press conferences are called, documentaries are filmed, and the financial dividends of the operation are clearly presented, although there is also plenty of talk of the historic opportunity to reach a ship and discover its secrets. Once the financial backing has been secured, the next step is to obtain necessary permits from the appropriate coastal country in the event of the wreck being located in territorial waters. Although it is becoming increasingly difficult to obtain authorization for these pillaging operations, until relatively recently, many countries did grant permits in exchange for a percentage of the sale of the recovered objects. This situation seems to be changing as a result of the more widespread acceptance of the 2001 UNESCO Convention.

The final step is the operation itself and the looting, which tends to be fairly discreet. Although documentaries about the process are filmed, they are not made public until the cargo is beyond the reach of any state or third-party intervention. Once the wreck has been located, its cargo is raised using a suction hose several times the size of the kind used by archaeologists, which sucks up all material of any economic value and leaves the remains of the boat nearly stripped of documentary interest.

Odyssey Marine Exploration, in its search for the wreck of HMS Sussex in Spanish waters, and the team that extracted part of the cargo of Nuestra Señora de
las Mercedes in international waters in 2007 (a cause célèbre with regard to underwater looting thanks to the ruling in favor of Spain by the court of Tampa, which obliged the looters to return more than 500,000 coins looted from the wreck), both followed this pattern of behavior.\(^ {19} \)

### 4. THE LEGAL FRAMEWORK TO COMBAT LOOTING

Spain has signed all the agreements, conventions, and other international legal documents directly related to looting, and which define the general legal framework of policies developed on the subject. However, our national legislation is still a key element that distinguishes us from other countries.

Spain’s domestic legislation is quite complex and little understood outside the country; therefore, we believe that providing a short explanation of its special characteristics could be of interest here.

Concerns about the conservation of archaeological remains emerged in Spain during the eighteenth century. The first laws to address such remains stated that, being of unknown ownership, they should be given to the administrative authorities for conservation. The law thus prevented their possible destruction due to ignorance of the finder, but it conflicted with the articles that the Código civil (Civil Code) of 1889 devotes to the so-called hidden treasure (or treasure trove, according to the traditional *nomem iuris* used by Anglo-Saxon law).\(^ {20} \)

The Código civil states that any hidden treasure belongs to the owner of the land where it was found. But if the discovery is made by a third person on the property of another or of the state, and is made by chance, one half of the discovery’s value will be attributed to the finder. In the case of objects of particular artistic or scientific interest, the state shall be allowed to acquire them through expropriation and in return for a fair payment, which shall be distributed in conformity with the rules stated.\(^ {21} \)

This issue was addressed by the Ley de Excavaciones Arqueológicas (Archaeological Excavations Act) of 1911. This regulation aimed to resolve both conceptual problems (the definition of an archaeological excavation and what should be understood by “antiquities”) and problems of a more practical nature, such as what should be done with moveable archaeological property recovered from excavations, found by chance, and without any archaeological activity involved. The regulation also made the export of archaeological goods abroad subject to prior authorization. All of these matters would be present in later legislation and would form the basis of Spanish law on archaeological heritage.

The Ley de Excavaciones Arqueológicas marked the start of a long process regarding the handling of historical heritage within the Spanish legal system. Throughout the process, a guiding thread has been the defense of the public interest with regard to historical goods as opposed to the rights of the goods’ owners. This culminated with the backing that the Constitución española of 1978 (Spanish Constitution, hereinafter “CE,” from the Spanish acronym) gave to the guardianship of this
type of goods by public authorities, regardless of their ownership status. Possibly influenced by the looting that was rife in the late 1970s, the CE also assigned responsibility for the punishment of the most serious crimes against historical heritage to the branch of criminal law (i.e., the penal code).\textsuperscript{22} With this step, the CE gave a clear message about the need to preserve historical goods, not only through awareness campaigns, but also through the \textit{ius puniendi} of the state.\textsuperscript{23}

The CE also established a regional level of government, the Autonomous Community, and a broad range of jurisdiction over historical heritage was transferred to these governments from the central government. However, the specific fight against looting is the shared responsibility of the central government and the governments of the autonomous communities, in accordance with the provisions of Article 149.28 CE and in line with Tribunal Constitucional (Constitutional Court) Sentence 17/1991.

In order to implement this transfer of jurisdiction, Spain has a state law, Ley 16/1985 de Patrimonio Histórico Español (Spanish Historical Heritage Act, hereinafter “LPHE,” from the Spanish acronym), and 17 regional laws within its administrative legislation, applicable to each Autonomous Community, on historical and cultural heritage.\textsuperscript{24}

The right of guardianship of cultural goods was born of the confrontation between their protection and the rights of ownership, which the state had limited in their most extreme forms to prevent the disappearance of the goods. We are talking, therefore, of a reactive law concerned only with the policing powers of the authorities with regards to these goods.

The LPHE considers archaeological heritage as special heritage defined according to the archaeology as the prevailing methodology used to study it, regardless of whether archaeological remains have been excavated or not. This definition replaces the traditional criterion of antiquity to define archaeological heritage with a new, scientific one.\textsuperscript{25} The introduction of this criterion aimed to encompass the international provisions that already contained it and, in particular, the innovation of the Commisione Franceschini,\textsuperscript{26} later reworded by M. S. Giannini.\textsuperscript{27}

Regarding this definition, M. A. Querol and B. Martínez draw an important conclusion that, to a certain extent, would explain the development of some specific archaeological-heritage protection features of regional government legislation. According to these authors, the LPHE considers archaeological heritage as comprising not only known goods but also unknown, or suspected, goods; in other words, those that are still below ground.\textsuperscript{28}

Taking this into account, the legislation provides a protective umbrella for all goods belonging to our archaeological heritage, regardless of whether certain relevant goods are also protected by a higher protective statute. There are two types of protection: first, the creation of an archaeological public dominion in Article 44.1 LPHE, in response to the awareness of the fragility of archaeological remains, and requiring normal guardianship terms of public dominion to be applied to them\textsuperscript{29}; second, specific laws related to how new goods appear, as regulated archaeological activity or chance findings.
As opposed to the legal system regulating archaeological activity that is more focused on disciplining those involved in the dynamic activity of searching for historical information based on archaeological evidence and establishing requirements that affect its purpose, methodology, management team, and the final destination of the discovered materials, legal and administrative techniques for chance findings are intended to clarify the legal situation of the archaeological good once it has been found. In these situations, the law is not interested in what brought about the discovery, as long as it was separate in both purpose and location from the discovery of archaeological goods; it is, however, interested in the guardianship of the discovered material in order to ensure it is not lost. In regards to this, it is important to point out that metal detectors do not produce chance findings; rather, findings are causal and should, therefore, receive a different judicial response. As González Pacanowska and Díez Soto say, “[t]he third party who discovers the treasure as a consequence of works designed for that purpose is not allowed to receive any part of the treasure or of its value, as such solution would encourage practices that may be very prejudicial to the preservation of historical patrimony.” The doctrine is almost in line with jurisprudence on this matter.

Although administrative legislation on historical and cultural heritage, on both a state and sub-state level, includes provisions referring to underwater heritage, some thought should be given to what the distinguishing features of cultural heritage are when it is found underwater, and an appropriate regulation for these specific cases should be introduced in the new laws on historical and cultural heritage.

This legislation also regulates certain aspects of the trade in cultural goods. Some state regulations established between 1924 and the present, and some of the regional laws of the autonomous communities, make it obligatory for persons trading in cultural objects to record their transactions in a book subject to monitoring by the authorities. Moreover, both the LPHE and the regional laws establish the duty of auctioneers to notify the authorities of any items of historical value that become available and to enable them to act on their preferential right to purchase them. In all cases, it is prohibited to transfer the title of any goods belonging to the Catholic church or the government, any goods in the public domain, such as archaeological artifacts, or goods originating from countries involved in armed conflict. When goods have been illicitly exported, Article 29 LPHE establishes the obligation of the state to carry out the pertinent action to ensure their recovery, including the option of using any means to acquire them.

The Constitución española establishes the need for punitive regulations that may be penal in nature (23 CE). In a way similar to that of countries in our legal environment, there are two forms of this power: the penal power of the law courts and the power exerted through punitive administrative law. The concept behind the latter is criminal law (although it is somewhat more subtly defined to moderate its application), and its procedural components are delimited by Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (Regulation on Public Administration and Common Administrative Procedure Law).
In short, Spanish law establishes a series of crimes and criminal misdemeanors in criminal law related to historical heritage in general and archaeological heritage in particular, with competent judges and public prosecutors to apply it, and another set of administrative offences, established in the LPHE and the rest of the regional laws on historical and cultural heritage, which, due to their lesser degree of severity, fall under the jurisdiction of the public authorities and are subject to appeal before the Court for Contentious Administrative Proceedings. As a consequence of the principle *ne bis in idem*, the ruling by a criminal court prevents an administrative sanction being applied to the same incident when related to the same person. The distinctive feature of punitive administrative law is its aim to control risks to archaeological heritage by tying the threat of a sanction to an order to proceed or not proceed.

As opposed to the criminal laws that include fines and custodial sentences, the administrative laws only contemplate the possibility of imposing the penalty of a fine, although, as provided for in Article 114.2.c of the Ley 14/2007 de Patrimonio Histórico de Andalucía (*Andalusian Historical Heritage Act*), there is also the possibility of definitively confiscating metal detectors and any other equipment seized by the state security forces when they discovered the persons in question using them without the necessary authorization.

As with the rest of the regional regulations on historical and cultural heritage, the LPHE bases its regulation of punitive power on three important directives: preventing actions against goods belonging to historical heritage from becoming the source of income for offenders, the need for restitution, and compensation for any damages caused.

Based on these guidelines, administrative legislation on historical and cultural heritage contains provisions on specific conduct that causes damage, whether through action or omission, as well as on any non-compliance with the obligations imposed in the relevant articles of the regulations, even when non-compliance results in damage to archaeological goods, and regardless of whether they have been included in one of the catalogues or inventories included in these laws. Such conduct is classified as an administrative offense when the degree of severity means it is not considered a crime.

Nevertheless, archaeological heritage lacks an ad hoc definition of looting that explicitly refers to the movement of earth to search for ancient objects without using archaeological methodology. In regional (or sub-state) legislation on historical and cultural heritage, advances have been made, with the chart of offenses contained in the provisions of the LPHE, by classifying the unauthorized use of metal detectors as an administrative offense. If a person is reported for using a metal detector without authorization, the corresponding punitive proceedings may be initiated and the person fined, in the event of the proceedings concluding that the person was indeed using the metal detector without prior authorization in an area where it is likely archaeological remains may appear (either an archaeological site or an area close to it), given that, in such a case, all the characteristics
would coincide for the incident to be sanctioned through administrative channels: illegality and malicious or negligent conduct that can be attributed to a person as perpetrator. These are offenses that arise as a result of a prior general duty for diligence and care to avoid any possible damage.

As our basis, we use the fact that, in the case of historical heritage, an asset that is legally protected by both administrative and penal law, it is its constitutionally recognized social purpose to reinforce the predictable collective rights of the very nature of the cultural goods, which are connected to the development of personality through culture, and not merely their physical or material safety. However, penal law is governed by the principle of minimum intervention, making it subsidiary in nature and limiting it to the most serious offenses that interfere with the public enjoyment that these goods are destined for.

The Código Penal (Penal Code) of 1995 (hereinafter “CP,” from the Spanish acronym) incorporates a mixed system of protection. On the one hand, there is a classification of certain types of conduct under the heading, “On Crimes Against Historical Heritage” (Articles 321 to 324 CP), and, on the other, a series of general aggravating factors for the crimes of theft (Article 235.1 CP); robbery (Article 241.1 CP); fraud (Article 250.5 CP); misappropriation (art. 252 CP); misappropriation of public funds (articles 432.2 and 625.2 CP, the latter regarding absence of damage) as well as specific classifications related to planning breaches (art. 319.1 CP) and crimes against cultural goods in cases of armed conflict (art. 613.1 CP and 77 of the Código Penal Militar (Military Penal Code) of 1985. To this we should also add Article 2.e (exportation without prior authorization of amounts exceeding 50,000 euros) of Ley Orgánica 12/1995, de Represión del Contrabando (Anti-Smuggling Act) of December 12, modified in 2011.

This penal system for historical heritage has been subject to many doctrinal analyses, a large number of which have specifically focused on archaeological heritage, given the major implications of the hidden nature of much heritage, which results in it being vulnerable to damage and destruction.

We should point out that almost none of the analysts are pleased with this systematic classification given the wide-ranging nature of criminal activity involving historical heritage. The newly established crimes against historical heritage contained in a specific chapter in the Código Penal of 1995, comprise four types of malicious or negligent conduct and a form of special misconduct in public service for civil servants. The legal doctrine has highlighted the absence of a crime that specifically encompasses archaeological looting not only on land, but also underwater.

Current criminal regulation has been the subject of frequent criticism, as it requires an economic value to be attributed to something as incalculable as archaeological damage: in accordance with Article 625 CP, criminal damage is punishable with a prison sentence or a small fine depending on whether or not the value exceeds 400 euros. According to the jurisprudence of the courts, an amount must be attributed during the trial to the damage done to an archaeological site, the contents
FIGHTING AGAINST ARCHAEOLOGICAL LOOTING

of which are essentially hidden. García Calderón uses compelling arguments to explain that such a division is disastrous and proposes, de lege ferenda, that the concept of incalculable value be used for any damaging activity affecting cultural heritage, and that other aspects of typical conduct be used for classification. The calculation of the economic value of the damage thereby becomes an indicator of the civil liability of the persons who caused the destruction or deterioration. 38

The main difference between the administrative and criminal legal systems, regarding the use of metal detectors, is that the first is aimed at prevention. Administrative systems punish the conduct itself, the use of devices without prior authorization, and do not require any results (the location of archaeological objects) to have been obtained. However, in criminal law, it is the result of that conduct (archaeological site damage caused by removing deposits without archaeological methodology) that is being punished, rather than the use of devices for locating the site.

International cooperation measures in place to help each state combat the illicit trafficking of cultural goods can be classified as measures aimed at intervention and control, punitive measures, and measures for the restitution of goods, which are worth little if no inventories or catalogues of the main goods exist. 39

Spain’s regulation of the export of cultural goods continues to be based on the imposition of limits and obstacles for a few categories of goods, while the rest can be exported freely. 40 Indeed, it has become evident, that the LPHE is based on the principle of the freedom to transfer the title of cultural goods, not because it expressly states this, but because it does not restrict the inherent right to property ownership without prejudice through the establishment of limits and exceptions. It is, therefore, halfway between those countries that have banned all exportation and those where almost the only option available to the state to obtain any goods subject to export is to purchase them. 41

In spite of the administrative controls and legal provisions, reality shows us, via the media, that there is a fairly flourishing national and international market for archaeological goods that is in no way limited. In theory, it should be impossible for any archaeological goods to cross Spanish borders without express authorization, yet hundreds of advertisements on eBay and other online auction sites sell these kinds of objects. Currently, the police units specializing in the fight against the illegal trade in antiquities insist that the looters themselves are putting the archaeological objects into circulation via the Internet. 42

5. LAW ENFORCEMENT

Although the main function, as regards the protection of archaeological heritage (and historical heritage in general), of the state and regional governments, and the state security forces as part of them, is to prevent damage to this heritage, it is clear that deterrent measures are not always effective and that these goods are becoming damaged. The state’s function must then be modified to include investigating
incidents in order to bring looters to justice and sentence them according to the acts committed, and to do so by bringing them before the courts or to the attention of the cultural administrative authorities. These two tracks cover the different degrees of severity of the illegal conduct. In the cases that we have put forward, the administrative reprimand is given to those who use a metal detector to search for surface archaeological objects or to do so in areas where the existence of such objects is plausible. Although this track is proving very effective at reducing looting, this administrative action is not, unfortunately, being performed equally in all autonomous communities. Andalusia stands out as one of the most active in its use of this approach. In the province of Seville alone, the Guardia Civil reported more than 1,000 people using metal detectors without authorization between 1991 and 2011. The number of punitive disciplinary actions processed reflects a decrease in the number of reported cases, which dropped from one hundred in 1999 to only eight in 2010 and to two the following year. It is certainly true that, as a result of this pressure exerted by the authorities, many professional looters living in this autonomous community have chosen to carry out their activity in other communities where there is a lesser degree of awareness or where fewer resources are dedicated to oversight and where, therefore, they can act with greater impunity.

However, as we have seen, these people are not the only users of metal-detecting devices. Professional looters (who, however, refer to themselves as metal-detecting enthusiasts), and others on a higher level, trade and traffic in archeological goods, while sophisticated companies employ other methods of underwater looting. These cases fall outside the jurisdiction of the administrative authorities, thus entering that of judges, public prosecutors, and the police.

Investigation into such cases is the responsibility of the criminal investigation department. In line with the provisions of the aforementioned LPHE, both the Cuerpo Nacional de Policía (National Police Force) and the Guardia Civil have created specific groups dedicated to hunting down the perpetrators of crimes against historical heritage. Their investigations are not aimed at resolving a single crime, but rather at breaking up groups that have committed a relatively high number of crimes of this kind, as the investigators also try to reach the intermediaries and buyers in order to recover as many items as possible. Therefore, complex means of investigation are necessary, just as they are for other aspects of organized crime, such as intercepting communication, surveillance, deliveries, and the use of undercover agents. These last measures are regulated by criminal procedure law for the case of unauthorized exportation.

The hearing is assigned to an examining magistrate, with the participation of the public prosecutor’s office, the organizational capacity of which has allowed for a public prosecutor, dedicated to prosecuting crimes against cultural heritage, planning breaches, and crimes against the environment, to be present at each ruling, providing unity of criteria when passing judgment on these forms of criminal activity. The coordination of prosecutors is done via a public prosecutor in the Ministerio Fiscal (Crown Prosecution Service).
The cultural administrative authorities have collaborated on this kind of investigation, acting as advisors to the police and identifying archaeological objects in home searches, but above all by providing specific training to the members of the state security forces, both the Cuerpo Nacional de Policía and the Guardia Civil, as well as to judges and public prosecutors. Specialist departments have also been developed in the prosecutors’ offices with regards to planning, historical heritage, and the environment. Together with the personnel of the cultural administrative authorities, these departments have generated a critical mass of human resources prepared to act in response to archaeological looting, although resources always seem insufficient, and we advocate improving and increasing the human and material resources available.

Finally, we should also mention the collaboration of the Spanish Navy in helping to protect existing wrecks in waters under Spanish jurisdiction as a result of an agreement signed between the ministries of defense and culture. This has enabled treasure hunters’ ships to be intercepted in areas where shipwrecks are known to exist.45

The impact of action by state security forces has been felt most keenly since 1990s. In 1999 and 2000, the first operations took place and hit the headlines in the press: Operation Trajano and Operation Zeus.46 Dizzingly high figures also began to appear. Nine thousand archaeological objects were recovered in the first of these operations and more than 800 in the second. Yet this is nothing compared to the figures corresponding to Operation Tambora in February 2002, when more than 160,000 items were recovered. Since then, operations have continued against looting on land (Operations Lirio, Tertis, Dionisos, Pitufo, and Helmet) and underwater (Operations Bahia I and Bahía II being among the most well known). These have gradually uncovered the different modus operandi of the looters in all their forms. Thousands of objects have also been confiscated—more than 700,000 in total—and hundreds of people have been charged, although with fewer sentences being given than would be hoped. Judges hearing or trying these cases may consider that the committing of a criminal offense has not been proven with sufficient clarity. Based on these results, in their investigations, the police take great care to document the site where the looting has taken place after monitoring the looters’ activities, in an effort to determine the origins of the pieces with precision.

6. CONCLUSIONS

Eppur si muove (“and yet it moves”): This phrase, attributed to Galileo Galilei, leads us neatly to our conclusion that, in spite of all the problems associated with the fight against looting and the slowness in obtaining tangible results, a close look at the Spanish situation reveals that the public authorities are slowly but surely moving forward.

This first legal response was, in all likelihood, deemed necessary to restrain the growth of archaeological plunder and the feeling of impunity among those
involved in the illicit trade of artifacts. Today, however, new means of dealing with this issue are being explored, such as the decriminalization of the use of detectors on beaches (provided the beaches are not protected by cultural legislation) as well as the incorporation of detectorists into archaeological research projects. Both policies are indeed necessary and must be complemented by educational programs that emphasize the social value of archaeological heritage.

For better results in the fight against looting, it is necessary for governments to prioritize archaeological heritage. Achieving this goal requires not only a change in the specific governmental responses to matters related to treasure hunting, but also a shift in the public approach to archaeology as a whole. Looting and illicit trade make less sense when a society demands respect for the vestiges of its own history, but it is still naive to consider the fight against plundering to be truly over.

ENDNOTES

2. “For the purpose of this Law, spoliation shall be understood as any action or omission placing all or any of the values of the property comprising the Spanish Historical Heritage at risk of loss or destruction or preventing it from carrying out its social function [...]” (Art. 4 LPHE).
3. Rodríguez Temiño 2012.
8. This is an interest group that aims to recover the memory and mortal remains of people shot by General Franco’s nationalist troops during the Spanish Civil War and the following years, merely because they were republicans. Their remains are generally found in common graves in areas outside cemeteries (see Rodríguez Temiño and Matas Adamuz 2013).
19. On this subject see, Aznar Gómez 2004, 368 ff; Dromgoole 2004; Ruiz Manteca 2012; and Cabo de la Vega 2012.
20. According to the Código civil (arts. 351, 352), a “hidden treasure” is a hidden and unknown deposit of money, jewelry, or other precious objects, the lawful ownership of which is not apparent (art. 352), in the sense that, according to the circumstances of the finding, it is not to be presumed that it has a present owner (see González Pacanowska and Díez Soto 2011, 622 ff).
22. “The public authorities shall guarantee the preservation, and promote the enrichment of the historical, cultural, and artistic heritage of the people of Spain and the property that makes them up,
regardless of their legal status and the ownership. The penal law shall punish any offences against this heritage” (art. 46 CE).

23. The power or authority of the state to punish.

24. The autonomous laws usually alternate between the use of two syntagms as nomen iuris: historical heritage and cultural heritage. However, these terms should be thought of as synonymous (see Rodríguez Temiño 2011).


32. Tribunal Supremo (Supreme Court) Sentence (Court for Contentious Administrative Proceedings, section 3) of the April 10, 2005, on the compensation to be given in the form of a reward to the finder of the treasure of Padilla de Duero (Valladolid) (found using a metal detector), states that the find cannot be deemed a chance finding, but must be classified as the product of a search for archaeological remains using a metal detector.


34. See Aznar Gómez et al. 2010.

35. See Roma Valdés 2011.


40. Spain has signed international agreements against illicit trafficking of cultural property, such as UNESCO’s Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 1970).


42. Cortés Ruiz 2002.

43. Rodríguez Temiño 2012, 276 ff.

44. On May 26, 2013, the Diario de Ávila newspaper reported the existence of organized gangs of looters from Andalusia that were emptying archaeological sites in that province (Ávila), which is part of the autonomous community of Castile and León.

45. On May 27, 2013, the El País newspaper reported a press release from the Spanish agency EFE, which stated that ships of the Spanish Navy had expelled the treasure-hunting vessel Endeavor from Spanish territorial waters.


BIBLIOGRAPHY


FIGHTING AGAINST ARCHAEOLOGICAL LOOTING


